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1943

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Pacific Reporter, Second Series, Vol. 135, Nos. 1-4;
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CALIFORNIA REPORTER

135 PACIFIC REPORTER

SECOND SERIES

21 Cal.2d 737

McGRATH v. STATE BAR OF CALIFORNIA.

S. F. 16835.

Supreme Court of California.

March 15, 1943.

1. Attorney and client ⇐48

Written verified accusation is not necessary in investigation proceedings preliminary to a hearing by Board of Governors under statute dealing with disciplinary powers of the Board of Governors. St. 1939, pp. 355, 357, 358, §§ 6075 et seq., 6107, 6108.

2. Attorney and client ⇐54

The appearance and testimony of complaining witness was not essential in disciplinary proceedings against attorney, since local committee or Board of Governors may of its own motion and without filing of complaint institute and conduct proceedings. St.1939, p. 355, § 6075 et seq.

3. Attorney and client ⇐53(2)

Local administrative committee's findings in disciplinary proceeding against attorney were not deprived of evidentiary support because of failure of complaining witness to testify, where attorney testified to and admitted every material fact embraced in the findings, and he was not prejudiced in presenting his defense by their absence. St.1939, p. 355, § 6075 et seq.

4. Attorney and client ⇐38

An attorney who intentionally withheld his client's funds in an attempt to coerce payment of a fee, although he had no agreement for compensation for services and was aware that he did not have a lien on the funds, committed a deliberate wrong and was guilty of conduct described as involving "moral turpitude". St.1939, pp. 355, 357, 358, §§ 6075, 6103, 6106–6108.

5. Attorney and client ⇐46

That an attorney did not intend to defraud his client, by withholding client's funds to coerce payment of a fee, did not constitute a defense to disciplinary proceedings against attorney. St.1939, pp. 355, 357, 358, §§ 6075, 6103, 6106–6108.

6. Attorney and client ⇐58

In disciplinary proceedings against attorney, it was proper to consider petitioner's past record in fixing the degree of discipline. St.1939, p. 355, § 6075 et seq.

7. Attorney and client ⇐58

In disciplinary proceeding against attorney, attorney's motive in withholding client's funds and the character of his client may be regarded as mitigating circumstances in determining the measure of discipline. St.1939, p. 355, § 6075 et seq.

8. Attorney and client ⇐58

Two-year suspension imposed by Board of Governors upon attorney for misconduct in withholding client's funds to coerce payment of a fee was excessive and reduced to three months, where attorney was entitled to a fee and had performed other services for client's family without compensation, and his actual derelictions were not grevious, justifying reduction of suspension period to three months. St. 1939, p. 355, § 6075 et seq.

In Bank.

Proceeding by Thomas R. McGrath against the State Bar of California, to review a recommendation of suspension of petitioner, an attorney, for two years.

Petitioner suspended for three months.

Thomas R. McGrath, of San Francisco, in pro. per., for petitioner.

George W. Wilson, of San Francisco, and Jerold E. Weil, of Los Angeles, for respondent.

PER CURIAM.

By an order to show cause issued on November 24, 1941, petitioner was charged with professional misconduct. A hearing was scheduled before a local administra-

tive committee of The State Bar on February 3, 1942, and the complaining witnesses, Edna Darambouro and her son-in-law, Dave Greenblat, were subpoenaed to appear. Because of their late arrival at the first hearing they could not be heard. Two continuances were ordered by the committee to enable them to testify, but they failed each time to appear. Petitioner, however, appeared and testified and upon his stipulation that the appearance of the complaining witnesses was not necessary to establish his defense, the examiner's request for another continuance was denied and the matter was ordered submitted on March 12, 1942.

The committee made the following findings of fact: Petitioner was employed and paid the sum of $40 by Edna Darambouro to recover possession of real property that she had purchased in May, 1934, from the estate of William F. Hogan, deceased. He filed suit against Marcelle H. Sheldon, the occupant, in September, 1934, but abandoned the action when he learned that R. L. Husted, attorney for the administrator of the Estate of Hogan, had previously instituted a similar action on behalf of petitioner's client and that judgment had been entered in her favor for possession of the property and for damages for unlawful withholding on October 2, 1934. Husted caused a writ of possession to be issued and execution to be levied against moneys due the judgment debtor as heir of the Estate of Hogan. On November 5, 1934, Patricia Sheldon, the judgment debtor's daughter, filed a third party claim against the funds held by the sheriff as a result of the execution. On November 13, 1934, petitioner was substituted for Husted as attorney for Edna Darambouro. On October 9, 1935, the sheriff issued and delivered to petitioner a check for $395.76, representing the proceeds of the levy of execution. Petitioner did not report the collection of the judgment to his client. He cashed the check and from the proceeds paid $60 to the attorney for Marcelle H. Sheldon to reimburse the judgment debtor for an over-execution in that amount. He also paid $100 to the attorney for the third party claimant in settlement of her claim. The third party claim had already been denied, without petitioner's knowledge, by a court order under date of September 30, 1935, and it is uncertain whether Edna Darambouro agreed to the settlement of the claim. On October 17, 1935, petitioner paid $31.17 to Husted as reimbursement for costs advanced by the latter for Edna Darambouro. Petitioner retained the balance of the judgment, $204.59, despite his client's demands for its remittance. He commingled the balance of the proceeds of the judgment with his own funds and expended it for his own use and benefit. Although he had no agreement with his client fixing the amount of compensation for his services, and although he did not submit a bill for his services, he retained the money as a means of bargaining with his client for the settlement of his claim for legal fees. His offer to remit $100 and retain $104.59 was rejected. He also performed other legal services for the Darambouro family without any agreement by Edna Darambouro to compensate him therefor. These services were rendered in the hope that the family would be induced thereby to concede his claim to the balance of the proceeds of the judgment in excess of $100.

The committee concluded that in failing to report to his client the collection of the judgment and in commingling the balance thereof with his own funds, petitioner violated rule 9 of the Rules of Professional Conduct of the State Bar, and that in failing to remit the balance and in expending it for his own use and benefit, he violated his oath and duties as an attorney within the meaning of section 6103 of the Business and Professions Code, St.1939, p. 357, and committed acts involving moral turpitude, dishonesty and corruption within the meaning of section 6106. It recommended that petitioner be suspended for a period of three months. The Board of Governors adopted the committee's findings of fact but recommended that petitioner be suspended for a period of two years. In fixing the degree of discipline, it took into consideration petitioner's past record, which consisted of a public reproval administered by the Board of Governors on June 21, 1940, for the retention of the sum of $10 advanced by a client for the filing of a suit which petitioner failed to file.

[1] There is no merit in petitioner's contention that the Board of Governors erred in failing to comply with the provisions of sections 289, 290, and 291 of the Code of Civil Procedure. Those sections were repealed in 1939 and reenacted as sections 6107 and 6108 of article 6, chapter IV, of the Business and Professions Code. Article 6 deals with the disciplinary au-

thority of courts, and sections 6107 and 6108 require a written and verified accusation when proceedings are taken by the court upon the information of another. It is well settled, however, that the procedure of investigation preliminary to a hearing by the Board of Governors under the authority of article 5, § 6075 et seq., St.1939, p. 355, dealing with the disciplinary authority of the Board of Governors, occupies the same field held by the written and verified accusations under the system provided for in the code sections. Hinds v. State Bar, 19 Cal.2d 87, 119 P.2d 134; Golden v. State Bar, 213 Cal. 237, 2 P.2d 325; Schaffer v. State Bar, 212 Cal. 367, 298 P. 994; Herron v. State Bar, 212 Cal. 196, 298 P. 474. Section 6075 of article 5 accordingly provides: "In their relation to the provisions of Article 6, concerning the disciplinary authority of the courts, the provisions of this article provide a complete alternative and cumulative method of hearing and determining accusations against members of the State Bar."

[2, 3] Petitioner contends, however, that the local administrative committee's findings and recommendation and the Board of Governors' recommendation are without support because the complaining witnesses did not appear or testify at the hearings before the committee. The appearance and testimony of a complaining witness is not essential in proceedings of this nature, however, for the local committee or Board of Governors may of its own motion, and without the filing or presentation of any complaint, institute and conduct disciplinary proceedings against members of the Bar. Geibel v. State Bar, 14 Cal. 2d 144, 93 P.2d 97; Tapley v. State Bar, 8 Cal.2d 167, 64 P.2d 404. The findings in the present case are not deprived of evidentiary support because of the failure of Edna Darambouro and Dave Greenblat to testify, for petitioner himself testified to and admitted every material fact embraced in the committee's findings. Petitioner was not prejudiced in presenting his defense by the absence of the complainants and their testimony was dispensed with only after he stipulated to that effect.

[4, 5] Petitioner next contends that the recommended disciplinary action is not justified because the local committee in making its recommendations recognized that "the complaining witnesses are persons with whom professional relations would be difficult" and that the offenses committed by petitioner "resulted from a careless disregard * * * of his duties as an attorney, rather than from a deliberate purpose to wrong his client." The evidence, however, does not compel the conclusion that petitioner was merely negligent. On the contrary, it discloses that even though he had no agreement for compensation for his services and was aware that an attorney in this state does not have a lien on his client's funds to insure payment of his fee, he intentionally withheld his client's funds in an attempt to coerce payment of a fee. An attorney who takes advantage of his client in such a manner commits a deliberate wrong and is guilty of conduct often described as involving moral turpitude (Rohe v. State Bar, 17 Cal.2d 445, 110 P.2d 389; Dalzell v. State Bar, 6 Cal.2d 433, 57 P.2d 1300; Oster v. State Bar, 2 Cal. 2d 625, 42 P.2d 627) and warranting disciplinary action. Rohe v. State Bar, supra; Hinds v. State Bar, supra; Dalzell v. State Bar, supra; Mills v. State Bar, 6 Cal.2d 565, 58 P.2d 1273; Oster v. State Bar, supra; Schaffer v. State Bar, supra; Herron v. State Bar, supra. While petitioner may not have intended to defraud his client, his motive in committing the acts charged does not constitute a defense to this proceeding.

[6] Moreover, it was proper to consider petitioner's past record in fixing the degree of discipline. Bruns v. State Bar, 18 Cal. 2d 667, 117 P.2d 327; Waterman v. State Bar, 8 Cal.2d 17, 63 P.2d 1133; Mills v. State Bar, supra; Marsh v. State Bar, 2 Cal.2d 75, 39 P.2d 403.

[7, 8] His motive and the character of his client, however, may be regarded as mitigating circumstances in determining the measure of discipline (see Lantz v. State Bar, 212 Cal. 213, 298 P. 497; Smith v. State Bar, 211 Cal. 249, 294 P. 1057, 73 A.L.R. 393), and petitioner's testimony on these matters is confirmed by the findings of the local administrative committee. It must be borne in mind also that he was entitled to a fee, that he performed other services for the Darambouro family without compensation, and that his actual derelictions were not grievous ones. Under the circumstances the discipline imposed by the Board of Governors is unduly severe, and that recommended by the local committee fits the offense.

It is therefore ordered that petitioner be suspended from the practice of law for a period of three months beginning thirty days after the filing of this order.



57 Cal.App.2d 536

TRIPLETT v. SUPERIOR COURT OF SANTA BARBARA COUNTY et al.

Civ. 13942.

District Court of Appeal, Second District, Division 2, California.

March 5, 1943.

Hearing Denied May 3, 1943.

1. Certiorari ⇐58

On certiorari to review orders of superior court, District Court of Appeal could consider for purpose of determining true facts upon which action of superior court was founded affidavit of petitioner filed with superior court clerk after writ was issued, where affidavit did not impeach the record made in superior court.

2. Certiorari ⇐58

District Court of Appeal would not consider affidavits attached to petition for rehearing and to reply thereto which were not part of proceedings submitted by superior court in response to writ of certiorari to review orders of such court and which were not presented prior to original decision in certiorari.

3. Executors and administrators ⇐32(2)

In determining whether court was authorized to vacate appointment of special administrator by ex parte order, recital therein that order of appointment had been entered through inadvertence and mistake was not conclusive of the nature of the error.

4. Executors and administrators ⇐32(2)

Statements in ex parte order vacating appointment of special administrator that appointment was inadvertently made without regard to preference ordinarily accorded to persons entitled to letters testamentary or of administration and without court having been consulted as to such appointment established that error, if any, in making appointment was "judicial" rather than "clerical" so that court was without power to set aside appointment by ex parte order.

See Words and Phrases, Permanent Edition, for all other definitions of "Clerical Error" and "Judicial Error".

On rehearing. Former opinion adhered to and orders of superior court annulled. For prior opinion, see 133 P.2d 690.

Fred A. Shaeffer, of Santa Maria, for petitioner.

Griffith & Thornburgh, of Santa Barbara, for respondents.

W. J. WOOD, Justice.

The will of Susan K. Triplett was filed for probate and the hearing on the petition for letters testamentary of Marion A. Smith and Ida Iliff, who had been named executors in the will, was set for hearing by respondent court for October 9, 1942, at 10 o'clock a. m. Before the time set for the hearing Charles Elwood Triplett, a grandson of decedent, filed a contest to the petition and the matter was continued to November 14, 1942, for further hearing. Charles Elwood Triplett on October 9, 1942, filed a petition asking that he be appointed special administrator of the estate and on the same day the court filed a written order granting the petition, the order being worded as follows: "It appearing that Charles Elwood Triplett on the 9th day of October, 1942, filed with this court his verified petition for the appointment of himself as special administrator of the estate of Susan K. Triplett, deceased, and the court having heard the evidence in support of the application and being satisfied that the circumstances of the estate require the immediate appointment of a personal representative, it is hereby ordered that said Charles Elwood Triplett be, and he is hereby appointed special administrator of the estate of Susan K. Triplett, deceased, with the same powers, duties and obligations as a general administrator. It is further ordered that special letters of administration issue to said Charles Elwood Triplett upon his giving a bond as such special administrator in the sum of ten thousand dollars ($10,000.00) and upon his taking the oath as required by law. Done in open court this 9th day of October, 1942. Ernest D. Wag-

ner, Judge of the superior court." Petitioner filed his oath as special administrator and a bond in the sum of $10,000.

Without notice to Charles Elwood Triplett and without the filing of a petition for his removal the court on October 14, 1942, signed and filed an order purporting to vacate the appointment theretofore made of the special administrator, the order reading as follows: "Good cause appearing therefor, it is ordered that the order heretofore made herein on the 9th dav of October, 1942, appointing Charles Elwood Triplett as special administrator in the above entitled estate, be and the same is hereby vacated and set aside, upon the ground that said order was made and entered through inadvertence and mistake." On October 15, 1942, the court made an ex parte order in writing appointing Marion A. Smith and Ida Iliff special administrators of the Triplett estate.

Charles Elwood Triplett filed in this court on October 30, 1942, a petition for a writ of certiorari for the purpose of annulling the order made on October 14, vacating his appointment as special administrator, and the petition was served upon the judge of respondent court on October 28, 1942. This court on November 16, 1942, issued its writ commanding respondent court to certify a complete transcript of the records and proceedings in the matter of the Triplett estate. In response thereto respondents have filed herein a transcript which shows, in addition to the matters above set forth, that respondent court on November 14, 1942, made an order "nunc pro tunc as of the 14th day of October, 1942," vacating the order made on October 9, 1942, whereby petitioner was appointed special administrator, and setting forth the reasons for the making of the nunc pro tunc order. It is set forth therein that numerous matters were set for hearing on the calendar on October 9, 1942; that at the close of the morning session the clerk of the court handed to the judge twelve orders to be signed; that the attorney for Charles Elwood Triplett had previously handed to Ira Altschul, clerk of the court, without consulting either the clerk or the judge of the court, an order appointing a special administrator; that at no time did the attorney consult with, discuss or in any manner take up with the court or the judge thereof the question of appointing a special administrator in the matter. The order further sets forth that Charles Elwood Triplett had been left the sum of $1 only in the will, that under the provisions of the Probate Code preference must ordinarily be given to the person entitled to letters testamentary or administration; and that in signing the orders for matters duly and regularly heard for that day the court "inadvertently and by mistake" signed the order appointing a special administrator for the Triplett estate; and that had the court been advised in the premises the order would not have been signed.

It further appears from the transcript filed by respondents that on December 4, 1942, petitioner filed with the clerk of respondent court an affidavit in which he stated: "That your affiant was in court on October 9, 1942, and was in the said courtroom from 10 o'clock a. m. until 12 o'clock m. That at approximately 12 o'clock m., and as soon as the other cases had been disposed of, Mr. Shaeffer asked the court if he would hear the petition for special letters of administration in the Triplett estate. Ernest D. Wagner, judge of said court, thereupon stated from the bench that he would hear said matter and at the time there were in the court the judge, the clerk, Mr. Shaeffer and myself. Mr. Shaeffer motioned for me to come forward, I came forward and was sworn and in substance testified that Susan K. Triplett died on or about the 16th day of September, 1942, and at the time of her death and for a long time prior thereto she was a resident of the county of Santa Barbara, State of California, and owned property in Santa Barbara County valued in excess of fifty thousand dollars ($50,000.00); that I am her grandson; that she did not leave surviving her any father, mother, husband, or any children; that the estate consists of houses that are being rented and it was necessary to have someone with authority collect the rents and take care of the houses; that in addition to the houses the estate consists of a ranch which is being rented for oil. That there has been a contest filed to the petition for probate of will. That thereupon Mr. Shaeffer stated that he would prepare a bond and the court said that the bond should be ten thousand dollars ($10,000.00). That the whole proceedings in said court did not take over two or three minutes." The transcript also contains what appears to be an affidavit by the clerk of respondent court, which contains statements similar

to the statements made in the affidavit of petitioner, but in the petition for a rehearing our attention has been called to the fact that the clerk did not sign this affidavit.

This matter was submitted for our decision upon the filing of the closing brief on December 31, 1942, and decision was rendered on January 27, 1943. In their petition for a rehearing counsel for respondents assert that it was proper for this court to consider the nunc pro tunc order made after the petition for the writ had been filed in this court but they insist that it was not proper for this court to take into consideration the affidavit filed by petitioner on December 4, 1942. At the same time they take an inconsistent position by attaching to their petition for rehearing an affidavit by the clerk of respondent court, sworn to on February 6, 1943, so that, as they claim "this court may have the true picture." In this affidavit the clerk states that Charles Elwood Triplett was not sworn as a witness in connection with the Triplett estate on October 9, 1942. To his reply to the petition for a rehearing petitioner has attached an affidavit by his attorney, Fred A. Shaeffer, in which Mr. Shaeffer corroborates the statements in the affidavit of Mr. Triplett concerning his testimony on October 9, 1942.

[1, 2] The question of the propriety of considering the affidavit filed by petitioner on December 4, 1942, has been raised for the first time in the petition for a rehearing. It was not mentioned at the time set for the oral argument and was not discussed in the briefs on file. In giving consideration to the affidavit filed on December 4, 1942, we followed the sound ruling in Wilde v. Superior Court, 53 Cal.App. 2d 168, 127 P.2d 560, 564. In that case the District Court of Appeal had issued a writ to review a judgment holding the petitioner guilty of contempt of court. The respondent had made a return and at the hearing the court issuing the writ permitted the petitioner to be sowrn as a witness and to give testimony. In passing upon the objections of the respondents to this procedure the court exhaustively reviewed the decisions on the subject and held that it could "receive and consider the evidence of petitioner given before this court, not to impeach the record made in the court below but to supplement and explain it and to develop the true facts upon which must rest the question of the jurisdiction of the superior court to punish petitioner for contempt." The question now before us for determination is whether respondent court exceeded its jurisdiction in vacating the order which had previously been made appointing the present administrator. The affidavit filed by petitioner does not impeach the record made in respondent court. It is proper for this court to consider the affidavit for the purpose of developing the true facts upon which the action of respondent court was founded. See Los Angeles v. Young, 118 Cal. 295, 298, 50 P. 534, 62 Am.St.Rep. 234. The two affidavits attached respectively to the petition for a rehearing and the reply thereto are not part of the proceedings submitted by respondent court. They were not presented in any manner prior to our original decision herein and will not be given further consideration.

[3, 4] The uncontradicted evidence in the present proceeding shows that on October 9, 1942, the court considered the application for the appointment of a special administrator, received sworn testimony thereon, and thereafter made an order granting the petition, appointing the special administrator and fixing his bond. The court in its order specifically stated that it had "heard the evidence in support of the application" and was satisfied that the circumstances of the estate required the appointment. The order constituted a formal record representing the performance of a judicial act and the exercise of judicial discretion. The recital in the order made on October 14, 1942, that the order of October 9, 1942, had been entered "through inadvertence and mistake" is not conclusive of the nature of the error. In re Estate of Burnett, 11 Cal.2d 259, 79 P.2d 89. Nothing appears in the narrative of facts in the nunc pro tunc order made on November 14, 1942, which is in substantial conflict with the statements made in the affidavit presented by petitioner, notwithstanding the statement is made in the order that the attorney for petitioner did not "consult with, discuss nor in any manner take up with the said court nor the judge thereof the question of appointing a special administrator in said matter." Petitioner does not claim that he consulted the court or discussed with the court the matter of the appointment. The statement that the attorney did not "in any manner take up" with the court

the matter of the appointment is too indefinite to amount to a contradiction of the positive statements made in the affidavit filed by petitioner. If error was made by the court on October 9, 1942, it was inherently judicial rather than clerical or inadvertent and the court had no power thereafter to set it aside by an ex parte order.

For the foregoing reasons the order made on October 14, 1942, and the nunc pro tunc order made on November 14, 1942, are annulled. The order made on October 15, 1942, appointing Marion A. Smith and Ida Iliff special administrators is annulled. Petitioner shall recover his costs incurred by this proceeding which shall be chargeable against the estate of Susan K. Triplett.

MOORE, P. J., concurred.

McCOMB, J., concurred in the judgment.

Hearing denied; CURTIS and CARTER JJ., dissenting.



57 Cal.App.2d 616

LONDON GUARANTEE & ACCIDENT CO., Limited, v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 12342.

District Court of Appeal, First District, Division 2, California.

March 12, 1943.

Hearing Denied May 10, 1943.

1. Workmen's compensation ⇐486

Where deceased employee furnished grandniece, who lived in his home, with most of the necessities of life, but she expended all of her earnings of about $80 a month on herself alone and for her support in maintaining her standard of living, she was not "wholly dependent" on employee within meaning of compensation act. St.1937, pp. 268, 269, §§ 3501, 3502.

See Words and Phrases, Permanent Edition, for all other definitions of "Wholly Dependent".

2. Workmen's compensation ⇐416

"Dependency" within meaning of Compensation Act does not mean absolute dependency for necessities of life, but it is sufficient that contributions of workman are looked to for support in maintenance of dependent's accustomed mode of living. St.1937, p. 269, § 3502.

See Words and Phrases, Permanent Edition, for all other definitions of "Dependency".

3. Workmen's compensation ⇐416

In determining whether there is "dependency" within meaning of Compensation Act, test is whether dependent relied on employee's contributions, wholly or partially, for living expenses necessary and proper to the class and position in life of the dependent. St.1937, p. 269, § 3502.

Proceeding under the Workmen's Compensation Act by Barbara Butterfield, a minor, etc., compensation claimant, against the London Guarantee & Accident Company, Limited, to recover compensation for the death of Archie S. Rosier, deceased employee. The Industrial Accident Commission awarded compensation to the claimant, and the London Guarantee & Accident Company, Limited, brings proceedings for annulment of the award.

Award annulled.

W. N. Mullen, of San Francisco, for petitioner.

Everett A. Corten and J. Gould, both of San Francisco, for respondents.

SPENCE, Justice.

Petitioner seeks the annulment of an award of the respondent commission in which the applicant Barbara Butterfield was awarded a death benefit of $6,000, in addition to burial expenses, for the death of Archie S. Rosier, the deceased employee. Said award was based upon the finding that the deceased "left surviving and wholly dependent upon him, Barbara Butterfield, a minor, his acknowledged grand-niece, and a member of said deceased employee's household in good faith at the time of and prior to the injury and death of the deceased * * *."

[1] Petitioner contends that the evidence was insufficient to sustain the finding that the applicant was "wholly dependent" upon the deceased and, in our opinion, this contention must be sustained. The essential facts are not in dispute.

All parties are agreed that the applicant was not within the class of persons who are conclusively presumed to be wholly dependent (Lab.Code, sec. 3501, St.1937, p. 268); that the applicant was, however, a member in good faith of the household of the deceased (Lab.Code, sec. 3502); and that the question of the existence as well as of the extent of the dependency must be determined in accordance with the facts as they existed at the time of the injury of the deceased. (Lab.Code, sec. 3502).

Deceased was a grand-uncle of the applicant, having married applicant's grand-aunt. He died on July 10, 1942, as the result of an industrial injury received on that day. He was a steel window erector and was earning $64 per week. The applicant was 18 years of age and had been steadily employed as an usherette for some time prior to the death of the deceased at a wage of approximately $80 per month. She lived in the home of the deceased, doing certain housework for the deceased, and the latter paid all the ordinary expenses for the maintenance of the home. The applicant had, however, spent all her earnings during the past year upon herself for the purpose of maintaining a certain standard of living. There is an abundance of testimony showing in detail the purpose for which the various expenditures were made by the applicant and the deceased, but we need only summarize such testimony here. Deceased paid the rent, utility bills, food bills, medical bills and also the bills resulting from charge accounts at certain restaurants and other places. The applicant paid for some of her clothes, admittedly having spent at least $200 out of her own earnings for that purpose during the year immediately preceding the death of the deceased. She paid for some of her meals which she ate away from the home and also paid all her incidental expenses such as those for carfare, taxifare, cosmetics and amusements, including dancing, bowling and ice-skating. These incidental expenses were quite substantial in amount according to the figures given by the applicant. It therefore appears from the uncontradicted evidence of the applicant herself that the applicant was maintaining a standard of living which required the contributions of both the deceased and herself and that the contributions made by the applicant consisted of all her earnings which were substantial in amount and which were regularly received by her in her position as an usherette. Under the circumstances, it would seem to do violence to the terms to hold that the applicant was wholly dependent upon the deceased rather than merely partially dependent upon him.

While many authorities are cited by the parties, it appears that the rules set forth in Peterson v. Industrial Acc. Comm., 188 Cal. 15, 204 P. 390, and Tuttle v. Industrial Acc. Comm., 31 Cal.App.2d 279, 87 P.2d 881, are controlling here. In the Peterson case an award based upon a finding of total dependency was affirmed while in the Tuttle case, an award based upon a finding of total dependency was annulled upon the ground that the evidence was insufficient to support the finding of total dependency. In the Peterson case the finding of the applicants' total dependency upon the deceased employee at the time of the latter's injury was affirmed despite the fact that the applicants had had some employment at other times which, however, was "uncertain and irregular, and at best continued only through a few months of a designated period." The court there said on page 18 of 188 Cal., on page 391 of 204 P., "It is but a truism to say that total dependency exists where the applicants subsist entirely on the earnings of the deceased employee, but in applying this rule courts will not deprive applicants of the rights accorded total dependents, when otherwise entitled thereto, merely because of minor considerations or benefits which do not substantially affect or modify the status of the applicants toward the deceased employee." In the concurring opinion, it was indicated that the award there could be affirmed only upon the ground that "the law disregards trifles." The Peterson case was distinguished in the Tuttle case upon the ground that the earnings of the mother of the applicants in the Tuttle case, which earnings averaged between $16 and $18 per week and were contributed to the support of the applicants, the mother and the deceased employee, could not be considered as "trifles" or as "minor considerations or benefits." In that case, it was said on pages 281 and 282 of 31 Cal. App.2d, on page 882 of 87 P.2d: "Under the circumstances, we are of the opinion that the finding that the Trautman children were wholly dependent upon the deceased finds no support in the evidence. The uncontradicted evidence showed that their mother steadily contributed substantial sums

toward their support and therefore their dependency upon the deceased was not more than partial."

The distinction between the facts in the Peterson case and those in the case before us is entirely apparent. Here we have an applicant who, at the time of the death of the deceased, was regularly receiving substantial earnings from her employment as an usherette and was expending all of said earnings upon herself alone and for her support in maintaining her standard of living. Under the rule of the Tuttle case, the evidence was insufficient to support a finding of total dependency. In this connection, we believe it is immaterial that the deceased may have furnished the applicant with most of what may be termed the necessities of life and that the applicant expended most of her earnings upon what may be termed the luxuries of life; and we believe it is further immaterial that after the death of the deceased, the applicant could no longer maintain the same standard of living without assistance. Such facts show a case of partial dependency rather than of total dependency.

[2, 3] In the reply brief petitioner seems to contend that the evidence was insufficient to show even partial dependency. This contention is apparently based upon the fact that the earnings of the applicant would have been sufficient to have supplied her with the bare necessities of life. But the question of dependency involves a consideration of the mode or standard of living of the alleged dependent. In affirming an award, based upon a finding of partial dependency, the court said in London Guarantee & Accident Co. v. Industrial Acc. Comm., 203 Cal. 12, 13, at page 16, 263 P. 196, at page 197, "The true test of dependency is stated as follows in L.R.A. 1916A, page 248: 'Dependency * * * does not mean absolute dependency for the necessities of life; it is sufficient that contributions of the workman are looked to for support in the maintenance of the dependent's accustomed mode of living.'" And in Campbell on Workmen's Compensation, vol. I, sec. 890, page 787, it is said, "The test is whether the dependent relied upon contributions of the employee, wholly or partially, for living expense necessary and proper to the class and position in life of the dependent." We therefore find no merit in the last mentioned contention of petitioner but the existing award, based upon a finding of total dependency, cannot be permitted to stand.

The award is annulled.

NOURSE, P. J., and DOOLING, Justice pro tem., concurred.

Hearing denied; CARTER, J., dissenting.



57 Cal.App.2d 579

BEARD v. BEARD.

Civ. 13878.

District Court of Appeal, Second District, Division 2, California.

March 9, 1943.

Hearing Denied May 7, 1943.

1. Judgment ⇐822(1)

A valid judgment of a sister state which has become final must be accorded "full faith and credit" by every other court within the United States. U.S.C.A. Const. art. 4, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Full Faith and Credit".

2. Divorce ⇐331

Final divorce decree of Oregon court having jurisdiction of the parties and subject matter of action was not subject to "collateral attack" by husband in wife's action in California to recover permanent alimony due under the decree on ground that alimony award was invalid because contrary to stipulation of the parties, since under "full faith and credit" clause of Federal Constitution proceedings and evidence upon which such final decree was predicated were not reviewable. U.S.C.A. Const. art. 4, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Collateral Attack".

Appeal from Superior Court, Los Angeles County; Rubin S. Schmidt, Judge.

Action by Mary L. Beard against Frank A. Beard to recover alimony allegedly due

under a foreign divorce decree. Judgment for plaintiff, and defendant appeals.

Judgment affirmed.

Fred E. Subith, of Los Angeles, for appellant.

Jean Wunderlich, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to recover alimony alleged to be due pursuant to a divorce decree entered in a sister state (Oregon), defendant appeals.

These are the essential facts:

April 30, 1930, the Circuit Court of the State of Oregon, in and for the County of Multnomah, entered a decree of divorce in favor of plaintiff which contained among others the following provision:

"It is Further Ordered, Adjudged and Decreed that defendant shall pay to plaintiff the sum of $60.00 per month permanent alimony, said first payment of $60.00 to be made on or before the 15th day of July, 1930, and all other alimony payments shall be made on or before the 15th day of each and every succeeding month. This decree is pursuant to a stipulation duly signed by plaintiff and defendant under date of April 24, 1930." *

The trial judge in the instant action gave judgment in favor of plaintiff for the sum of $7,221.80, the amount of the unpaid alimony which had accrued pursuant to the terms of the Oregon decree.

Defendant urges reversal of the judgment upon the proposition *that the Oregon decree was invalid in awarding plaintiff $60 per month permanent alimony, since such award was contrary to the stipulation of the parties.*

[1] This proposition will not be considered by this court for the reason that it is settled that a valid judgment of a sister state which has become final must be accorded full faith and credit by every other court within the United States, Art. IV, sec. 1, Const. of U.S.C.A.; Biewend v. Biewend, 17 Cal.2d 108, 111, 109 P.2d 701, 132 A.L.R. 1264; Williams v. North Carolina, 63 S.Ct. 207, 87 L.Ed. 279.

[2] Applying this rule to the facts of

* The stipulation mentioned in the decree read as follows:

"It Is Hereby Stipulated by and between Mary L. Beard and her attorney, A. F. Knight, and Frank A. Beard and his attorney G. A. Samuels, that defendant shall pay to the plaintiff the sum of One Hundred and Fifty Dollars ($150.00) Attorneys fees and balance of court costs in the above entitled suit.

"It Is Further Stipulated and Agreed that plaintiff who is the owner of a certain note made payable to her by defendant herein, shall place said note in escrow in the hands of a third party and to be retained by said party for a period of not to exceed two years and shall at the end of said period, be delivered to defendant herein or his attorney, provided defendant shall faithfully and punctually pay alimony to plaintiff herein in the sum of Sixty Dollars ($60.00) per month during a period of two years with the understanding however that the first payment of said alimony shall not be due and owing until the 15th day of July, 1930, and with monthly payments thereafter on the 15th day of each and every succeeding month.

"It Is Further Understood and Agreed by and between the parties herein mentioned, that the note held against the plaintiff and defendant by the U. S. National Bank of Salem, Oregon in the sum of Two Hundred Dollars ($200.00) and for the security of which Northwestern Electric bonds in the sum of Two Hundred Dollars ($200.00) are held by the said U. S. National Bank of Salem, Oregon as security.

"It Is Further Understood that defendant herein shall pay or cause to be paid said note in full on or before the 1st day of July, 1930, and upon the payment of which the herein mentioned Northwestern Electric bonds shall forthwith be delivered to plaintiff or her attorney, and she shall be released from the further payment of any sum or sums of said note, nor shall she be called upon to execute any further notes on the part of defendant herein.

"It Is Further Stipulated and Agreed that the terms and conditions herein mentioned shall be accepted by plaintiff and defendant as a complete property settlement existing between them by reason of the marriage contract as set forth in this suit.

"Mary L. Beard,
"Plaintiff.
"A. F. Knight,
"Attorney for Plaintiff.
"Frank A. Beard
"Defendant.
"G. A. Samuels,
"Attorney for Defendant.
"Dated this 24th day of April, 1930."

the instant case, it appears that the decree entered in favor of plaintiff in the State of Oregon was entered by a court having jurisdiction of the parties and subject matter of the action, and that such decree has become final in the State of Oregon. Therefore, the decree entered in the State of Oregon may not be collaterally attacked in this state and the courts of this state may not review proceedings and evidence upon which the decree was predicated.

It is conceded that the circuit court of the State of Oregon had jurisdiction of the parties when it entered the degree upon which the present suit is predicated. Therefore we refrain from expressing any opinion as to the extent of the powers of the courts of this state to make inquiry relative to the jurisdictional facts upon which the judgment of a sister state is predicated.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.



RISKIN et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 13939.

District Court of Appeal, Second District, Division 2, California.

March 11, 1943.

Rehearing Denied March 30, 1943.

Hearing Granted May 7, 1943.

1. Workmen's compensation ⇐308

An "independent contractor" is one who renders service for another for a specified recompense to attain a specific result, and who is under control of his principal only as to result of the work and not as to the means or methods by which the result is to be accomplished. St.1937, p. 267, § 3353.

See Words and Phrases, Permanent Edition, for all other definitions of "Independent Contractor".

2. Workmen's compensation ⇐327

Compensation claimant engaged by mine owners to do some tunnel work not to exceed 40 feet at specified rate per foot, with owners to furnish tools and claimant to furnish everything else necessary for work, was an "independent contractor", and not an "employee", and hence was not entitled to compensation for injuries, notwithstanding that one of owners pointed out where work was to be done or that agreement provided that it might be terminated at any time either by owners or claimant. St.1937, p. 267, § 3353.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee".

3. Workmen's compensation ⇐327

Fact that agreement between compensation claimant and mine owners for claimant to do some tunnel work provided that it might be terminated at any time either by owners or claimant was a mere circumstance, and was not conclusive, in determining whether claimant was an "employee" of owners, so as to be entitled to compensation for injuries sustained during course of work, or an "independent contractor". St.1937, p. 267, § 3353.

MOORE, P. J., dissenting.

Proceeding by R. W. Riskin and others against the Industrial Accident Commission and A. F. Miner to review an order of the respondent commission directing petitioners to pay compensation benefits to A. F. Miner.

Award annulled.

Overton, Lyman & Plumb and L. K. Vermille, all of Los Angeles, for petitioners.

Everett A. Corten and Fred G. Goldsworthy, both of San Francisco, for respondents.

McCOMB, Justice.

Petitioners seek to annul an order of respondent Industrial Accident Commission directing them to pay compensation benefits to respondent A. F. Miner for injuries which he is alleged to have received during the course of and as the result of his employment by petitioners.

The evidence being viewed in the light most favorable to respondents, the essential facts are:

In March, 1942, petitioners were jointly engaged in mining operations on a claim

known as Ruby Quartz near Shoshone, California. Petitioner Morris on behalf of the joint venture contacted Mr. Brown, the operator of a general store at Shoshone, and told him that petitioners wanted some tunnel work done on the mining claim; that if he knew anyone who would take a contract and furnish everything and do the work for $7 a foot, to send such party to see petitioner Riskin.

Thereafter Mr. Brown told Mr. Casey, an experienced miner, of his conversation with Mr. Morris, whereupon Mr. Casey and respondent Miner examined the mining claim, after which Mr. Casey told Mr. Brown that they would take the job.

An agreement was entered into between Mr. Casey on behalf of himself and Mr. Miner, with Mr. Brown acting as agent for petitioners. This oral agreement provided that Messrs. Casey and Miner would drive a tunnel on petitioners' claim not to exceed 40 feet; that petitioners would furnish the tools; and that everything else necessary for the work such as transportation, water, powder, fuses, caps, et cetera would be furnished by Messrs. Casey and Miner, they to receive $7 for each foot the tunnel was driven. It was mutually agreed that Messrs. Casey and Miner might quit at any time they desired, and that petitioners might terminate the agreement at their pleasure.

Shortly thereafter, petitioner Riskin accompanied by Messrs. Casey and Miner went to the claim and pointed out to them where the work was to be done, stating that the tunnel should be driven to the left in order to meet with an incline shaft already located on the property.

April 18, 1942, while working in the tunnel, respondent Miner was injured by the premature explosion of dynamite. At the time of the accident the tunnel had been driven 31 feet. Messrs. Casey and Miner decided not to proceed further with the work, a settlement being made with them for the work performed in accordance with the agreement of the parties.

Petitioners urge annulment of the award on the proposition *that Messrs. Casey and Miner were independent contractors and not their employees at the time Mr. Miner was injured.*

This proposition is tenable and is governed by this pertinent rule of law:

[1] An independent contractor is one who renders service for another for a specified recompense to attain a specific result, and who is under control of his principal only as to the result of the work and not as to the means or methods by which the result is to be accomplished. Sec. 3353, Labor Code St.1937, p. 267; Winther v. Industrial Acc. Comm., 16 Cal.App.2d 131, 135, 60 P.2d 342; Los Flores School Dist. v. Industrial Acc. Comm., 13 Cal.App.2d 180, 183, 56 P.2d 581; Valente v. Industrial Acc. Comm., 68 Cal.App. 151, 153, 228 P. 667; Roberts v. Industrial Acc. Comm., 52 Cal. App. 31, 33, 197 P. 978.

[2] Applying the foregoing rule to the facts of the present case it is apparent that respondent Miner at the time of the accident in which he was injured, was engaged in rendering service to petitioners for a specified recompense which was being paid to attain a specific result, and that he was under the control of petitioners only as to the result of his work and not as to the means or methods by which that result was to be attained. He was therefore not an employee of petitioners, but was an independent contractor.

The fact that petitioner Riskin had pointed out to Messrs. Casey and Miner where the work was to be done, and had told them to drive the tunnel a little to the left in order that it might meet an incline shaft which had already been sunk, did not change the relationship of the parties to that of employer and employee. Winther v. Industrial Acc. Comm., supra, 16 Cal.App.2d 136, 60 P.2d 342; Provensano v. Division of Ind. Acc., 110 Cal.App. 239, 241, 294 P. 71.

[3] Neither is it controlling that the agreement between the parties provided that it might be terminated any time either by petitioners or Messrs. Casey and Miner. Such fact is a mere circumstance in determining the question as to whether the relationship is that of employer and employee or of independent contractor. See 13 Cal.Jur. (1923) 1034, sec. 14; Parsons v. Industrial Acc. Comm., 178 Cal. 394, 396, 173 P. 585; Luckie v. Diamond Coal Co., 41 Cal.App. 468, 482, 183 P. 178. In this case it is clear that this privilege was merely a provision of the contract which the parties had made.

For the foregoing reasons the award of the Industrial Accident Commission is annulled.

W. J. WOOD, J., concurred.

MOORE, Presiding Justice (dissenting).

The findings are that the applicant, A. F. Miner, sustained an injury arising out of and occurring in the course of his employment by petitioners; that the injury caused temporary disability. Upon such findings the commission made an award, the amount of which is not challenged.

The evidence discloses that petitioners were associated in the operation of the Ruby Copper Mine near Shoshone upon which they desired to have a tunnel excavated. Petitioners Eby and Riskin were the employees of petitioner Morris in his management of a talc mine near Ibec Springs. In order to procure the construction of the tunnel on the Ruby Copper Mine, petitioner Morris called at the store of Charles Brown at Shoshone and stated to the merchant that Messrs. Riskin and Eby wanted forty feet of work done on their copper mine; that if anyone would take a contract to furnish everything and to do the work at $7 a foot he should send such party over to see Mr. Riskin. Morris stated to Brown that the parties selected to do the work must have their own tools and equipment and transportation for the hauling of their water. But it was to be the privilege of such parties, as should undertake to do the work, to withdraw whenever they wished and they were to be paid at the rate of $7 per foot for the footage actually excavated. Casey and Miner called on Riskin who showed them the location and how to drive the tunnel, but gave them no instructions on how large to make it. Nor did Riskin thereafter inspect the work done by the men. After Miner suffered his injury as the result of a premature discharge, Casey called on Brown for a settlement for the 31 feet of tunneling done prior to the accident and was paid the sum of $217 for the work of the two men.

Basing their arguments in the main upon the foregoing facts shown by the testimony petitioners contended that the applicant was at work under an independent contract at the time of his injury. They cite section 3353, Labor Code; Los Flores School Dist. v. Industrial Acc. Comm., 13 Cal.App.2d 180, 56 P.2d 581; Lillibridge v. Industrial Acc. Comm., 4 Cal.App.2d 237, 40 P.2d 856; Winther v. Industrial Acc. Comm., 16 Cal.App.2d 131, 60 P.2d 342; State Compensation Insurance Fund v. Industrial Acc. Comm., 46 Cal.App.2d 526, 116 P.2d 173, and other authorities.

(1) However the record discloses other proof which, notwithstanding the foregoing facts, is sufficient to support the findings of respondent commission. The parties testified that Casey and Miner were at liberty to quit at any time they chose and that they could be discharged at the pleasure of petitioners. Moreover Morris understood that it was the privilege of Casey and Miner to quit at any time so long as they should be paid $7 per foot for the distance actually covered in the construction of the tunnel. Also, Mr. Brown testified that it is the rule in the Shoshone mining community under contracts to drive tunnels at a specified pay per foot that the party who does the excavating has the right to abandon the job at any time and be paid for the work actually done. If other proof were requisite to establish the understanding of the parties, the payment by petitioners for the 31 feet is sufficient.

(2) From the evidence in the instant case it is shown to be customary in mining districts where a person is employed to drive a tunnel that the foreman does not customarily supervise the work, but he gives general directions only. Detailed instructions for such work are not necessary. The details of such work are left to the judgment of those employed to construct the tunnel. From the fact that Riskin did not instruct Casey and Miner as to the size of the tunnel it was a reasonable inference that all of such tunnels are of a customary size. A certain amount of freedom of action was necessarily allowable by reason of the very nature of the work done by the applicant and his associate. But such freedom did not convert the relationship of master and servant into one of owner and independent contractor. Cameron v. Pillsbury, 173 Cal. 83, 86, 159 P. 149; Press Publishing Co. v. Industrial Acc. Comm., 190 Cal. 114, 120, 210 P. 820.

(3) Any person rendering service for another is presumed to be an employee unless it be otherwise expressly shown, Sec. 3357 Labor Code, St.1937, p. 268. The plea that an injured person claiming to be an employee is an independent contractor,

or for other reason is excluded from the protection of division IV of the Labor Code, is an affirmative defense and the burden of proof rests upon defendant to establish his exemption. Sec. 5705, Labor Code; Hillen v. Industrial Acc. Comm., 199 Cal. 577, 580, 250 P. 570; Los Flores School District v. Industrial Acc. Comm., 13 Cal. App.2d 180, 56 P.2d 581. Because the applicant was not to be paid according to any unit of time does not establish that he was not a servant of petitioner. Wages may be measured by the piece, foot or any other standard agreed upon by the parties. Where a party was employed to clear up the brush in an orchard for the sum of $30 the owner reserving the right to discharge the workman in the event the work did not progress satisfactorily it was held to be an employment. La Franchi v. Industrial Acc. Comm., 213 Cal. 675, 3 P.2d 305.

In view of the fact that the testimony of the parties or the fair inferences to be drawn therefrom support the finding that either party to the agreement could have terminated the relationship at will without liability it is clear that the relationship of employer and employee between the applicant and the petitioner was established. 13 Cal.Jur. 1034. Petitioner at all times had the power of control over the manner of performing the work. Helmuth v. Industrial Acc. Comm., 59 Cal.App. 160, 210 P. 428; Press Publishing Co. v. Industrial Acc. Comm., supra; Hillen v. Industrial Acc. Comm., supra, 199 Cal. page 581, 250 P. 570. The fact that such power was not exercised by petitioners is beside the point. Where the contract initiating the relationship between the parties contains no express provision for or against the power of control the presence or absence of such power must be determined from the reasonable inferences to be drawn from all the circumstances surrounding the parties at the time of entering into the agreement as well as from the character of the parties, nature of the work and the conduct of the parties towards each other. Yucaipa Farmers Co-op. Association v. Industrial Acc. Comm., 55 Cal.App.2d 234, 237, 238, 130 P.2d 146. If upon a review of all the circumstances the trier of facts might fairly have determined either that there was or that there was not the right of control his finding is final. Chapman v. Edwards, 133 Cal.App. 72, 74, 77, 24 P.2d 211.

The award should be affirmed.

57 Cal.App.2d 620

YETTA C. MANOIL, Inc., v. GIBSON.

Civ. 13941.

District Court of Appeal, Second District, Division 2, California.

March 12, 1943.

1. Bailment ⇐1
Landlord and tenant ⇐76(2), 104

Where arrangement between tenant of garage building and transport motor company was not merely for storage of company's automobiles for hire in part of building, but for company's rental of such part from month to month, thus creating relation of "landlord and tenant", rather than "bailor and bailee", tenant breached provision of lease against subletting any part of demised premises, so as to entitle landlord to forfeiture of lease and restoration to possession of building. Code Civ.Proc. § 1179.

See Words and Phrases, Permanent Edition, for all other definitions of "Bailor and Bailee" and "Landlord and Tenant".

2. Appeal and error ⇐110

An appeal does not lie from order denying motion for new trial in civil case.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Unlawful detainer action by Yetta C. Manoil, Inc., against Cecil E. Gibson. From a judgment for plaintiff and orders denying defendant's motions for relief against forfeiture of a lease and for a new trial, defendant appeals.

Judgment and order denying relief against forfeiture affirmed, and appeal from order denying motion for new trial dismissed.

Harry M. Irwin, of Los Angeles, for appellant.

Arch R. Tuthill, Flint & MacKay, and Roscoe C. Andrews, all of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an unlawful detainer action for the purpose of recovering the immediate pos-

session of a three-story building, on the ground that the lessee had violated the terms of a lease, defendant lessee appeals.

There are also appeals from orders denying defendant lessee's:

(1) Motion for an order under section 1179, Code of Civil Procedure, and

(2) Motion for a new trial.

The evidence being viewed in the light most favorable to plaintiff (respondent), the essential facts are these:

October 1, 1941, plaintiff as lessor leased to defendant, Cecil E. Gibson, a three-story concrete building in Los Angeles known as 1017 North Alameda Street and 720 North Spring Street. The building is a garage building consisting of three floors. There is a separate entrance to the second floor from Spring Street, there being no direct connection between the first and second floor other than by a freight elevator, which can be operated between all three floors in the building.

It was provided in the lease that, "Except with the written consent of Landlord, only Tenant shall occupy the demised premises; and neither the demised premises, nor any part thereof, shall be sublet, nor shall this lease be assigned by Tenant voluntarily or involuntarily by operation of law."

In December, 1941, defendant lessee sublet the entire second floor of the building to Transport Motor Company for a monthly rental of $200 payable in advance. Plaintiff lessor never gave his consent to the sublease.

[1] This is the sole question necessary for us to determine.

Was there substantial evidence to sustain the trial court's finding that defendant lessee, contrary to the provisions of the lease, sublet a portion of the demised premises without the consent of plaintiff lessor?

This question must be answered in the affirmative. It is undisputed that the written lease between the parties contained a provision prohibiting the subletting of the leased premises or any portion thereof without written consent of the lessor. It is likewise conceded that the lessor did not at any time consent to a subletting of any portion or all of the leased property.

Defendant lessee's contention that the arrangement between himself and Transport Motor Company did not constitute a subletting, but was a permissive use under the clause in the lease, that the demised property was to be used as a garage for storage, is without merit.

The arrangement between the parties as disclosed by the evidence was not merely one whereby automobiles of Transport Motor Company were stored for hire, which would have established the relationship of bailor and bailee (a permissible use under the terms of the lease), but was one for the rental of a definite portion of real property under a month to month tenancy which created the relation of landlord and tenant.

This distinction is clearly delineated in Gruber v. Pacific States Savings & Loan Company, 13 Cal.2d 144, 88 P.2d 137, in which case a portion of a quarry, consisting of a barn, lot, and corral was rented for the purpose of storing equipment at a rental of $15 per month. In determining the legal relationship created by this arrangement, Mr. Chief Justice Waste, speaking for the Supreme Court, says in Gruber v. Pacific States Savings & Loan, supra, 13 Cal.2d at page 150, 88 P.2d at page 140:

"The agreement between the parties, as disclosed by the record, was not one of storage for hire which establishes the relationship of bailor and bailee but rather was one for the rental of real property which establishes the relationship of landlord and tenant even though, as here, it may be contemplated that the property will be used by the tenant solely for storage purposes."

In view of the foregoing it is evident that the lessee breached a provision of the written lease which he had entered into with the plaintiff lessor, that the trial judge's finding to such effect is supported by substantial evidence, and the judgment directing that plaintiff be restored to the possession of the leased property is correct.

In view of the conclusions we have reached it is unnecessary for us to discuss the other points presented by counsel.

For the foregoing reasons the judgment and the order denying defendant Gibson's motion under section 1179, Code of Civil Procedure are and each is affirmed.

[2] An appeal does not lie from an order denying a motion for a new trial in a

civil case (D'Alessio v. D'Alessio, 56 Cal. App.2d —, 132 P.2d 271). Therefore the attempted appeal from the order denying the motion for a new trial is dismissed.

MOORE, P. J., and W. J. WOOD, J., concurred.



57 Cal.App.2d 591

PEOPLE v. MARSICANO.

Civ. No. 2977.

District Court of Appeal, Fourth District, California.

March 9, 1943.

Rehearing Denied April 6, 1943.

1. States ⇐104

The words "said property", as used in agreement to deed to state a 20-foot strip of land for highway purposes with provision for use by vendor so long as state did not take possession of said property, and that state, upon taking possession, would remove or replace all improvements existing on said property on date of agreement to a location clear of highway, referred to strip conveyed and not to remainder of premises, and word "improvements" referred only to improvements situated within strip conveyed.

See Words and Phrases, Permanent Edition, for all other definitions of "Improvements" and "Said Property".

2. Appeal and error ⇐1008(3)

Where 20-foot strip of land required for highway purposes included therein parking area between highway and building, and owner proposed agreement with state to convey such strip on condition that state upon taking possession would remove or replace all improvements existing on strip conveyed on date of agreement, and trial court, under statute, found that only reasonable construction of agreement did not obligate state to remove building back 20 feet so that parking area could still exist in front of building, such construction would not be disturbed on appeal. Civ. Code, § 1654.

3. Contracts ⇐147(3)

In construing contract, the whole is to be taken together so as to give effect to every part if reasonably practicable, and, if provisions are susceptible of interpretation which will give effect to mutual lawful intention of parties as it is found to have existed at time of contracting, court is bound to give provisions such interpretation. Civ.Code, § 1641.

4. Appeal and error ⇐1071(6)

An appellant cannot complain of failure of trial court to find on an issue where finding, if made, would of necessity be adverse to appellant.

5. Eminent domain ⇐240, 243(2)

In proceeding to condemn land for highway purposes, where state already had title subject to contract to remove improvements upon taking possession, and defendant, in effect, sought a judgment for damages for failure of state to comply with defendant's interpretation of agreement, court by judgment for state found by inference against defendant's claimed construction of agreement and resultant damage, and findings were not subject to objection that they were not responsive to issues of fact presented by pleadings for failure to find on defendants claimed construction of agreement.

6. Trial ⇐388(4)

Findings are not necessary upon stipulated facts.

7. States ⇐104

Construction of contract for conveyance of land to state for highway purposes is a "question of law".

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Law".

8. Appeal and error ⇐843(2)

Where respondent challenged right of appellant to raise for first time on appeal objection to findings on ground that they should have been more certain, and by stipulation appellant was given permission on motion for diminution of record to bring up record as to appellant's objections, but allowed time to expire without bringing up such record, and judgment was required to be affirmed on other grounds, District Court of Appeal did not pass on respondent's challenge.

Appeal from a judgment of the Superior Court of San Bernardino County; Frank A. Leonard, Judge.

Proceeding in eminent domain by the People against Mary Marsicano to condemn for highway purposes a claimed interest in land. From a judgment for People, defendant appeals.

Affirmed.

Charles A. Christin and T. J. Keegan, both of San Francisco, for appellant.

C. C. Carleton, C. R. Montgomery, and Robert E. Reed, all of Sacramento, and Francis J. Carr, Holloway Jones, and Lincoln V. Johnson, all of San Francisco, for respondent.

GRIFFIN, Justice.

This is a proceeding in eminent domain brought by respondent for the purpose of condemning a claimed interest in the land of appellant. In 1928 respondent, with the view to widening, at some future time, the highway known as Foothill Boulevard, in the town of Cucamonga, in San Bernardino County, sought to acquire a 20-foot strip of land on each side of its highway. Appellant owned the southwest corner property (208 feet by 179 feet) fronting on Foothill Boulevard, at Archibald Avenue. At that time a service station was located near the corner on a part of the property. On a larger part of the property, and outside the 20-foot strip proposed to be taken by respondent, there was constructed a large concrete store and restaurant building. In front of the large building and between the building and the 20-foot strip sought by respondent, there existed a sidewalk, curb and gutter. Between the curb and gutter and the then existing paved street, appellant had constructed a concrete apron which was available as a parking area. Automobiles could drive in from Foothill Boulevard onto appellant's property, and park against the curb on the concrete apron in front of the building. The new right of way line of the highway extends to within one foot of the curb, but leaves the curb and the 12-foot sidewalk in front of the store and restaurant exactly as they existed before the widening of the highway. On March 10, 1928, appellant agreed to deliver a deed conveying a highway easement over the 20-foot strip of land on which were constructed the parking area as well as the northerly island of pumps attached to the service station. Since respondent on that date was not ready to extend the traveled way of its highway on Foothill Boulevard, it agreed that appellant could have the use and possession of the property so long as respondent did not take possession for highway purposes. Respondent also agreed that, if and when it did take possession for highway purposes, it would remove or replace the improvements located in the 20-foot strip as of the date of the agreement. Respondents filed this condemnation proceeding and took possession for highway purposes on July 26, 1938.

The complaint is the usual complaint in condemnation. It describes the 20-foot strip desired, alleges the claimed fee interest of appellant and the interest of the defendant lessees George and May Klusman, who were tenants of the property under a 25-year lease, and who erected the buildings on the property described. Respondent prayed that the court ascertain and assess the value of the right of way, determine the severance damages and benefits, if any, resulting from the construction of the highway improvement proposed, and upon payment of such sums as may be found due, for an order of condemnation of the property, after specifying all the liens and incumbrances of record. The defendant lessees answered, alleged their claimed damages, set up their lease with appellant, and later stipulated with respondent that they have a judgment in the sum of $3,000 for their interest in the land condemned and for all damages of every kind and nature suffered by them. On February 19, 1940, appellant answered and admitted the allegations of respondent's complaint except as to the amount of damages. On February 20, 1940, she filed an amendment to her answer setting up her agreement of March 10, 1928, with respondent. This agreement was in letter form and read in part:

"Department of Public Works,

* * * * *

"Please be advised that State Highway deeds covering the following described property * * * (20-foot strip) have been properly executed and the same have been delivered to Mercantile Trust Co., * * * with instructions to deliver said deeds to you upon your marginal approval and return of this letter.

"It is, however, understood that so long as the State of California does not take possession of and use the *said property* for highway purposes, the undersigned shall be allowed to use and enjoy the surface of

said property in the same manner and for the same purposes as the *said property* has heretofore and now is used by the undersigned.

"Any improvements other than those already on *said property* which may hereafter be placed thereon are at owners risk and without expectation of damages or financial gain in event of removal by the State of California.

"It is also understood that if and when the State of California shall take possession of and use *said property* for highway purposes it, the State of California, shall remove or replace, * * * all *improvements* existing on the date of this letter, and will remove or replace said *improvements* to a location that will be clear of the State Highway right of way described in the above mentioned State Highway deeds * * * (Italics ours).

"(Signed) Mary Marsicano.

"Approved:

"State of California

"Department of Public Works * * *"

On the trial there was received in evidence a deed, executed on April 23, 1930, by appellant to the state. It recited that in consideration of one dollar "and the benefits to accrue to her by reason of the location and establishment of the state highway upon, over and across said lands, she does hereby signify her approval of and consent to the location, establishment and construction of said state highway and she does * * * hereby grant * * * to the State * * * the right of way and incidents thereto for said state highway upon, over and across her said lands, hereinafter described, * * * And she, *the said grantor, does hereby waive all claim for any and all damages or compensation for and on account of the location, establishment and construction of said state highway;* * * *" (Italics ours.) The concrete parking strip, a portion of the service station, and three pumps, were the only improvements in the 20-foot strip. They have been removed or moved in accordance with the contract. Inasmuch as appellant had leased the property to third parties (Klusmans) a stipulation was made with the third parties regarding the details of the moving. Respondent did not actually replace the parking area, but deposited the cost thereof in court. This was done because the tenants who were in possession desired the matter to be handled that way. It was covered in the stipulation above referred to. The amount deposited covered the cost of substituting a new parking area of equal size on an equally usable portion of the remaining property. The court apparently held that the agreement had been fully complied with and entered the judgment and final order of condemnation on June 8, 1940.

Appellant contends that the contract of March 10, 1928, requires the moving, as a unit, of the large concrete building, together with sidewalk, curb, and gutter, away from the new right of way line a distance of 20 feet; or, if moving the entire building be more costly, then that the contract would permit the cutting off of 20 feet from the front of the building and adding 20 feet to the back of it, including, of course, the construction of a new front and the removal of the existing rear wall, and so constructed that the parking area would be in front of the building instead of alongside of it. The cost of either method would exceed $8,000. In other words, appellant asked the court to so construe the 1928 agreement as to require the moving of a $20,000 building for the sole purpose of vacating an area in front of the building for parking purposes. Respondent's contention, on the other hand, is that since the service station has been moved, and since respondent has agreed to replace the parking area in a new location available at the side of the store and restaurant building, it has performed its entire obligation under the 1928 contract, and that the judgment of the trial court, which decreed that appellant has no further interest in the land sought to be condemned, is correct and should be affirmed.

The true issue in this appeal is whether the trial court gave a reasonable interpretation to the contract of March 10, 1928, and whether it, as contended by appellant, erroneously failed to find on a material issue, i. e., whether, under the terms of the contract, respondent was bound to move the stone store building back 20 feet or cut 20 feet from the front of the building and add 20 feet to the back of it so as to provide an additional parking space of 20 feet in front thereof, or whether appellant, for failure of respondent to remove it as pleaded in the amended answer, was entitled to the cost of removing the building as damages.

The record discloses that during the trial respondent, through its counsel, Mr. John-

son, offered to stipulate with Mr. Christin, counsel for appellant, to certain things. The testimony in this respect was as follows:

"Mr. Johnson. Now, I might say, also, Mr. Christin, that the state is willing under the if and when agreement which is in evidence as Plaintiff's Exhibit 1, to move and relocate the gas station, a portion of which extends within the area being condemned and to defray the cost of that so as to set that gas station up anew so it will operate in substantially the same condition after the removal as that operated before, the cost of which we have found to be $880.

"Now, we are also willing to replace on the west side of the store building, what will be the equivalent of the paved parking area in front of the two rights-of-way lines and to pave or surface the portion lying westerly of the store building on the leased premises to give the lessee either the same or more parking space than he now has in front of the building and to defray the cost of that which we have found will approximate $691. * * *

"Mr. Christin. And Mr. Johnson, I take it from your offer that the state is not prepared at this time to offer to replace the concrete apron which we just referred to by moving it back 20 feet so that there would be twenty feet of apron in front of the building.

"Mr. Johnson. No. We would be unwilling to stipulate to that.

"Mr. Christin. I was asking that for the record * * *

"Mr. Johnson. I will also introduce in evidence as Plaintiff's Exhibit No. 4 a copy of the deed from Mary Marsicano to the state.

"Mr. Christin. So stipulated.

"The Court. Admitted."

After respondent rested appellant produced evidence that the cost of setting the store building back twenty feet would be $9,000. The trial court found that both oral and documentary evidence was introduced on the issues; that upon the pleadings and oral stipulations entered into in open court and from the evidence introduced that the use for which the parcel of land was sought was necessary for a public use; that the allegations of plaintiff's complaint were true; that the allegations in the answer of appellant and the amendment thereto as to the value of the property sought to be condemned were untrue; that appellant, on April 23, 1930, "sold, assigned and transferred by deed to the plaintiff all of her right, title and interest in and to the parcel of land described * * * in the complaint * * * on July 26, 1938, said defendant had no interest in said parcel. * * *" As a conclusion of law it stated that plaintiff was entitled to a decree condemning whatever alleged right, title and interest remained vested in appellant, and that she was not entitled "to any compensation for the alleged right, title or interest which she claims to have in the aforesaid parcel." These findings were served on appellant on May 21, 1941. On June 4, 1941, judgment was entered accordingly.

The decree recited that appellant was not "entitled to any compensation for the alleged right, title or interest which she claims to have in the aforesaid parcel * * * or to any damages to the lands contiguous to that parcel of land taken for highway purposes."

[1] The appeal from the judgment entered on June 4, 1941, was filed August 22, 1941. The property sought to be condemned was described in the agreement as the 20-foot strip. It is to be remembered that the building, sidewalk, curb and gutter are all outside of the 20-foot strip acquired by respondent. The agreement provided, and could only be reasonably construed by any court to mean that any improvements other than those already on *said property* (20-foot strip) were to be erected at the owner's risk and without expectation of damages in the event of removal; that if and when the state should take possession of and use "said property" (20-foot strip), the state should remove or replace, as of that date, all improvements existing (on said property) and to a location clear of the highway right of way. The use of the words "said property" in the agreement clearly refers to the 20-foot strip. The use of the word "improvements" must refer to the improvements situated within the 20-foot strip. Certainly, had appellant intended to force respondent to agree to move, or cut off and add to the expensive concrete building outside the right of way area, she would have made such an obligation clear and unequivocal in the letter of March 10, 1928. Sec. 1654 of the Civil Code reads: "In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused

the uncertainty to exist. The promisor is presumed to be such party; except in a contract between a public officer or body, as such, and a private party, in which it is presumed that all uncertainty was caused by the private party."

[2, 3] The construction that respondent was not obligated under the agreement to remove the store building back 20 feet was the only reasonable one that could be drawn from a consideration of the entire instrument. This construction will not be disturbed by us as a reviewing court. Manhattan Beach v. Cortelyou, 10 Cal.2d 653, 660, 76 P.2d 483. Any other interpretation would seem to violate the plain intent of the language used. The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other, and if the provisions of the contract as a whole are susceptible of an interpretation which will give effect to the mutual lawful intention of the parties as it is thus found to have existed at the time of contracting, the court is bound to give to them that interpretation. Lemm v. Stillwater Land & Cattle Co., 217 Cal. 474, 19 P.2d 785; sec. 1641, Civ.Code.

[4-7] It is apparent from the contract and deed that appellant has waived any right to "damages or compensation for or on account of the location, establishment and construction of the state highway." Appellant cannot now complain if the trial court failed to find on that issue because if a finding were to be made it would of necessity be adverse to appellant. However, such a finding was made. Respondent already had title to the 20-foot strip when the action was filed. In fact, appellant's supplemental answer in effect merely seeks a judgment for damages for failure of the respondent to comply with *appellant's interpretation* of the agreement to remove the stone building. Appellant so argues in her brief when she says: "Appellant is entitled to her damages for the failure of the State to carry out the terms of the 'if and when' contract of March 10, 1928." From the facts found and the facts stipulated to (upon which findings were not necessary) (Wilson v. Mattei, 84 Cal.App. 567, 572, 258 P. 453), the trial court apparently concluded that all improvements had been moved from the right of way in accordance with the contract of March 10, 1928, and, at least by inference, found against appellant's claimed construction of the agreement and resultant damage. The construction of the contract was one of law. Gardner v. San Gabriel Valley Bank, 7 Cal.App. 106, 93 P. 900. Therefore, the findings were not subject to the criticism that they were not responsive to the issues of fact presented by the pleadings in the case. City of Alameda v. City of Oakland, 198 Cal. 566, 246 P. 69; Chambers v. Farnham, 39 Cal.App. 17, 179 P. 423.

[8] Respondent argues that neither during the time prior to the signing of the findings nor in her motion for a new trial did appellant object to the findings made by the court and that therefore she cannot raise, for the first time on appeal, an objection to the findings on the ground that they should have been more explicit and certain, citing In re Estate of Perry, 64 Cal.App. 21, 220 P. 321; Moore v. Craig, 5 Cal.App.2d 283, 42 P.2d 647. Appellant argues in her brief that such objections were made on both occasions. On a motion for diminution of the record it was stipulated that appellant might diminute the record by bringing up the record in this respect. No such record has been presented and the time allowed for such diminution has expired. However, in view of the other reasons stated why the judgment must be otherwise affirmed, it will be unnecessary to pass upon that question.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concurred.

57 Cal.App.2d 542

KLEIN v. FARMER et al.
Civ. 12301.

District Court of Appeal, First District, Division 2, California.

March 8, 1943.

Rehearing Denied April 7, 1943.

Hearing Denied May 7, 1943.

1. Deeds ⇐208(7)

Evidence that grantee admitted that the envelope containing the deed to grantee had been received by grantee through the mail from an unknown source after death of grantor, which contradicted grantee's testimony as to delivery before death, was sufficient to support finding that deed had not been delivered prior to grantor's death.

2. Deeds ⇐211(1, 4, 5)

Evidence supported finding that deceased had an active, alert and independent mind at time of executing deed and that the execution and delivery of the deed was his free and voluntary act and was not procured by duress or undue influence of grantee.

3. Appeal and error ⇐1122(2)

Where evidence established that a deed was not procured by duress or undue influence of grantee, trial court's findings, which made no unqualified finding against existence of duress or undue influence but only a finding that there was no duress or undue influence because no confidential relation existed between deceased grantor and grantee, were amended on appeal to conform to the evidence. Code Civ.Proc. § 956a; Const. art. 6, § 4¾.

Appeals from Superior Court, Alameda County; John J. Allen, Judge.

Action by Dicka Klein against Florence M. Farmer and George A. Gray to quiet title wherein defendants filed cross-complaint. From the portion of the judgment in favor of defendant Gray, plaintiff appeals and from the portion of the judgment in favor of plaintiff, defendant Farmer appeals.

Findings amended and judgment affirmed.

John L. McVey, of Oakland, for plaintiff and appellant.

Rode, Burnhill & Rode and Lincoln Rode, all of Oakland, for defendant and appellant and for respondent.

SPENCE, Justice.

Plaintiff brought this action to quiet title to a parcel of real property. Defendants Florence M. Farmer and George A. Gray filed an answer and also a cross-complaint seeking to quiet their title to said parcel. The cause was tried by the court sitting without a jury upon the above-mentioned pleadings together with plaintiff's amended answer to the cross-complaint.

It appears from said pleadings and from the evidence that plaintiff claimed title as the assignee of plaintiff's mother, Luella Cool, who was the sister and only heir at law of William Otto Emerson, deceased. It further appears that the two defendants claimed title to said parcel under two deeds, which it was claimed were executed and delivered by said deceased during his lifetime. In one of said deeds defendant Farmer was named as the grantee. It covered a portion of said parcel and was recorded shortly after the death of said deceased. In the other of said deeds defendant Gray was named as the grantee. It covered the remaining portion of said parcel and was likewise recorded shortly after the death of said deceased. It was plaintiff's claim that there had never been a valid delivery of either of said deeds and further, that the execution of said deeds was procured by the undue influence of the defendants. The trial court entered judgment in favor of plaintiff and against defendant Farmer with respect to the portion of the parcel claimed by defendant Farmer. Said judgment was based upon the finding that the deed to said defendant had never been delivered. The trial court further entered judgment in favor of defendant Gray and against plaintiff with respect to the portion of the parcel claimed by defendant Gray. Said judgment was based upon finding that the deed to said defendant had been delivered and upon further findings with respect to the issue of undue influence which will be hereinafter discussed. Plaintiff appeals from the portion of said judgment in favor of defendant Gray. Defendant Farmer appeals from the portion of the judgment in favor of plaintiff. Both appeals are presented on a single typewritten transcript.

The deceased died on December 24, 1940, at the age of 85 years. He was a bachelor and had been a cripple since infancy. He was an artist and ornithologist and he maintained his interest and activity in these

fields until his death. There is abundant testimony to show that while he suffered from and required assistance because of his physical disability, he was very alert mentally. He actively participated until the last in the work of the Boy Scouts of America, mainly by giving merit badge tests and, only three months before his death, he addressed a meeting of the Cooper Ornithological Club at the University of California. When his doctor called upon him at his home on the morning before his death, the doctor found him at his work stuffing a quail. It is the home place of the deceased near Hayward which constitutes the parcel of land which is the subject of this litigation.

Defendants Gray and Farmer were formerly husband and wife. Both had formerly been engaged in the real estate business. Defendant Gray had been well acquainted with the deceased since 1900 while defendant Farmer had been well acquainted with the deceased since 1918. The friendship was a very close one and both defendants performed many services for the deceased up to the time of his death. Defendant Farmer had had some experience as a practical nurse and, when the deceased became ill in 1932, she acted as day and night nurse for him for about six weeks without compensation. Thereafter deceased entered into an arrangement with defendant Farmer whereby she worked for him from 10 a. m. to 4 p. m. each day for $40 per month, carrying on her own business in the early morning and the evening. Later defendant Farmer worked for deceased full time, living at his home and receiving $65 per month. This arrangement continued up to the time of the death of said deceased.

Defendant Gray described himself as a "helper, companion and friend" of the deceased. He testified in the probate court that the deceased consulted him "in almost all his business affairs." He frequently did errands for the deceased in attending to the deceased's affairs as the deceased was a cripple and was unable to get around without assistance. He described himself as the "feet" of the deceased. The record is replete with evidence of the numerous favors done by defendant Gray for the deceased. They were very close friends, they addressed each other in the most endearing terms, they had pictures taken together and they exchanged Christmas cards and gifts. Defendant Gray testified that he "visited and advised with him (the deceased) over those years." The close relationship was further evidenced by the fact that about eight or nine years before his death, the deceased endorsed securities of the value of about $30,000 and delivered them to defendant Gray to be delivered to plaintiff and her mother after the death of the deceased. Defendant Gray kept these securities in his own safe-deposit box throughout those years and delivered them, according to instructions, after the death of the deceased. It seems entirely clear from the testimony that the deceased depended upon defendant Farmer as his housekeeper, nurse and companion and depended upon defendant Gray as his devoted friend, confidant and adviser throughout the several last years of his life.

The deed in which defendant Farmer was named as grantee was dated February 7, 1933. The acknowledgment was dated February 8, 1933. Said deed was recorded on December 26, 1940.

The deed in which defendant Gray was named as grantee was dated July 7, 1937. The acknowledgment was dated July 14, 1937. Said deed was recorded on December 30, 1940.

Appeal of Defendant Farmer.

Defendant Farmer contends that the evidence was insufficient to sustain the finding of the trial court to the effect that the deed to defendant Farmer had never been delivered. In support of this contention said defendant calls our attention to the admitted possession of the deed by said defendant after the death of the deceased and also to the testimony of said defendant with respect to the circumstances under which the deceased gave said defendant possession of said deed.

There is some discrepancy in defendant Farmer's testimony as to the exact circumstances relating to the alleged delivery but we do not believe these discrepancies to be material, particularly in view of the conclusions hereinafter set forth with respect to other testimony in the record. Defendant Farmer testified that the deceased agreed to give her a portion of the parcel in question and some stock if she would come and work for him and remain in his employ throughout his remaining years. She further testified that in the early part of 1934, he made the alleged delivery as follows: "He sealed the envelope (containing the deed and some stock) and he handed it to me, put a sticker on the back of the envelope and handed the envelope

to me. 'Now Florence' he says, 'this shows I will keep my part of the bargain and you keep yours and it is yours so long as you stay with me. If at any time you leave my employ you are to give me that envelope back in the same condition in which I give it to you and if you are in my employ and I pass along,' he said, 'it is yours.' On the envelope, after it was sealed and a sticker put on it was 'To be opened at my death and put on record immediately,' when he passed away. After he passed away, I had it recorded as he said."

[1] Basing her claims upon this testimony, defendant Farmer relies upon that which has been referred to in certain cases as "the much misunderstood rule laid down in section 1056 of the Civil Code." See Hotaling v. Hotaling, 193 Cal. 368, 383, 224 P. 455, 461, 56 A.L.R. 734; Kenney v. Parks, 137 Cal. 527, 531, 70 P. 556. It appears unnecessary, however, for us to determine here whether the above mentioned testimony, if entitled to full credit, would have required a finding of a valid delivery of the deed. There was other testimony in the record which, while contradicted by defendant Farmer, showed that defendant Farmer admitted to two witnesses after the death of the deceased that she had received the envelope containing said documents through the mail from an unknown source after the death of the deceased. This testimony, if believed by the trial court, discredited the above-mentioned testimony of defendant Farmer regarding the alleged delivery during the lifetime of the deceased and was sufficient to support the finding that the deceased had never delivered the deed to said defendant. We therefore find no merit in the contention of said defendant that the evidence was insufficient to support said finding.

Appeal of Plaintiff

Plaintiff's attack upon the portion of the judgment in favor of defendant Gray relates solely to the findings and evidence on the issue of undue influence. The finding that the deed to defendant Gray was delivered to him by the deceased is not challenged.

The allegations of the amended answer to the cross-complaint contained many allegations directed at alleged duress and undue influence, as well as those directed at alleged non-delivery of the deeds. Several paragraphs were inserted purporting to allege the existence of a relation of trust and confidence between the deceased and the defendants and it was finally alleged in a sub-paragraph lettered (p) "That the execution of said deeds and each of them was not the free and voluntary act of said Emerson, but the making and execution thereof was procured by the duress and undue influence of said cross-complainants as hereinbefore alleged."

The trial court made the following findings with respect to the issues presented by said allegations: "The court finds that it is not true that during all or any part of the time of defendant George A. Gray's acquaintanceship with said Emerson, a relation of trust and confidence existed between them. The court further finds that by reason of the last preceding finding with respect to defendant George A. Gray, the allegations of paragraphs (l), (n), (o), and (p) of said amended answer to the cross-complaint are untrue."

Plaintiff contends (1) that confidential relations were established in this case by the testimony of defendant Gray; (2) that a presumption of undue influence arose; (3) that the only evidence against the presumption was the testimony of defendant Gray and (4) that in view of the situation thus presented, there was no finding, except as a conclusion of law, on the ultimate fact of undue influence.

The unusual nature of the findings in this case gives rise to a rather unusual situation. Preliminarily it may be stated that it is not claimed that there was any evidence whatever of duress and further that it is not claimed that there was any evidence of undue influence except that which may have arisen from the claimed presumption. But the trial court made no unqualified finding against the existence of duress or undue influence but only a finding that there was no duress or undue influence "by reason of the last preceding finding," in which last preceding finding it was found that no confidential relationship existed.

[2, 3] Plaintiff claims that all of the evidence showed that a confidential relationship within the meaning of the law existed between the deceased and defendant Gray and that the finding to the contrary is not sustained by the evidence. Our review of the evidence and the authorities leads us to the conclusion that there is merit in plaintiff's claim but we do not believe that it follows that a reversal is required. The important issue under the pleadings was whether or not the deed had been procured by duress or undue influence

and not merely whether or not a confidential relation existed. The great preponderance of the evidence clearly shows that the deceased had an active, alert and independent mind and that his act in executing and delivering the deed was his free and voluntary act and that it was not procured by duress or undue influence as alleged in the amended answer to the cross-complaint. We believe it appropriate under the circumstances for this court to make a finding to that effect under the powers granted by article VI, section 4¾ of the Constitution and section 956a of the Code of Civil Procedure.

It is therefore ordered that the findings be amended by adding thereto the following finding: "That the execution of the deed to defendant Gray was the free and voluntary act of William Otto Emerson, deceased, and that neither the execution or delivery thereof was procured by the duress or undue influence as alleged in the amended answer to the cross-complaint or otherwise." With this amendment to the findings, the portions of the judgment appealed from are affirmed.

NOURSE, P. J., concurred.



57 Cal.App.2d 627

NEWSOM et al. v. SMILEY et al.

Civ. 13893.

District Court of Appeal, Second District, Division 2, California.

March 16, 1943.

1. Evidence ⇐471(2)

In personal injury action, objection to question, asked defendants' truck driver on cross-examination, as to whether he had made any "conscious" effort, after observing boys crossing street in front of his truck, to determine whether any other boys were approaching on sidewalk, was properly sustained as calling for a "conclusion".

The word "conscious" is defined as immediately aware of, mentally recognizing to some degree and extent, one's own life of feeling and thought, or its objective reference; improperly; embarrassed by sense of one's own individuality; self-conscious; mentally alert; well aware of some object, impression, or truth; present in the mind, recognized as belonging to one's self, as conscious superiority; cognizant of guilt or fault; deliberate, as a conscious lie; pertaining to consciousness; having the faculty and physical attributes of consciousness; possession of knowledge in common with another; mutually informed.

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion" and "Conscious".

2. Appeal and error ⇐1043(6)

Plaintiffs were not prejudiced by refusal to permit reading of deposition of defendants' truck driver, where no testimony properly received in the deposition impeached statements made by defendants' truck driver at the trial.

3. Witnesses ⇐280

In personal injury action, objection to question, "It never occurred to you, did it, Mr. Smiley to make any effort to determine whether there were any other boys running along the sidewalk?", asked defendants' truck driver on cross-examination, on ground that question was argumentative, was properly sustained.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Richard Newsom, a minor, etc., and another, against Harold L. Smiley and another for injuries sustained by the minor when struck by defendants' truck and for consequential damages sustained by minor's father. From a judgment for defendants, the plaintiffs appeal.

Affirmed.

Harold Richardson, of Whittier, Betts & Garrison, of Los Angeles, and Montgomery G. Rice, of Whittier, for appellants.

Spray, Davis & Gould, of Los Angeles, for respondents.

W. J. WOOD, Justice.

Plaintiff Richard Newsom, a boy eight years of age, seeks to recover for injuries which he suffered when he was struck by a truck driven by defendant Smiley and owned by defendant Herington. His father seeks to recover for medical expenses.

A jury returned a verdict in favor of defendants and plaintiffs have appealed from the ensuing judgment.

The accident occurred shortly before noon on April 16, 1940, at the intersection of Haviland Avenue and Camilla Street in the city of Whittier. According to the testimony of plaintiff Richard Newsom, which was introduced by stipulation, he had "no recollection whatever of any of the events occurring immediately prior to or at the time of the accident in question." Defendant Smiley testified that he was driving the truck northerly on Haviland Avenue at a speed of from 20 to 25 miles per hour; that as he approached to within 30 to 40 feet of the intersection of Haviland Avenue and Camilla Street he observed four boys, one riding a bicycle and the others running after him in the intersection; that the nearest boy to the bicycle was 3 or 4 feet behind the bicycle; that the boys appeared to be running in competition with the bicycle; that all of these boys passed the front of the truck and passed the center of Haviland Avenue before the accident; that these boys were strung out at a distance of about 8 to 10 feet between the boy on the bicycle and the last boy following him; that he did not see the fifth boy, who came in contact with his truck, until the boy jumped off the sidewalk into Haviland Avenue from behind the shrubbery on the parkway on Haviland Avenue; that when he observed the boy on the bicycle and those following him he immediately slowed down and applied his brakes and "watched them as they continued on past"; that he stopped his car within 6 feet after the impact.

Appellants contend that they were unduly curtailed in their cross-examination of defendant Smiley. The record discloses:

"A. After you observed these boys in the street going across you didn't make any conscious effort to determine whether or not there were any other boys coming on the sidewalk, did you? Mr. Smiley: Well, I was looking ahead.

"Q. You didn't make any conscious effort to determine whether or not there were any other boys coming on that sidewalk?

"Mr. Smiley: What do you mean by that?

"Mr. Spray: Objected to as calling for the conclusion of the witness. Let him state what he did."

Counsel for appellants offered to prove that at the time of the taking of his deposition the witness had answered the same question: "I guess not, except I was looking ahead." In sustaining the objection the court stated that the question would be allowed if propounded in the proper form.

[1, 2] The ruling of the court was not erroneous. When the witness was asked whether he made "conscious effort" to determine if other boys were coming it was but natural for him to ask what was meant by the question. An answer concerning "conscious effort" in all probability would have been confusing to the jury. In Funk and Wagnall's Standard Dictionary the word, conscious, is defined: "1. Immediately aware of; mentally recognizing, to some degree and extent, one's own life of feeling and thought, or its objective reference. 2. Improperly, embarrassed by the sense of one's own individuality; self-conscious. 3. Mentally alert; well aware of some object, impression, or truth. 4. Present in the mind, recognized as belonging to oneself; as, conscious superiority. 5. Cognizant of guilt or fault. 6. Deliberate; as, a conscious lie. 7. Pertaining to consciousness. 8. Philos. Having the faculty and physical attributes of consciousness. 9. [Archaic or Obs.] Possessing knowledge in common with another; mutually informed." Manifestly, the jury could not be expected to determine which of these definitions should be applied to the expression contained in counsel's question. Moreover, the question called for a conclusion of the witness. If the witness had testified on direct examination that he had made "conscious effort" to determine if other boys were coming, the testimony would doubtless have been subject to the criticism that it called for a conclusion of the witness. The fact that the question was asked on cross-examination does not make it less objectionable. The court ruled properly in requiring that the question be propounded in proper form. Appellants were not prejudiced by the refusal of the court to permit the reading of the deposition of defendant Smiley, for no testimony properly received in the deposition impeached the statements made by the witness at the trial.

[3] The trial court did not err in sustaining an objection to the following question: "It never occurred to you, did it, Mr. Smiley, to make any effort to deter-

mine whether there were any other boys running along the sidewalk?" The question is argumentative. It was the function of the jury to determine whether defendant had exercised due care in the management of the truck. This they could do by a consideration of the facts established by the evidence, what defendant observed, what he did, or what he failed to do.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concurred.



57 Cal.App.2d 704

PEOPLE v. PEINADO.
Cr. 3652.

District Court of Appeal, Second District, Division 3, California.

March 18, 1943.

1. Larceny ⇐65

Evidence supported conviction of grand theft.

2. Witnesses ⇐266, 379(9)

A defendant is entitled to full opportunity to cross-examine witnesses who appear against him and to make use of their statements at preliminary examination.

3. Criminal law ⇐590(1)

Trial court did not abuse its discretion in refusing to allow a continuance in order to procure attendance of reporter who took testimony at preliminary hearing, where it appeared that matters which occasioned reference to transcript of testimony at preliminary hearing were of a trivial nature.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Miguel Antonio Peinado was convicted of grand theft, and he appeals.

Affirmed.

Jesse Bach Porter, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for respondent.

SHINN, Justice.

Defendant appeals from a judgment after conviction of grand theft by verdict and from an order denying his motion for a new trial. He was charged by information with taking $35 from the person of one Ramirez and with having suffered two prior felony convictions, which he admitted.

The contention here urged that the evidence was insufficient to support the verdict is without merit. Early one evening Ramirez and a male companion, with defendant and a female companion, went from one cafe to another, all of them except defendant drinking and at the expense of Ramirez. The latter became well intoxicated; he had a roll of paper money consisting of one twenty, one ten and two five-dollar bills. He testified that as he was paying for a drink in the late hours, his roll was snatched from his hand by defendant, who ran from the cafe and, although pursued by Ramirez, escaped and disappeared for the time being. Ramirez then found himself without his automobile key, which he claimed had also been taken by defendant, a friend fixed the wires of his car so it could be driven without a key, they drove about for awhile with the friend at the wheel, who soon tired of having Ramirez with him, detached the wires and departed, leaving Ramirez in the street with his stalled car, which he was obliged to leave there for the remainder of the night. Upon the following day defendant was arrested at the home of his female companion of the night before, was searched by an officer and was found to have upon his person one ten, one five and five one-dollar bills. These were folded lengthwise, then crosswise and tucked under defendant's belt "in the small of his back under his trousers." To the officer defendant denied having any knowledge of the money and gave no explanation as to how it got there. All of these facts were testified to by either Ramirez or the officer. Defendant upon the stand admitted having been with the party but denied having taken the money; he claimed to have left the cafe alone because of a dispute with his companion and that the money found on his person was his own.

[1] Our attention is called to certain contradictory statements of Ramirez but

the most that we gather from the testimony is that with slight discrepancies it was explicit and positive and he at least pretended to have, especially on cross-examination, an unusually clear recollection of what had transpired at a time when he was rather heavily under the influence of liquor. While the others present claimed not to have witnessed the theft and the conviction rests upon the evidence which we have related, it was clearly sufficient to justify the verdict; Ramirez succeeded in convincing the jury of the truth of his story and they were the ones to judge of his credibility and that of defendant.

We have examined the rulings of the court on the admission of evidence throughout the trial and have read the instructions given and those refused. We find therein no error and no rulings which would justify specific attention in this opinion.

[2, 3] Defendant complains because he was not allowed a brief continuance during the trial in order to procure the attendance of the reporter who took testimony at the preliminary hearing. We cannot see wherein defendant was prejudiced by denial of the requested continuance. He was entitled to a full opportunity to cross-examine the witnesses who appeared against him and to make use of their statements at the preliminary examination, but most of the matters which occasioned reference to the transcript were of a trivial nature. Furthermore, the disagreements between counsel for the people and the defendant did not relate to the correctness of the reporting and transcription of the testimony at the preliminary. It seems that at the preliminary Ramirez had insisted upon giving his testimony through a Spanish interpreter and, no court interpreter being available, the court had called upon another prisoner who was awaiting trial, to serve in that capacity. The result, not unnaturally, was that the transcript was somewhat lacking in that degree of verity which such reports should and usually do possess. It was the correctness of the translation, not the reporting, that was questioned. This situation could not have been remedied by a reading of the reporter's notes. However, the ruling upon the application for a continuance was discretionary, there was at most but a meager showing of the use of diligence by defendant's counsel, and in addition to that, the testimony in connection with which the former testimony was sought to be used related to matters which were unimportant, if they were material at all.

The judgment and order are affirmed.

DESMOND, P. J., and PARKER WOOD, J., concur.



NATIONAL AUTOMOBILE INS. CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 13888.

District Court of Appeal, Second District, Division 2, California.

March 12, 1943.

Hearing Granted May 10, 1943.

1. Workmen's compensation ⇐1939

On proceeding by alleged employer and its insurer to annul compensation award to dependents of deceased employee, evidence was viewed in light most favorable to dependents. St.1917, p. 831, as amended.

2. Workmen's compensation ⇐210

Where, under terms of agreement between lessor of truck and lessee, lessee was to have exclusive control and use of leased truck, was to pay truck driver's wages, and directed and controlled driver's movements while he was in lessee's employ, lessor was not the "special employer" of the driver within meaning of the Compensation Act, and hence was not liable to driver's dependents for compensation benefits for driver's death, though lessor determined driver's competency to drive truck before permitting him to assume control of truck. St.1917, p. 831, as amended.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Employer".

3. Workmen's compensation ⇐208

The real test of what constitutes "special employment" within meaning of

Compensation Act lies in character of control and supervision exercised by alleged special employer over work and employee engaged in its performance. St.1917, p. 831, as amended.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Employment".

4. Workmen's compensation ⇐208

To constitute "special employment" within meaning of Compensation Act, it must appear, either by terms of contract or during course of its performance, that employee of general employer came under direction and control of alleged special employer and thereby suffered injury. St. 1917, p. 831, as amended.

5. Workmen's compensation ⇐208

To constitute "special employment" within meaning of Compensation Act, alleged special employer must be in control of work so that he can at any time stop or continue it and determine way in which it shall be done, not merely in reference to result but as to method of reaching result. St.1917, p. 831, as amended.

Proceeding under the Workmen's Compensation Act, St.1917, p. 831, as amended, by the dependents of George Ivy, claimants, against Miller Oil Products, alleged employer, and the National Automobile Insurance Company, insurer of Miller Oil Products, to recover compensation benefits for the death of George Ivy, deceased employee. The Industrial Accident Commission awarded damages to claimants, and the insurer and alleged employer bring a proceeding to review the Industrial Accident Commission's award.

Award annulled.

C. W. Bowers, of Los Angeles, for petitioners.

Everett A. Corten and Dan Murphy, Jr., both of San Francisco, for respondents.

McCOMB, Justice.

Petitioners seek to annul an award of respondent Industrial Accident Commission directing the payment of compensation benefits to the dependents of George Ivy, which order is predicated upon the finding that petitioner Miller Oil Products was an employer of Mr. Ivy at the time he received injuries which resulted in his death.

[1] The evidence being viewed in the light most favorable to respondents, the essential facts are:

March 15, 1942, petitioner Miller Oil Products, hereinafter referred to as "Miller," entered into an agreement with Pathfinder Petroleum Company, hereinafter referred to as "Pathfinder," by the terms of which, said petitioner leased to Pathfinder a truck. This agreement contained among others the following provisions:

"Lessee, during the time Lessee shall use the leased equipment pursuant to the terms of this lease, shall have the sole and exclusive control and use of the said leased equipment to the same effect as if Lessee were the owner thereof. Lessee shall employ and pay the wages of the drivers of the said equipment. Lessee agrees to employ and to permit said equipment to be operated only by competent and careful drivers duly licensed as required by law, and that Lessee shall in connection with such employment of such drivers carry all necessary and required workmen's compensation insurance or other insurance and shall comply with all laws, rules and regulations relating to the employment of truck drivers."

May 11, 1942, Pathfinder, pursuant to its agreement with Miller, asked said company to furnish Pathfinder a truck and to get some one to drive it. Mr. Paul O. Miller, one of the owners of Miller, interviewed George Ivy, an applicant for the position. Mr. Miller testified that, "I told him at the time that before we would keep him on permanent on the truck we would send one of our drivers along with him for a trip."

Thereafter Mr. Ivy went on a trip with one of the Miller drivers who reported that Mr. Ivy was a competent truck driver, whereupon Mr. Ivy was sent with the truck to work for Pathfinder. Thereafter on May 13, 1942, while in the employ of Pathfinder, who paid his entire salary and had the exclusive control and direction of Mr. Ivy's activities, Mr. Ivy received injuries, during the course of and arising out of his employment, from which he died. Thereafter, pursuant to an application of Mr. Ivy's wife and minor son, respondent Commission made an award in their favor against Miller and their insurer (petitioner), National Automobile Insurance Company.

This is the sole question necessary for us to determine:

Was there substantial evidence to support respondent Commission's finding that petitioner Miller was the employer of the decedent at the time he received the injuries which resulted in his death?

[2-5] This question must be answered in the negative, and is determined by the following rule which is succinctly and accurately stated in Campbell's Workmen's Compensation, (1935) vol. 1, 410, sec. 454, thus:

"The real test of what constitutes special employment lies in the character of the control and supervision exercised by the alleged special employer over the work and the employee engaged in its performance. *It must appear, either by the terms of the contract or during the course of its performance, that the employee of the general employer came under the direction and control of the other party to the contract and suffered injury as the result of such direction and control.* The right to or the actual exertion of control must exist. *The alleged employer must be in control of the work so that he can at any time stop or continue it and determine the way in which it shall be done, not merely in reference to the result to be reached but as to the method of reaching the result.*" (Italics added.)

Applying the foregoing rule to the facts of the instant case it is apparent that the deceased employee was not subject to the direction or control of Miller at the time of the unfortunate accident which resulted in his death.

The record is devoid of any evidence that Miller or its agents exercised or had the right to exercise any degree of control whatsoever over Mr. Ivy after he was employed. The action of Mr. Paul Miller in determining Mr. Ivy's competency to drive a truck before permitting him to assume control of the truck leased to Pathfinder was entirely unrelated in any way to the duties the deceased employee was performing at the time of the accident which resulted in his death.

Under the terms of the agreement between the parties, Pathfinder was to have the sole and exclusive control and use of the truck leased to it by Miller, was to pay and in fact did pay the wages of the driver of the truck, Mr. Ivy, and did direct and control his movements during the time he was in their employ.

Since there was no evidence in conflict with the foregoing, it follows that respondent commission's finding which is here questioned was unsupported by any substantial evidence.

For the foregoing reasons the award of the Industrial Accident Commission against petitioners is annulled.

MOORE, P. J., and W. J. WOOD, J., concur.



57 Cal.App.2d 637

KRAFT et al. v. INNIS.

Civ. 3040.

District Court of Appeal, Fourth District, California.

March 16, 1943.

Hearing Denied May 13, 1943.

1. Venue ⇐21

Generally, a defendant has right to have action, brought against him alone, tried in county wherein he resides.

2. Venue ⇐24

Plaintiff's right to have action tried in another county than that in which defendant resides is exceptional, and plaintiff claiming such right must bring himself within terms of exception.

3. Venue ⇐22(1)

One of several defendants may not have venue of action changed to county of his residence, in absence of showing that none of other defendants is resident of county of venue, though all defendants join in demand for or consent to change, but cause will be retained in county of venue, if any of defendants reside therein and complaint attempts in apparent good faith to state cause of action against such defendants.

4. Appeal and error ⇐965

On appeal by one of several defendants from order denying change of venue to county of his residence, allegations of complaint, stating separate causes of action against each of defendants residing in different counties for separate and independent torts, must be assumed to be true. Code Civ.Proc. § 427.

5. Venue ⇐22(1)

In malpractice action against three physicians, of whom two resided in county of venue, third defendant was not entitled to change of venue to county of his residence, though complaint accused him of committing a tort separate and independent from torts charged against other defendants and alleged no concurrent negligence as between him and codefendants. Code Civ.Proc. § 427.

6. Appeal and error ⇐874(4)

Though a physician is not entitled to change of venue of malpractice action against him and other physicians from county of such codefendants' residence to county of his residence, questions raised by his motion for such change are reviewable on appeal from judgment sustaining his demurrer to subsequent amended complaint without leave to amend. Code Civ. Proc. § 427.

Appeal from Superior Court, Kern County; William L. Bradshaw, Judge.

Action by Wanda Kraft and husband against Dr. E. C. Innis and others for malpractice. From an order denying named defendant's motion to change the place of trial to the county of his residence, he appeals.

Affirmed.

Fred O. Reed and Henry E. Kappler, both of Los Angeles, for appellant.

Joseph D. Taylor, of Los Angeles, and T. H. Werdel, of Bakersfield, for respondents.

MARKS, Justice.

This is an appeal by defendant E. C. Innis from an order refusing to change the place of trial of the action from Kern County to Los Angeles County.

The first amended complaint contains four separate causes of action which must be considered in some detail.

Paragraph one of the first cause of action alleges that Joseph Smith and Samuel Smith are residents of Bakersfield in Kern County, California; that the San Joaquin Hospital, Inc., Ltd., is located in Kern County and is operated as a hospital; that E. C. Innis is a resident of Newhall in Los Angeles County; that Newhall Community Hospital is a corporation located in Los Angeles County.

Paragraph two contains appropriate allegations concerning the fictitious defendants.

Paragraph three alleges the corporate existence of the San Joaquin Hospital, Inc., Ltd., and that its principal place of business is in the city of Bakersfield, in Kern County, California.

Paragraph four alleges that plaintiffs are husband and wife.

Paragraph five alleges that Joseph Smith is a duly licensed physician and surgeon practicing in Bakersfield, Kern County, California; that Samuel Smith is a duly licensed dentist practicing in the same city; that E. C. Innis is a duly licensed physician and surgeon practicing in Newhall, Los Angeles County, California.

Paragraph six alleges that on June 15, 1940, Wanda Kraft employed all the defendants to treat and care for certain described injuries; that she entered the San Joaquin Hospital on that day for treatment by all defendants.

Paragraph seven alleges the standards of good medical practice in Kern County require the taking of X-ray pictures of injuries such as those from which Wanda Kraft was suffering; that Doctor Joseph Smith negligently failed to have such X-ray pictures taken.

Paragraph eight alleges other standards of good practice in Kern County, and negligence on the part of Doctor Joseph Smith in failing to follow them.

Paragraph nine alleges damages suffered by Wanda Kraft resulting from the alleged negligence of Doctor Joseph Smith.

It is clear that the first cause of action attempts to state a cause of action for damages against Doctor Joseph Smith alone.

Paragraph one of the second cause of action incorporates by reference paragraphs one to six inclusive of the first cause of action.

Paragraph two alleges that on June 15, 1940, plaintiffs employed Doctor Samuel Smith to treat Wanda Kraft's injuries.

Paragraph three alleges certain standards of good practice of dentists in Kern County; that Doctor Samuel Smith was negligent in failing to conform to those standards of good practice.

Paragraph four alleges certain damages suffered by plaintiff Wanda Kraft as the result of this alleged negligence of Doctor Samuel Smith.

Paragraph five alleges other standards of good practice of dentists in Kern County; that Doctor Samuel Smith was negligent in failing to follow them; and that Wanda Kraft was damaged by such alleged negligence of Doctor Samuel Smith.

It is clear that this cause of action seeks damages against Doctor Samuel Smith alone.

Paragraph one of the third cause of action incorporates, by reference, the allegations of paragraphs one to five inclusive of the first cause of action.

Paragraph two alleges that on June 24, 1940, plaintiffs employed Doctor E. C. Innis to treat certain described injuries of Wanda Kraft; that on that date Wanda Kraft entered the Newhall Community Hospital for care and treatment.

Paragraph three alleges certain standards of good practice of physicians and surgeons in Los Angeles County; that Doctor Innis was negligent in failing to conform to those standards in the treatment of Wanda Kraft.

Paragraph four alleges the damages suffered by Wanda Kraft as the result of the alleged negligence of Doctor Innis.

This cause of action seeks to recover damages from Doctor Innis alone.

Paragraph one of the fourth cause of action incorporates by reference all of the allegations of the first, second and third causes of action.

Paragraph two alleges consequential damages of Roy Kraft alleged to have followed from the alleged malpractice of the dentist and the two physicians.

Doctor Innis demurred generally and specially to the several causes of action of the first amended complaint. The demurrer included the grounds of misjoinder of parties defendant and misjoinder of causes of action. The demurrer was sustained with leave to amend.

Dr. Innis also moved to change the place of trial from Kern County to Los Angeles County because of his residence there. This motion was denied and this appeal was taken from that order.

[1, 2] Had Doctor Innis been the only defendant in the action, his right to have the place of trial changed to Los Angeles County could not be doubted. In Brown v. Happy Valley Fruit Growers, Inc., 206 Cal. 515, 274 P. 977, 979, it was said: "The right of a defendant to have an action brought against him tried in the county in which he has his residence is an ancient and valuable right, which has always been safeguarded by statute and is supported by a long line of judicial decisions. 'The right of a plaintiff to have an action tried in another county than that in which the defendant has his residence is exceptional, and, if the plaintiff would claim such right, he must bring himself within the terms of the exception.' Brady v. Times-Mirror Co., 106 Cal. 56, 39 P. 209."

While this is true, defendants Joseph Smith and Samuel Smith have the same right to have the case against them tried in Kern County, the place where they reside, as defendant Innis has to have the case against him tried in Los Angeles County, the place of his residence. Taff v. Goodman, 41 Cal.App.2d 771, 107 P.2d 431.

[3] The rule governing this case is thus stated in 25 Cal.Jur. 879: "When none of several defendants resides in the county where the action is brought, they have a right, upon showing that fact—the action being one properly triable in the county of defendants' residence—to have the venue changed to the county where some or all of them reside. But a defendant may not have the action changed to the county of his residence in the absence of a showing that none of the other defendants is a resident of the county in which the action was brought, even though all the defendants join in the demand or consent to the change. In such case the cause will be retained if any of the defendants reside in the county of venue, provided the complaint attempts in apparent good faith to state a cause of action against the defendant or defendants in whose county of residence the action is commenced; and the subsequent dismissal of some of the defendants does not give the right to a change where the complaint as originally filed stated in good faith a cause of action against them." See, also, Freeman v. Dowling, 219 Cal. 213, 25 P.2d 980.

[4-6] Dr. Innis urges that he should not be forced to trial in Kern County because the wrong he is accused of committing is a tort separate and independent from those charged to the other defendants and that it was improper to join him as a defendant with them. § 427, Code Civ.Proc.

It seems to be true that each of the three doctors is accused of a separate tort and that there is no allegation of concurrent

negligence, at least between the two Doctors Smith and Doctor Innis. This is true of even the fourth cause of action where Roy Kraft sought consequential damages, because such damages flowed from separate torts committed by separate defendants at different times, and with no act of concurring negligence alleged, and no connection shown between Dr. Innis and the other defendants. Assuming the allegations of the first amended complaint are true, as we must, separate consequential damages followed each act of the separate and unrelated negligence of Doctor Innis and the two Doctors Smith or either of them.

While Doctor Innis may not have the venue changed, he is not without a remedy. Examination of another record in a second appeal in this case shows that plaintiffs filed their second amended complaint to which Doctor Innis demurred. This demurrer was sustained without leave to amend and plaintiffs appealed from the judgment. The questions just considered are reviewable on an appeal from the judgment.

The order is affirmed.

BARNARD, P. J., and GRIFFIN, J., concurred.

21 Cal.2d 742

BETHLEHEM STEEL CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

S. F. 16828.

Supreme Court of California.

March 19, 1943.

Rehearing Denied April 15, 1943.

1. Workmen's compensation ⇐1364

In proceedings for compensation for contagious disease allegedly contracted during course of employment, where extent of disease at place of employment amounted to an epidemic, burden did not rest upon employer of proving that disease was of epidemic proportions among general public of city for purpose of establishing that employees were not subjected to some special exposure in excess of that of the commonalty. St.1937, p. 299, § 5705.

2. Workmen's compensation ⇐622

A disease contracted by employee is not proximately caused by an "injury arising out of employment" or by reason of a "risk incident to employment", so as to be compensable, unless there exists relation of cause and effect between employment and disease, and it is shown that there exists a reasonable probability that employee contracted disease because of his employment, and further that employee was subjected to some special exposure in excess of that of the commonalty.

See Words and Phrases, Permanent Edition, for all other definitions of "Injury Arising Out of Employment" and "Risk Incident to Employment".

3. Workmen's compensation ⇐1502

Evidence that epidemic of contagious eye disease, known as kerato conjunctivitis, existed in shipyards and that number of cases in community outside of shipyards was of much less proportion compared to the population, supported finding that employees in shipyards were subjected to a special exposure in excess of that of the commonalty and that their contracting the disease was proximately caused by a compensable "injury arising out of employment" or by reason of a "risk incident to employment".

The term "epidemic" is a relative term, and the question of how many cases constitute an epidemic is a question of fact depending upon the prevailing circumstances. This term, in its common and ordinary meaning, applies to any disease which is widely spread or generally prevailing at a given place and time.

See Words and Phrases, Permanent Edition, for all other definitions of "Epidemic".

4. Workmen's compensation ⇐1939

The Supreme Court cannot disturb findings of fact by State Industrial Accident Commission where there is substantial evidence to support findings.

In Bank.

Proceedings by Bethlehem Steel Company against Industrial Accident Commission, Lovine George, and others to review orders of the respondent commission awarding compensation for personal injuries.

Awards affirmed.

R. P. Wisecarver, of San Francisco, for petitioner.

Everett A. Corten and Dan Murphy, Jr., both of San Francisco, for respondents.

GRIFFIN, Justice pro tem.

This is a proceeding to review an award of compensation by the Industrial Accident Commission in favor of certain employees working in shipyards of petitioner who had contracted the contagious eye disease known as kerato conjunctivitis. Separate awards were made to ten employees of petitioner who had contracted kerato conjunctivitis. The cases were consolidated for this proceeding. The commission made the following finding as to the employees: that each "while employed * * * during the month of December, 1941, at San Francisco, California, by Bethlehem Steel Company, Shipbuilding Division, sustained injury arising out of and in the course of his employment as follows: while working in the shipyards of defendant * * * contracted a contagious disease known as kerato conjunctivitis, which was then epidemic in the shipyards of said defendant. * * *"

[1] Petitioner contends that the claimants failed to prove that the disease they acquired was acquired by reason of their employment in the shipyards and that the findings and evidence are insufficient to support the awards. It is not disputed that the extent of the disease among shipyard workers amounted to an epidemic.

Petitioner contends, however, that the proof was conclusive that the disease was also epidemic in San Francisco and other places and that there has been a complete failure to prove that the disease was contracted by claimants during and because of their employment. The commission asserts that although there were many cases of the disease among the public, there is nothing in the record to show that the same proportion as in the shipyards was affected; that if the disease was of epidemic proportions among the general public the burden of proof as to this fact lies with the employer, because it is an affirmative defense and the burden is upon the one asserting the affirmative of the issue, citing Labor Code section 5705, St.1937, p. 299. There is no merit to this last contention. That section provides that the burden of proof rests upon the party holding the affirmative of the issue. The section then lists certain affirmative defenses in which the burden of proof rests upon the employer. The contentions of the commission cannot be brought within any of those specific affirmative defenses.

In Pattiani v. Industrial Acc. Comm., 199 Cal. 596, 600, 601, 250 P. 864, 49 A.L.R. 446, it was held, as it must be held here, that where an employee contracts a contagious or infectious disorder he must, in order to recover compensation, establish the fact that he was subjected to some special exposure in excess of that of the commonalty, and in the absence of such showing, the illness cannot be said to have been proximately caused from an injury arising out of his employment. To the same effect are Pacific Employers Ins. Co. v. Industrial Acc. Comm., 19 Cal.2d 622, 628, 122 P.2d 570, 141 A.L.R. 798, and Children's Hospital Society v. Industrial Acc. Comm., 22 Cal.App.2d 365, 71 P.2d 83.

[2] It is well established in this state that compensation is not due merely for injury caused by disease contracted by an employee while employed. The injury must be one arising out of the employment, and where the injury is by disease, there must exist the relation of cause and effect between the employment and the disease. It is also true that to justify an award there must be an affirmative showing of a case within the statute and it must affirmatively appear that there exists a reasonable probability that the employee contracted the disease because of his employment. City and County of San Francisco v. Industrial Acc. Comm., 183 Cal. 273, 282, 191 P. 26. It must further be shown that the disease contracted was not merely a hazard of the community but that the employee was subjected to some special exposure in excess of that of the commonalty. In the absence of such showing, the illness of the employee cannot be said to have been proximately caused by an injury arising out of his employment or by reason of a risk or condition incident to the employment. Pattiani v. Industrial Acc. Comm., supra; Pacific Employers Ins. Co. v. Industrial Acc. Comm., supra. The employee's risk of contracting the disease by virtue of the employment must be materially greater than that of the general public, i. e., the injury must be a natural or a reasonably probable result of the employment or of the conditions thereof. Storm v. Industrial Acc. Comm., 191 Cal. 4, 214 P. 874; Hartford Acc. & Ind. Co. v. Industrial Acc. Comm., 140 Cal.App. 482, 35 P.2d 366; Campbell's Workmen's Compensation, vol. 1, p. 248, sec. 247. Whether the employee respondents have produced evidence sufficient to bring themselves within this rule is the remaining question. A review of the evidence is essential to a proper determination thereof.

The testimony of the medical experts describes the disease of kerato conjunctivitis to be an infection caused by a virus starting in the lids of the eye with a deep infiltration of the tissues of the conjunctiva. The lids become swollen and the irritation spreads from the lids onto the sclera of the eye. From medical experience it has been found that complete rest in bed, with protection from light and by compressing with epsom salts solution, produces better results than any other type of treatment; that if the recovery is rapid, no particular damage is done and a man might return to his work in from three days to two weeks; that in a substantial portion of the cases there is a deeper involvement, with implication of the bones of the face and the glands in front of the ear and under the jaws; that at a later period the disease then appears on the cornea and that in this particular it differs markedly from the old and more common disease known as "pink eye"; that it is this later manifestation in the cornea that causes concern; that if the condition does appear in the cornea there

is a peculiar formation of minute blebs in the center of the pupil and it takes several months before absorption is complete. The testimony in reference to the appearance of this disease in the plant of petitioner shows that the employees here involved received some prior eye injury, affliction or irritation in the plant and were treated in the company's first-aid station by first-aid employees or nurses of the company in a manner usually followed in the treatment of the ordinary eye injuries complained of and without knowing at the time that the patient was then infected with or might thereafter become infected with the eye disease known as kerato conjunctivitis. It appears in the cases here involved that several days after the first aid treatments the employee "broke out with kerato conjunctivitis." The standard routine with the employer's first-aid station in any case of complaint concerning the eyes was to examine them for a foreign body. This was true even where the complaint was of a "flash" burn. The examination was conducted with the hands and with metal or wooden instruments or eye droppers. The commission concedes that the first-aid attendants employed by petitioner, although they were not doctors or registered nurses, exercised reasonable care in treating the eyes of the employees who came in with various eye complaints. Until about December 20, however, the record discloses, these people were not aware that they were dealing with an epidemic and treated each case as an individual disorder arising from one of the ordinary types of eye injury. When the epidemic became manifest, the attendants were instructed to use extraordinary care. They were told to use a different medicine dropper for each patient, which they had not been doing before. The evidence shows that they did use the same eye dropper for man after man without sterilization.

Lovine George, one of the claimants, testified that he suffered what is called a welder's "flash" which necessitated his eyes being treated at the employer's first-aid station; that about two weeks after his eyes were washed for this "flash" he broke out with kerato conjunctivitis. The same general history as to a previous injury or irritation, treatment and results, prevailed as to the other claimants. One of the medical experts testified that the general incubation of the disease is about five days but that many patients go on working for some days without very many symptoms "and as a rule, fail to report to the doctor until the eye is pretty well involved." Applicant Pierce testified that before the epidemic he was in a line with four or five employees and that the attendant treated each of them without washing his hands. Applicant Levin testified that: "I did see the attendant standing right in front of the chair and never moved to go to the back (to wash his hands). He wouldn't turn away at all. He would take his fingers and lift the lid of the eye without stepping away from the time he gets rid of the last patient. As soon as one steps off there was another man ready to step in the chair"; that the attendants opened the patients' eyelids with their fingers. One of the employer's doctors (Crawford) testified that the attendants had been instructed to "wash their hands carefully if there is any chance of the case being an infectious one."

The commission throughout excuses the method of treatment by the attendants because "it must be remembered that when most of these employees were first being treated for eye injuries there was no knowledge on the part of the attendants that an infection was present." Dr. Crawford also testified that when the epidemic became apparent he "then advised them to change their technique by not touching the eye at all with the bare fingers but using cotton from the end of the fingers to open the lid." Before it was known that infection was spreading, employees were sometimes allowed to treat themselves at the first-aid clinic when it was crowded and everyone was busy. While the evidence is conflicting, Dr. Carr testified that abrasions from foreign substances in the eye would cause irritation which increased the susceptibility of the membrane to infection by the disease. A Dr. Hogan, from the University of California clinic, one of the chief witnesses for the employer, testified in response to a question by the referee:

"Q. Doctor, this disease (kerato conjunctivitis) has not been nearly as prevalent in the general population on a percentage basis as it has at the shipyards, has it? A. *I think the disease started in the shipyards* (italics ours) and I think we are beginning to see it in the population now."

He then testified that there was some talk about the disease originating in Java or Burma and that he thought it "was brought over here from some place like that. I think that is the source of the disease. * * * The disease is endemic in those areas. It is there all the time and any boat coming in could bring a carrier, a person who would transmit the disease. * * * Maybe a fellow went there where the Navy builds bases, or maybe the Navy evacuated civilians from China or from the Philippines. It is probably there, too. They could have brought it from there, women and children. Then I think it is in all the shipyards, because we will say a fellow works in Todds. He quits or might get fired at Todds and come over to the Bethlehem and get a job or a fellow working in Los Angeles would come up here. I understand they have got a pretty severe epidemic down there now.

"Q. In the shipyards? A. Generalized, but one place I heard particularly, one of the doctors told me their first-aid man was up from down there and they have quite a few cases. I don't know which one.

"Q. On a percentage basis, if they had had 280 cases from the Bethlehem, which was testified to this morning, with 13,000 men out there, that would be about 2 per cent which would allow for 14,000 cases in a city the size of San Francisco of 700,000; there hasn't been anything like that in the city, has there? A. I don't know. I doubt it very much. Of course, people * * *. I don't think there have been that many or we would have seen more in the clinic as clinic patients, probably more than we have. I have probably seen 12, I suppose."

The testimony of Dr. Crawford indicates the possibility that the disease did spread in the shipyards because of the working conditions. In response to a question he replied:

"Q. And the close proximity of one worker with another with some 13,000 persons thrown into one position more or less makes a spreading of the disease—rather adds in the spread of any disease? A. Oh, yes, it does, because where a lot of men are crowded together that means use tools in common, they probably worked at the same benches and they wiped their eyes and put their Kleenex or handkerchief on the bench, or they shake hands with each other more frequently, and I believe it is in ways like that that the disease is transmitted. I think the disease is transmitted from the discharge that comes from the eye."

Petitioner contends that there was a similar epidemic of the disease in San Francisco at the time and therefore these claimants have not established that they were subject to special exposure in excess of that of the commonalty. There was quite substantial evidence produced by the employer company that would indicate that the particular disease did not necessarily originate in the shipyards of the petitioner and also that it was epidemic in character and prevailed to some extent in the community as well as in the shipyards. The record shows that after it was discovered that many of the employees had contracted the disease they were refused permission to work at the plant and they were no longer given treatment at the first-aid station. Instead, they were referred to Dr. Crawford and Dr. Hogan, research eye specialists connected with the University of California, who were endeavoring to discover a specific cure for the disease. Dr. Crawford testified that the disease was one that had recurring epidemics over the world since 1889; that there were epidemics in Europe in 1889, in India in 1900, and an extensive epidemic in Germany in 1939, and in the same year an epidemic in San Fernando Valley, California; that the disease was first noted in San Francisco in occasional cases throughout the year, but "not very many of these cases"; that just before Christmas it "had been seen in large numbers in farming communities, Sacramento, Stockton" (10 or 20 cases); that the term "epidemic" is a relative term and that he did not know how many cases constituted an epidemic; that epidemics tend to be localized at first and then spread out to other parts of the country; that in his opinion the kerato conjunctivitis does not and did not in any of the cases he examined have any "relation to any preceding injury" of the eye; that the disease was a new one to him in its epidemic form until around December, 1941; that he had seen ten or twenty cases before he "realized we were dealing with an epidemic"; that of the 200 people he had examined for the disease only ten were from outside the Bethlehem Steel Company plant. Another doctor, an eye specialist and resident of San Francisco,

testified that he had examined 35 or 40 similar cases; that the first case he had began in August, 1941, and was one of the first cases on record in San Francisco; that of the last 25 cases he examined he could find not even a remote connection with employment at the shipyards; that 75 per cent of those examined were women. Another doctor from the Stanford Medical School, practicing in San Francisco, testified that about six or seven months prior to February 5, 1942, two or three patients, not industrial cases, came to his office for examination with the eye disease and that "since the disease has become epidemic we have realized that those isolated cases belong to the same group." Dr. Hogan testified that of the 142 proved cases sent to him, 91 were from industrial plants, from other places 51; that about 80 of the 91 came from shipyards; that in September he treated one isolated case, a secretary in a downtown office; that in October, 1941, he was called to Santa Rosa, California, and found 18 patients with this eye disease; that a doctor wrote him that he had seen about 100 cases in Stockton; that another in New York said he had seen 8 cases in his practice; and that in Portland he heard that there were about 100 cases. This is about the extent of the testimony received in reference to the question whether the disease was also epidemic in San Francisco and other places and whether or not the exposure was such a special exposure as to be in excess of that of the commonalty.

[3] It must be conceded, as related by the doctor, that the term "epidemic" is a relative term and that the question of how many cases constitute an epidemic is a question of fact depending upon the prevailing circumstances. This term, in its common and ordinary meaning, applies to any disease which is widely spread or generally prevailing at a given place and time. Pohlaski v. Mutual L. Ins. Co., 36 N.Y.Super.Ct. 234; Black's Law Dictionary, 3d Ed. p. 669; Martin v. Springfield City Water Co., Mo.App., 128 S.W.2d 674. It is conceded that the number of reported cases compared to the number of employees in the shipyards here involved constituted an epidemic. The evidence is quite convincing that the disease in the community outside of the shipyards was of much less proportion compared to the population. Whether the proportion established by the evidence constituted an epidemic was a question of fact to be determined by the commission. From its implied finding it is apparent that it has found that the epidemic in the shipyards constituted a special exposure in excess of that of the commonalty. Under the evidence we cannot disturb this finding. City and County of San Francisco v. Industrial Acc. Comm., supra.

The only remaining question is whether or not the injury and sickness complained of can be said to have been proximately caused by and to have arisen out of the employment by reason of such exposure. Disregarding conflicting and hearsay evidence, there is testimony, circumstantial as well as direct, if believed by the commission, that "the disease started in the shipyards." (See quoted testimony of Dr. Hogan.)

[4] We have carefully examined the testimony of each of the claimants with reference to the history of previous eye injuries. All have testified that they received treatment at the company's first-aid station for several specified eye injuries and irritations such as welder's "flash," "specks of steel, metal, foreign particles or foreign bodies in the eye" of burns from "fumes," and that within a few days after treatment for the eye injuries above mentioned in the first-aid station the eye disease known as kerato conjunctivitis developed. This evidence, when considered with the testimony in reference to the manner of treatment of the eye injuries before discovering that the disease was an epidemic in the plant and the testimony of Dr. Carr, assistant professor of the University of California and graduate of Harvard Medical School specializing in pathology, that in his opinion "abrasion and irritation" of the eye "increases the susceptibility of the membrane to infection" and the testimony of Dr. Hogan that "a flash would make the eye more or less resistant to any infection," brings us to the conclusion, notwithstanding the medical testimony to the contrary, that the question whether the eye disease, classified as an injury was one arising out of and in the course of employment, was one of fact for the determination of the commission. The time-honored rule, therefore, must apply, that in the case of a conflict of evidence this court may not disturb the finding of the commission where there is substantial evidence to support it. Chichester v. Seymour, 28 Cal.App.2d 696, 83 P.2d 301; City and County of San Francisco v. Industrial Acc. Comm., 183 Cal.

273, 191 P. 26; Pacific Employers Insurance Co. v. Industrial Acc. Comm., 19 Cal. 2d 622, 122 P.2d 570, 141 A.L.R. 798.

Awards affirmed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.



21 Cal.2d 893

BETHLEHEM STEEL CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

S. F. 16819.

Supreme Court of California.

March 19, 1943.

Rehearing Denied April 15, 1943.

Workmen's compensation ⇐1502

Evidence that epidemic of contagious eye disease, known as kerato conjunctivitis, existed in shipyards and that number of cases in community outside of shipyards was of much less proportion compared to the population, supported finding that employee in shipyards was subjected to a special exposure in excess of that of commonalty and that his contracting the disease was proximately caused by compensable "injury arising out of employment" or by reason of a "risk incident to employment".

See Words and Phrases, Permanent Edition, for all other definitions of "Injury Arising Out of Employment" and "Risk Incident to Employment".

In Bank.

Proceeding by the Bethlehem Steel Company against the Industrial Accident Commission and Chester B. Ashby to review an order of the respondent commission awarding compensation for personal injuries.

Award affirmed.

R. P. Wisecarver, of San Francisco, for petitioner.

Everett A. Corten and Dan Murphy, Jr., both of San Francisco, for respondents.

GRIFFIN, Justice pro tem.

This proceeding seeks the review of an award of compensation by the Industrial Accident Commission in favor of respondent Chester B. Ashby, an employee working in the shipyards of petitioner, who contracted the contagious eye disease of kerato conjunctivitis. The employee testified that while so engaged as a pipe fitter's helper on January 5, 1942, a foreign substance lodged in his eye; that he went to the company's first-aid station for treatment; that the doctor took "something out of it" and put "drops in there"; in a day or two he washed it out; that on January 11 he went back complaining about his eye; that it was burning and irritated; that several days later he was sent to the University of California Hospital for treatment for kerato conjunctivitis; that he was later confined to a dark room for six weeks; and that he was practically blind during that time.

It was agreed in this case that it incorporated and included all of the testimony taken in the consolidated case of Bethlehem Steel Co. v. Industrial Acc. Comm. et al., Cal.Sup., 135 P.2d 153, this day decided, and that the same disposition should be made here as was made in that case.

In view of the evidence there related and the reasoning therein expressed, the award in this case must be and is affirmed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.



21 Cal.2d 751

CALIFORNIA CASUALTY INDEMNITY EXCHANGE v. INDUSTRIAL ACCIDENT COMMISSION et al.

S. F. 16834.

Supreme Court of California.

March 19, 1943.

Rehearing Denied April 15, 1943.

1. Workmen's compensation ⇐719

In compensation law, the "going and coming rule" is that an employee going to or coming from his place of work is excluded from benefits of the compensation act, since the relationship of "employer and employee" is suspended during such time.

See Words and Phrases, Permanent Edition, for all other definitions of "Employer and Employee" and "Going and Coming Rule".

2. Workmen's compensation ⇐748

The term "employment" within statute requiring compensable injuries to arise out of and in course of the employment and to have been proximately caused by the employment includes the doing of the work and a reasonable margin of time and space required to be used in passing to and from the place where the work is to be done. St.1937, p. 269, § 3600.

See Words and Phrases, Permanent Edition, for all other definitions of "Employment".

3. Workmen's compensation ⇐748

If an employee is injured while passing, with the implied consent of the employer, to or from work over the employer's premises or over those of another in such proximity and relation as to be in effect a part of the employer's premises, the injury is one arising "out of" and "in course of employment".

See Words and Phrases, Permanent Edition, for all other definitions of "In Course of Employment" and "Out of Employment".

4. Workmen's compensation ⇐748

Generally, an "employment" begins when the employee reaches the entrance to the employer's premises where the work is to be done, and an employee going to and from work upon entering the employer's premises or a means provided for access thereto enters the "course of employment" and begins to perform services arising "out of employment".

5. Workmen's compensation ⇐710

Mere fact that the employee's injury occurred on the employer's premises is not the sole test of compensability for the injury must be one arising out of and in course of employment. St.1937, p. 269, § 3600.

6. Workmen's compensation ⇐750

An injury to an employee while coming to his place of work on the premises of the employer and by the only way of access or the one contemplated by the contract of employment is incurred in "course of" and arises "out of employment".

7. Workmen's compensation ⇐750

As respects injury sustained by an employee on a private means of access appurtenant to the employer's premises, an injury is incurred "in course of" and "arises out of employment" when the injury occurs in close proximity to the place of work and on a road or other way intended by the contract as being the exclusive means of access to the place of work.

8. Workmen's compensation ⇐750

As respects injury sustained by an employee on a private means of access appurtenant to the employer's premises, an injury is sustained "in course of" and arises "out of employment" if the place at which the injury occurred is brought within the contract of employment by the requirement of its use by the employee.

9. Workmen's compensation ⇐751

An employee leaving the premises of her employer in the usual and customary way after her work is ended is within the "course of employment" within the Workmen's Compensation Law, and an injury sustained in walking to and from the street and a building where one is employed is compensable.

See Words and Phrases, Permanent Edition, for all other definitions of "Course of Employment".

10. Workmen's compensation ⇐766

It is not indispensable to compensation recovery that at the time of the injury the employee was rendering service to his employer and the exception is not limited to acts performed on the employer's premises.

11. Workmen's compensation ⇐719, 766

In compensation law, the going and coming rule and the rule that the employee must be rendering service for the employer at the time of the injury, for it to be compensable, are not of inevitable application.

12. Workmen's compensation ⇐667, 756

Where bookkeeper who had left employer's premises to engage in personal errand caught her heel in her skirt after she was about to alight from her automobile after returning to the employer's premises to finish her work and sustained injuries when she fell from the automobile to employer's private driveway, the bookkeeper's injuries arose "out of" and "in course of employment" and were "proximately caused by the employment", and therefore were compensable. St.1937, p. 269, § 3600.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximately Caused by the Employment".

13. Workmen's compensation ⇐1720

The question whether a bookkeeper's injury arose out of and in course of employment and was proximately caused by the employment was one of fact where bookkeeper who had left employer's premises to engage in personal errand caught her heel in her skirt after she was about to alight from her automobile after returning to the employer's premises to finish her work and sustained injury when she fell from the automobile to employer's private driveway. St.1937, p. 269, § 3600.

14. Workmen's compensation ⇐1939

Where an injury occurs to an employee during the hours of his employment on the premises of the employer and the factual situation may give rise to a reasonable inference that the injury arose out of and in course of the employment, the Industrial Accident Commission's finding in this respect will not be disturbed.

15. Workmen's compensation ⇐1935

The Supreme Court must indulge all reasonable inferences to support the Industrial Accident Commission's findings.

16. Workmen's compensation ⇐667

Any reasonable doubt as to whether an act is contemplated by the employment and at what particular time or moment an employee resumes his former duties as an employee performing duties for his employer, in view of policy of liberal construction in favor of the employee, should be resolved in favor of the employee.

In Bank.

Proceeding to Review an Order of the Industrial Accident Commission.

Proceeding under the Workmen's Compensation Act by the California Casualty Indemnity Exchange, insurance carrier, against the Industrial Accident Commission and Cecelia E. Cooper, employee, to annul a workmen's compensation award by the Commission in favor of employee.

Award affirmed.

For prior opinion, see 128 P.2d 116.

Burbank & Laumeister, of San Francisco, for petitioner.

Everett A. Corten and Dan Murphy, Jr., both of San Francisco, for respondents.

GRIFFIN, Justice pro tem.

This is a proceeding to review an order of the Industrial Accident Commission granting compensation for personal injuries.

On October 27, 1941, the petitioner was the employer's insurance carrier. The injured employee was a bookkeeper for an automobile parts concern in South San Francisco. She had been with the company for 22 years. Her normal working hours were from 8 a. m. to 4:30 p. m. She had the implied consent of her employer to go on such short personal errands as she desired during working hours and without any deduction being made in her salary. The evidence shows that the employee was obliged to use her automobile for the purpose of going to and from work because the plant was located about a mile from either train or bus. Her general duties as a bookkeeper were performed within the employer's building, which building was erected upon a sizeable corner lot. Both building and lot were owned and controlled by her employer. The main entrance to the building was set back from the property line several yards. The employer, for the convenience of the employees and the public in general, constructed a driveway in the shape of a semi-circle leading from South Linden Avenue and terminating in Tanforan Avenue which runs parallel with the side of the building. The driveway was located entirely upon the employer's property and made use of for parking cars of the employees and the general public as well as for ingress and egress to and from the front entrance of the building. This driveway, at its nearest point, was but a few feet from the main entrance to the building.

On the day of the accident the employee drove her automobile to work in accordance with her usual custom, parked it on the driveway, and went into the building to her office. She there telephoned the nearest service station, which was some distance from her office, and requested the attendant to, and he did, take her car and grease it. When the car had not been returned in the afternoon, she telephoned the service station again. Since the attendant was alone, they agreed that if he delivered the car to her she would return him to the station in it. This was done. The employee then drove her car to her office and parked it in the driveway just a few feet from the main entrance to the building. In attempting to step from the car to the driveway so that she could go into the office to finish her work for the day, she caught her heel in the hem of her dress, fell and broke her wrist.

In seeking to annul the award by the commission petitioner contends that because the employee had left her employment to attend to a personal errand and had not yet reached the place of her employment at the time of her injury, she was outside of the protection of the Workmen's Compensation Law and that said injury did not "[arise] out of and in the course of the employment" and was not proximately caused by the employment as contemplated by section 3600 of the Labor Code, St.1937, p. 269.

[1] There is a general rule in compensation law known as the "going and coming rule" which is that an employee going to or coming from his place of work is excluded from the benefits of the compensation act. The reason for the rule is that the relationship of employer and employee is suspended from the time the employee leaves his work to go home until he resumes his work, since the employee, during the time he is going to or coming from work, is rendering no service for his employer. Campbell's Workmen's Compensation, vol. 1, pp. 147, 148. The general rule, subject to many exceptions, however, is that injuries inflicted under the foregoing circumstances are not compensable. Because of the "going and coming rule," difficulty has been encountered in many border-line cases such as this one, in determining just when the employee is no longer subject to the rule but falls within the purview of the compensation law, thereby becoming a beneficiary under its provisions.

[2-5] The term "employment" includes not only the doing of the work, but a reasonable margin of time and space necessary to be used in passing to and from the place where the work is to be done. It was said in Bountiful Brick Co. v. Giles, 276 U.S. 154, 48 S.Ct. 221, 222, 72 L.Ed. 507, 66 A.L.R. 1402, that: "If the employee be injured while passing, with the express or implied consent of the employer, to or from his work by a way over the employer's premises, or over those of another in such proximity and relation as to be in practical effect a part of the employer's premises, the injury is one arising out of and in the course of the employment as much as though it had happened while the employee was engaged in his work at the place of its performance. In other words, the employment may begin in point of time before the work is entered upon and in point of space before the place where the work is to be done is reached. Probably, as a general rule, employment may be said to begin when the employee reaches the entrance to the employer's premises where the work is to be done; but it is clear that in some cases the rule extends to include adjacent premises used by the employee as a means of ingress and egress with the express or implied consent of the employer." The general rule there stated is that an employment may be said to begin when the employee reaches the entrance to the employer's premises where the work is to be done. There the employee was struck by a train and killed while he was crossing a railroad track situated adjacent to the employer's plant and from which railroad track the employee had to pass in order to reach the employer's premises. The court held that under the facts appearing the railroad property where the employee was fatally injured was "in practical effect a part of the employer's premises." It was there said, in interpreting the general rule, that the courts have meant simply to convey the idea that an employee in going to and from work, upon entering the employer's premises or a means provided for access thereto, enters the "course of" his employment and begins to perform services "arising out of and in the course of the employment." Of course it cannot be said that the mere fact that the injury occurred on the employer's premises is the sole test of compensability. The injury must be one arising out of and in the course of the employment.

[6-8] The history of legislation involving Workmen's Compensation was aptly and succinctly related in Ocean Accident, etc., Co. v. Industrial Acc. Comm., 173 Cal. 313, 159 P. 1041, L.R.A.1917B, 336, cited by petitioner, in a very able opinion written by Mr. Justice Henshaw. Since that time many cases have been presented to our higher courts in which exceptions to the general going to and coming from work rule has been considerably broadened. Western Pipe, etc., Co. v. Industrial Acc. Comm., 49 Cal.App.2d 108, 121 P.2d 35. In Starr Piano Co. v. Industrial Acc. Comm., 181 Cal. 433, 184 P. 860, 862, it was held that under the act an employee of a company which rented space in a building, who was hurt by falling into the elevator shaft in an attempt to use the elevator on his way to perform services for his employer, was entitled to compensation although the elevator was controlled by the

owner of the building. Many cases are cited in that opinion bearing on that question. In discussing De Constantin v. Public Service Comm., 75 W.Va. 32, 83 S.E. 88, L.R.A.1916A, 329, it was said that the language in that case "* * * is too broad if it was intended thereby to include injuries sustained on a public road or way, but the fundamental idea is sound when applied to a private means of access appurtenant, so to speak, to the employer's premises. The language is: 'Since injury after termination of actual work, while on the premises of the employer and in pursuit of the usual way of leaving the same, is held to be within the course of employment and to have arisen out of the same, it seems clear that an injury to a workman while coming to his place of work on the premises of the employer and by the only way of access, or the one contemplated by the contract of employment, must also be regarded as having been incurred in the course of the employment and to have arisen out of the same. If, in such case, injury does not occur on the premises, but in close proximity to the place of work and on a road or other way intended and contemplated by the contract as being the exclusive means of access to the place of work, the same principle would apply and govern. If the place at which the injury occurred is brought within the contract of employment, by the requirement of its use by the employé, so that he has no discretion or choice as to his mode or manner of coming to work, such place and its use seem logically to become elements or factors in the employment, and the injury thus arises out of the employment and is incurred in the course thereof.'"

In the instant case the evidence is clear that the driveway was on the premises of the employer and was a means of access to the place of employment and one contemplated by the contract of employment. The evidence is not entirely clear as to whether this was the exclusive means of access provided to the place of employment or the only one contemplated by the contract of employment. We do not believe it necessary to base our determination of this case upon this ground.

The question here presented is whether the employee, at the time of her injury, was on the premises of her employment "for the purpose of immediate resumption of her duties," so as to bring her within the provisions of section 3600 of the Labor Code. The fact relied on by petitioner that applicant had not entered the building before the injury occurred would not necessarily deprive her of compensation benefits. Petitioner does not contend that had the employee entered the building and immediately thereafter caught her heel in the hem of her dress, fell and broke her wrist, the injury would not be compensable. So, where can we draw any fixed dividing line in the few feet distant between the automobile parked on the driveway and the main entrance to the building so as to say that the employee was or was not "on the premises for the purposes of immediate resumption of her duties"? Injuries sustained by an employee while going to or from his place of work on premises owned and controlled by his employer are generally deemed to have arisen out of and in the course of the employment. Smith v. Industrial Acc. Comm., 18 Cal.2d 843, 118 P.2d 6. Pacific Electric R. Co. v. Industrial Acc. Comm., 137 Cal.App. 245, 30 P.2d 444, was a proceeding to review an award wherein a streetcar conductor was struck by an automobile while he was proceeding to board his car. Prior to the time he was about to board his car he had gone home, with the consent of his employer, to change his shoes during a lay-over period of twenty minutes, for which time he was being paid. The accident happened in the street about ten feet away from the car door. It was there held that had the accident happened "at some appreciable distance from the station there would have been no right of compensation but as the employee" had arrived upon the premises or within an area constituting a part of the premises of his employment and was there for the purpose of immediate resumption of his duties as conductor the finding of the commission that his injury and death arose out of and occurred in the course of his employment must be upheld.

The case of Globe Indemnity Co. v. Industrial Acc. Comm., 208 Cal. 715, 284 P. 661, is factually similar. There, in discussing the going to work rule, it was held that the protection of the act applied where the employee, a newsboy, was riding on his bicycle to a station to teach another boy a newspaper route and while on his way there collided with the other boy within two or three feet of the station platform where the papers were lying; that since the occurrence took place within the precinct of the station, the award was proper. Citing

Makins v. Industrial Acc. Comm., 198 Cal. 698, 247 P. 202, 49 A.L.R. 411.

[9] In Smith v. Industrial Acc. Comm., supra, this court cited Lynch v. City of New York, 242 N.Y. 115, 151 N.E. 149, and also McDonald v. Richardson County, 135 Neb. 150, 280 N.W. 456, 458, in which latter case an office employee of the county working in the courthouse was injured while leaving on a driveway from the building to the street. Quoting from that case the court said: "In this case Byrd McDonald was not in the courthouse for her own personal reasons. She was in the building because she was employed there. For that reason she was on the driveway on the grounds. It was necessary as a part of her employment that she come and go across the grounds after leaving the public street. To urge that she had a right to go upon the premises as a member of the public is, we think, putting too narrow a construction upon the meaning of the compensation act as to what is or is not within the course of employment. An employee is required to cross the grounds of the premises of employer. An employee leaving the premises of her employer in the usual and customary way after her work is ended is within the course of her employment within the meaning of the workmen's compensation law. Walking to and from the street and a building where one is employed is a necessary incident of the employment, and an injury sustained in so doing is compensable." See, also, Freire v. Matson Nav. Co., 19 Cal.2d 8, 118 P.2d 809; Starr Piano Co. v. Industrial Acc. Comm., supra.

It must therefore be held in the instant case, in view of the finding of the commission, that the injury "arose out of and in the course of the employment."

[10] The next question presented is whether or not, in addition to this showing, there must be evidence to sustain the implied finding that, under section 3600 of the Labor Code, subdivisions (b) and (c) thereof, "at the time of the injury, the employee is performing service growing out of and incidental to his employment and is acting within the course of his employment," and that "the injury is proximately caused by the employment, either with or without negligence." It is not indispensable to recovery that at the time of the injury an employee must be rendering service to his employer. Acts of the employee for his personal comfort and convenience while at work, such as taking a drink of water, lighting a cigarette, warming himself, etc., do not interrupt the continuity of the employment, and this exception is not limited to acts performed on the employer's premises. Western Pipe etc. Co. v. Industrial Acc. Comm., supra. See, also, Di Renzo v. Bethlehem Shipbuilding Corp., 7 I.A.C. 107, where the employee tripped over the feet of a fellow-employee while going toward the lunch counter located on the premises; Mulholland v. Western Ind. Co., 4 I.A.C. 182 Rieff v. City of Sacramento, 2 I.A.C. 251; 27 Cal.Jur., sec. 73, p. 359.

[11] Although the above cases have only an indirect bearing on the specific problem involved in this proceeding, they do demonstrate that the "going and coming rule" and the rule that the employee must be rendering service for the employer at the time of injury are not of inevitable application. If it can be properly held, as it was determined in Pacific Electric R. Co. v. Industrial Acc. Comm., supra, that crossing a street before boarding a streetcar and being struck by a passing automobile was an injury "proximately caused by the employment," then the injury in the instant case could likewise be held to have been "proximately caused by the employment."

[12-16] It is not disputed that the employee, immediately prior to the time she left her place of employment, was a bookkeeper and while so acting was performing a service growing out of and incidental to her employment and acting within the course of her employment, and had any such injury as tripping on the hem of her dress then and there occurred it could have been rightfully held that such injury was proximately caused by the employment. It therefore would follow that when she returned to her place of employment for the purpose of immediate resumption of her former duties it may be said, from the evidence here presented, that she again resumed her former status of performing service growing out of and incidental to her employment and was acting within the course of her employment, and that her injury was one proximately caused by the employment. Had the employee returned to the premises of the employer for a purpose other than the immediate resumption of her former duties or for a purpose not incidental to or growing out of her employment, or if the injury was not proximately caused by the employment, a different question would here be presented. But such is

not the finding of the commission. We find nothing in the later interpretations of this act which would impel a different conclusion. The question was one of fact. Each case must be adjudged by the facts which are peculiarly its own. Enterprise Foundry Co. v. Industrial Acc. Comm., 206 Cal. 562, 275 P. 432. Where an injury occurs to an employee during his hours of employment on the premises of an employer and the factual situation may give rise to a reasonable inference that the injury arose out of and in the course of the employment, the finding of the commission in this respect will not be disturbed. Pacific Employers Ins. Co. v. Chavez, 5 Cal.2d 247, 54 P.2d 701. It is the duty of this court to indulge in all reasonable inferences to support the commission's findings. Hatheway v. Industrial Acc. Comm., 13 Cal.2d 377, 90 P. 2d 68. Any reasonable doubt as to whether an act is contemplated by the employment and at what particular time or moment an employee resumes his former duties as an employee performing duties for his employer, in view of this state's policy of liberal construction in favor of the employee, should be resolved in favor of the employee. Employers', etc., Corp. v. Industrial Acc. Comm., 37 Cal.App.2d 567, 99 P. 2d 1089; Western Pipe etc. Co. v. Industrial Acc. Comm., supra.

For the foregoing reasons the award is affirmed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.



21 Cal.2d 760

PEOPLE v. COSTELLO.
Cr. 4432.

Supreme Court of California.
March 25, 1943.

1. Criminal law ⇐1186(4)

Where evidence of alibi conflicts with evidence connecting defendant with crime, and an instruction is given which deprives jury of its freedom of judgment on weight to be accorded alibi evidence or on credibility of witnesses testifying to facts of alibi, giving of instruction constitutes prejudicial error. Const. art. 6, §§ 4½, 19.

2. Criminal law ⇐1186(4)

Where evidence raises a conflict, the harm resulting from giving of an erroneous instruction on subject of alibi is not overcome by general instructions so as to justify on that ground alone an affirmance. Const. art. 6, §§ 4½, 19.

3. Criminal law ⇐1186(4)

An instruction directing that jury scrutinize testimony offered in support of alibi with care, that they be satisfied that a fabricated defense was not being imposed upon them, constituted prejudicial error, where there was evidence of alibi before jury and defendant's testimony did not connect her with the crime. Const. art. 6, §§ 4½, 19.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George J. Steiger, Judge.

June Costello was convicted of grand theft, and she appeals.

Reversed.

For prior opinion, see 126 P.2d 433.

Kenneth C. Zwerin and Fabian D. Brown, both of San Francisco, for appellant.

Earl Warren, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

SHENK, Justice.

The defendant has appealed from a judgment of conviction on a charge of grand theft, and from an order denying her motion for a new trial. She does not contend that the evidence on behalf of the prosecution, if believed by the jury, was not sufficient to support the verdict. The grounds of the appeal are that the court erred prejudicially in rulings on the admission of evidence and in giving a certain instruction on the defense of alibi.

The evidence in support of the verdict was substantially as follows: About 9:20 p.m. on May 12, 1941, the prosecuting witness De Matei was walking toward his home. At the corner of Queseda and Jennings Streets in San Francisco he was accosted by a colored woman who was riding in an automobile which she brought to a stop on her left hand side of Jennings Street. She asked whether De Matei knew

an accordion player in the neighborhood named Tony. He replied in the negative. She then alighted from the car and asked De Matei whether she had a flat tire. While his attention was diverted, she took a wallet containing $12 out of the back pocket of his trousers. She jumped into the car. In her haste in driving away she collided with an approaching car. She immediately backed up and drove away. The prosecuting witness identified the defendant as the colored woman who had taken his wallet.

The corner of Queseda and Jennings Streets was not well-lighted, and the occupants of the other car were unable to identify positively the license number of the car which collided with theirs. Allen, a witness for the prosecution, lived in the same apartment house as the defendant and had on two occasions permitted her to use his car, but testified that he did not loan it to her on the night of May 12th. The defendant testified that she was in her home the entire evening of May 12th. A witness, Gilroy, testified that he had called to see the defendant's husband between 9 and 9:30 that night and that the defendant talked with him from the window of the apartment.

The trial court instructed the jury on the subject of alibi as follows:

"The effect of an alibi, when established, is like that of any other conclusive fact presented in a case, showing as it does that the party asserting it could not have been at the scene of the crime, and therefore could not have participated in it, which is, when credited, a defense of the most conclusive and satisfactory character. The fact, however, which experience has shown, that an alibi as a defense is capable of being and has been occasionally successfully fabricated, that even when wholly false its detection may be a matter of very great difficulty, and that the temptation to resort to this as a spurious defense may be very great, especially in cases of importance—these are considerations attendant upon this defense which call for some special suggestions upon the part of the Court. Hence I respectfully suggest to you ladies and gentlemen of the jury that while you are not to hesitate at giving this as a defense full weight, that conclusive effect to which, when established, it is justly entitled, either as entirely satisfying you of the innocence of the defendant, or as creating a reasonable doubt which entitles the defendant to an acquittal, still you are to scrutinize the testimony offered in support of an alibi with care, that you may be satisfied that a fabricated defense is not being imposed upon you."

The foregoing instruction was taken practically verbatim from the instruction involved in the case of People v. Lee Gam, 69 Cal. 552, 11 P. 183, 184, where a conviction of murder was sustained. In that case, in holding that the giving of the instruction was not error, the court said that it did "not appear that the jury were instructed upon the weight of evidence." The court adopted the language just quoted from People v. Wong Ah Foo, 69 Cal. 180, 183, 10 P. 375, which, however, involved a different instruction on alibi. The instruction in the Wong case in effect left to the jury the same consideration of alibi as of other evidence. Apparently the Lee Gam case has been the basis for the instruction objected to herein or a similar instruction in subsequent cases. But since the decision in that case, and beginning with People v. Levine, 85 Cal. 39, 22 P. 969, 24 P. 631, 632, the courts have consistently criticized and in some cases held to be prejudicially erroneous, any instruction which told the jury that evidence given in support of an alibi was to be "scrutinized otherwise or differently from that given in support of any other issue," or which suggested to the jury that the defendant must prove an alibi by a preponderance of the evidence, or that alibi evidence must satisfy the jury of the defendant's innocence, or that the jury must disparage or give less weight to alibi evidence than to other evidence. See People v. Lattimore, 86 Cal. 403, 24 P. 1091; People v. Roberts, 122 Cal. 377, 55 P. 137; People v. Winters, 125 Cal. 325, 57 P. 1067; People v. Smith, 189 Cal. 31, 207 P. 518; People v. Arnold, 199 Cal. 471, 250 P. 168; People v. Johnson, 203 Cal. 153, 263 P. 524; People v. Wing, 31 Cal.App. 785, 161 P. 759; People v. Purio, 49 Cal.App. 685, 194 P. 74; People v. Barr, 55 Cal.App. 321, 203 P. 827; People v. Girotti, 67 Cal.App. 399, 227 P. 936; People v. Nichols, 69 Cal.App. 214, 230 P. 997; People v. Hammer, 74 Cal.App. 345, 240 P. 56; People v. Garrett, 93 Cal.App. 77, 268 P. 1071; People v. Thorp, 104 Cal.App. 379, 285 P. 916; People v. Gist, 28 Cal.App.2d 287, 82 P.2d 501.

In the Levine case it was said that had the verdict turned upon the truth or falsity of the evidence given in support of the defense of alibi, the court would be inclined

to hold that the instruction was erroneous to a degree entitling the defendant to a reversal of the judgment "for," said the court, "the defense of alibi is, in our judgment, not one requiring that the evidence given in support of it should be scrutinized otherwise or differently from that given in support of any other issue in a cause." In People v. Lattimore the court referred to the Levine case and said [86 Cal. 403, 24 P. 1092]: "We again repeat that the defense of alibi is 'not one requiring that the evidence given in support of it should be scrutinized otherwise or differently from that given in support of any other issue in the cause;' and we may add that, if trial courts will cease to give this particular form of instruction, the ends of justice will be equally as well subserved, and the administration of the laws less embarrassed."

In the Roberts case we find this language [122 Cal. 377, 55 P. 138]: "When a jury is told that any particular fact must be established to their satisfaction, such statement can only mean that such fact must be established at least by a preponderance of evidence; yet there is no such burden cast upon a defendant charged with a crime, except in certain particular instances, which are in no sense presented here. It is for the people to make a case against the defendant beyond a reasonable doubt, and the element of alibi is included in the case which the law demands the people to make out, equally with all other parts of it. * * * It is thus apparent that the alibi, to be efficacious to a defendant, need not be 'satisfactorily proven,' and need not be established to the satisfaction of the jury." In the Garrett case the court quoted the language from the Lattimore case and said [93 Cal.App. 77, 268 P. 1072]: "There is no reason why evidence tending to show that at the time of the commission of the offense the defendant was at another place than that at which it was committed so that he could not have been a party thereto should be scrutinized differently from any other proof."

In the Girotti case the court repeated the language from People v. Levine, People v. Lattimore, and People v. Roberts, and added [67 Cal.App. 399, 227 P. 938]: "The instruction not only casts an unwarranted burden upon the defendant, but casts suspicion upon his defense and the evidence produced in support thereof. It is essentially an argument against the defendant, legitimate if made by the district attorney, but an invasion of the province of the jury when made by the court. * * * The instruction should never be given." The criticism voiced in the foregoing cases was referred to in People v. Arnold, and in People v. Nichols. In the Arnold case this court took occasion to say to district attorneys who continue to offer and to trial courts who continue to give the criticized instruction, "that in so doing they assume an unnecessary risk." [199 Cal. 471, 250 P. 182] In the Johnson case it was remarked that the instruction reviewed in the Arnold case was given "in the instant case, notwithstanding the observation we made in the case last cited." [203 Cal. 153, 263 P. 528] The note of warning was again sounded in People v. Gist. It was observed in the Thorp case that the instruction on alibi was similar to that given in the Lee Gam case. The court, citing the Roberts, Smith, Arnold and Girotti cases said: "This instruction has been criticized in many cases and should not be given." [104 Cal.App. 379, 285 P. 918.]

It is difficult to understand why the severely criticized instruction still is utilized by district attorneys and trial courts in cases involving alibi evidence. If the repeated disregard of the reviewing courts' adverse criticism of the instruction is prompted by the hope that in the particular case the court will conclude that the instruction has not prejudiced the defendant's rights, the hope is not commensurate with the risk of reversal. It may not be assumed that the failure to heed the admonitions of the reviewing courts is due to ignorance of the repeated and uniform denunciation of the instruction. In view of the consistent criticism to which it has been subjected both before and after the adoption of section 19 of article VI of the Constitution in 1934, the instruction cannot be deemed a justifiable comment by the judge "on the evidence and the testimony and credibility of any witness" as contemplated by the constitutional amendment. The instruction did not purport to be such a comment. It purported to be a statement of the law but in reality it was a misstatement of the law.

[1, 2] It is elemental that in criminal cases the prosecution must prove the defendant's guilt beyond a reasonable doubt. If the defendant introduces evidence of an alibi which is sufficient to create a reasonable doubt in the minds of the jury and it does create such a doubt, he is entitled to a verdict of acquittal. Thus, where the

evidence of alibi conflicts with the evidence connecting the defendant with the crime and an instruction is given which deprives the jury of its freedom of judgment on the weight to be accorded alibi evidence, or on the credibility of witnesses testifying to the facts of alibi, error is committed which is prejudicial to the defendant's rights. A suggestion may not be made to the jury that an alibi must be proved by a preponderance of the evidence, or that alibi evidence must satisfy the jury of the defendant's innocence, or that the jury must give less credit to testimony of alibi witnesses, or more careful scrutiny or less weight to alibi than to other evidence in the case. It is obvious that in cases where the defendant's own testimony supports the verdict of guilty (People v. Hammer, 74 Cal.App. 345, 240 P. 56), or where there is no evidence in support of the alibi (People v. Smith, 189 Cal. 31, 207 P. 518; People v. Johnson, 203 Cal. 153, 263 P. 524), the giving of an erroneous instruction on the subject of alibi should not be held to prejudice the rights of the defendant. But in cases where the evidence raises a conflict it may not properly be said that the harm resulting from the giving of such an instruction is overcome by general instructions so as to justify on that ground alone an affirmance pursuant to section 4½ of article VI of the California Constitution. See People v. Garrett, 93 Cal.App. 77, 268 P. 1071; People v. Nichols, 69 Cal.App. 214, 230 P. 997; People v. Girotti, 67 Cal.App. 399, 227 P. 936; People v. Thorp, 104 Cal.App. 379, 285 P. 916.

[3] In the present case the giving of the instruction complained of was prejudicial error. There was before the jury evidence of an alibi. The defendant's testimony did not connect her with the crime. The prosecution failed to show, except by conjecture, that the car driven by the person who committed the theft was the car belonging to the witness Allen, or that Allen, assuming that he was the owner, had permitted the defendant to use the vehicle on the night of the theft. The defendant was entitled to have the benefit of the weaknesses developed in the prosecution's case and to the benefit of her own evidence on the issue of alibi, uninfluenced by the erroneous instruction.

In view of the foregoing it becomes unnecessary to consider the objectionable rulings on the admission of certain impeaching evidence introduced by the prosecution. Such errors are not likely to recur in the event of another trial.

The judgment and order are reversed.

GIBSON, C. J., CURTIS, EDMONDS, CARTER, and TRAYNOR, JJ., and GRIFFIN, Justice pro tem., concurred.



57 Cal.App.2d 859

In re ESPOSITO'S ESTATE.

ESPOSITO v. RODRIGUEZ (STATE, Intervener).

STATE v. ESPOSITO et al.

Civ. 13602, 13603.

District Court of Appeal, Second District, Division 3, California.

March 29, 1943.

Rehearing Denied April 28, 1943.

Hearing Denied May 27, 1943.

1. Bastards ⇐101

Where illegitimates had been adopted by their father in conformity with section 230 of the Civil Code and were claiming a legacy to father who had predeceased testator, under section 92 of the Probate Code providing that death of devisee related to testator shall not defeat devise if devisee leaves lineal descendants who survived testator, section 255 of Probate Code, providing that illegitimate does not represent father or mother by inheriting estate of parent's kindred in absence of intermarriage and subsequent acknowledgment or adoption by father, did not apply. Probate Code, §§ 92, 255; Civ.Code, § 230.

2. Bastards ⇐13

Where illegitimates were adopted by their father in conformity with codal section, they were thereafter deemed legitimate for all purposes from the time of their birth. Civ.Code, § 230.

3. Adoption ⇐21

The rights which a child acquires by adoption are not limited to those which exist only while both parent and child are living, but the adopted child becomes the "child" or "issue" of the adoptive parent and a "natural child" as respects right to

inherit from adoptive parent. Civ.Code, § 230.

See Words and Phrases, Permanent Edition, for all other definitions of "Child", "Issue" and "Natural Child".

4. Bastards ⇐13

As between the child and its parents, a child born illegitimate but adopted by its father is, at least from the time of its adoption, the "child" and therefore the "lineal descendant" of its parents. Civ.Code, § 230.

See Words and Phrases, Permanent Edition, for all other definitions of "Lineal Descendant".

5. Wills ⇐552(3)

The scheme of section of the Probate Code providing that death of devisee related to testator before testator shall not defeat devise if devisee leaves lineal descendants who survive testator is founded on blood relationship and belongs to the branch of the law which provides methods which admit of the disposition of estates as they would not go under the laws of succession. Probate Code, § 92.

6. Wills ⇐552(3)

Section of the Probate Code providing that death of devisee or legatee related to testator before testator shall not defeat devise if devisee leaves lineal descendants who survive testator must be read into the will devising estate to testator's son who had predeceased testator. Probate Code, § 92.

7. Wills ⇐552(3)

Where illegitimates had been adopted in accordance with section of the Civil Code by their father who was devised all the estate of his father but had predeceased him, such children who survived testator were the "lineal descendants" of their father within section of the Probate Code providing that death of devisee or legatee related to testator before testator shall not defeat devise or legacy if devisee or legatee leaves lineal descendants who survive testator. Probate Code, § 92; Civ. Code, § 230.

8. Adoption ⇐18

Where illegitimate had been adopted by her father in conformity with section of the Civil Code, her subsequent adoption by strangers severed her legal relationship toward her natural parents and established a new one with the foster parents, but her status as a "relative by blood" of the kindred of her parents was not altered. Civ. Code, § 230.

See Words and Phrases, Permanent Edition, for all other definitions of "Relative by Blood".

9. Wills ⇐552(3)

The right of adopted child to inherit from adoptive parents the same as a natural child does not prevent adopted child from being a "lineal descendant" of natural parents within section of the Probate Code providing that death of devisee, related to testator, before testator shall not defeat devise if devisee or legatee leaves lineal descendants who survive testator. Probate Code, § 92; Civ.Code, § 230.

10. Wills ⇐552(3)

Where illegitimate had been adopted by her father in conformity with section of the Civil Code, fact that child was subsequently adopted by strangers did not prevent child from being a "lineal descendant" within section of Probate Code providing that death of devisee or legatee related to testator before testator shall not defeat devise if devisee leaves lineal descendants who survive testator and child was entitled to share in estate left to her natural father by his father's will although devisee had predeceased testator. Probate Code, § 92; Civ.Code, § 230.

Appeals from Superior Court, Los Angeles County; Kurtz Kauffman, Judge.

Proceeding in the matter of the estate of Eugenio Esposito to determine heirship, wherein Gloria Elise Rodriguez and Joseph E. Esposito asserted their respective claims of heirship and interest in the estate, and the State of California, by the Attorney General, appeared by petition in intervention and claimed property involved by escheat, and the Security-First National Bank & Trust Company appeared as executor. From so much of the decree as recognized the claim of Gloria Elise Rodriguez, Joseph E. Esposito appeals, and from so much of the decree as recognized the claims of both Joseph E. Esposito and Gloria Elise Rodriguez, the State of California appeals.

Affirmed.

Harry Rabwin and Monroe R. Rubin, both of Los Angeles, for appellant and respondent Joseph E. Esposito.

Robert W. Kenny, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for appellant, intervenor, and respondent State of California.

David Silverton, of Los Angeles, for contestant and respondent Gloria Elise Rodriguez.

SHINN, Justice.

Joseph E. Esposito and Gloria Elise Rodriguez are the children of Eugene Esposito and Estelle Bermudez, who never intermarried. Eugene was the son of Eugenio Esposito, who died leaving a will, which by its terms left all of his estate to his son Eugene, although the latter had predeceased his father.

In a hearing to determine heirship, Joseph and Gloria asserted their respective claims of heirship and interest in the estate under the will of their grandfather. The State of California, by the Attorney General, appeared by petition in intervention, contending that Eugenio left no surviving heirs and that his estate was escheated property and distributable as such to the State. By the judgment it was decreed that Joseph and Gloria are "lineal descendants" of Eugene and are entitled to take share and share alike the legacy given to Eugene by the will of Eugenio. From that judgment the Attorney General has taken an appeal. Joseph has appealed from that portion of the judgment which awards one-half of the legacy to Gloria, contending that he is entitled to receive the whole of it. The two appeals will be considered together.

The court found that Eugene publicly acknowledged Joseph and Gloria as his children, received them into his family, otherwise treated them as if they were his legitimate children, and thereby adopted them as such. It was further found that Gloria was legally adopted during her minority by strangers. These findings are not questioned.

Upon the appeal of the State the question is whether the children of Eugene were his lineal descendants within the meaning of section 92 of the Probate Code, which reads as follows: "If a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, unless an intention appears to substitute another in his place; except that when any estate is devised or bequeathed to any kindred of the testator, and the devisee or legatee dies before the testator, leaving lineal descendants, or is dead at the time the will is executed, but leaves lineal descendants surviving the testator, such descendants take the estate so given by the will in the same manner as the devisee or legatee would have done had he survived the testator." The precise question has not been answered in any reported case which has come to our attention. The children were born illegitimate, became legitimate upon adoption by their father, and their parents did not intermarry. Gloria was later adopted by strangers, which fact bears only on the appeal of Joseph. The demand of the state under the law of escheat is predicated upon the single fact that the parents did not intermarry. It is the contention of the Attorney General that in the absence of such intermarriage the children were barred from taking the legacy by the provisions of section 255 of the Probate Code, which reads as follows: "Every illegitimate child is an heir of his mother, and also of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father; and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he does not represent his father or mother by inheriting any part of the estate of the parent's kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried, and his father, after such marriage, acknowledges him as his child, or adopts him into his family; in which case such child is deemed legitimate for all purposes of succession."

[1-4] We cannot agree that this section applies to the case of children claiming a legacy under section 92, supra. The children were adopted by their father in accordance with the requirements of section 230 of the Civil Code and, as therein provided, were thereafter deemed for all purposes legitimate from the time of their birth. The rights which a child acquires by adoption are not limited to those which exist only while both parent and child are living, such as the right to parental care and support; the adopted child becomes the child or issue of the adoptive parent and a natural child with respect to its right to inherit from the foster parent. This is by virtue of the adoption and was so recognized before the right to inherit was expressly given by statute. In re Es-

tate of Newman, 1888, 75 Cal. 213, 16 P. 887, 7 Am.St.Rep. 146. It necessarily follows that as between the child and its parents a child born illegitimate and who is adopted by its father is, at least from the time of its adoption, the child and therefore the lineal descendant of its parents. This much the Attorney General concedes, but he says that with relation to the estate of their grandfather, and the bequest in question, these children cannot be considered as the "lineal descendants" of their parents because, in the absence of the intermarriage, they could not represent their parents for the purpose of inheriting from kindred of the parents. The fundamental error of the argument lies in the assumption that the children are claiming under the laws of succession. They claim under the law relating to wills and independently of the laws of succession.

[5-7] The scheme of section 92, Probate Code, is founded on blood relationship and belongs to the branch of the law which provides methods which admit of the disposition of estates as they would not go under the laws of succession. Reading the section into the will, as we must (In re Estate of Pew, 1935, 10 Cal.App.2d 41, 50 P.2d 1045; Larrabee v. Tracy, 1940, 39 Cal.App.2d 593, 104 P.2d 61), we see that the legacy was, in reality, left to the children of Eugene, since he had predeceased his father. It is as if they had been named in the will, provided, of course, they are his lineal descendants, which we cannot doubt. They are the lineal descendants of their parents because they are the offspring of their parents and it is as such offspring, and not by right of representation or by inheritance, that they qualify to take the legacy. In other words, their right to take the legacy inheres in their status of lineal descendants. It is no more dependent upon the laws of succession than the right of their father would have been if he had survived his father. Also, it must be quite obvious that there is no reason for believing that the term "lineal descendants" as used in section 92 was intended to embrace only those who under the laws of succession may inherit by right of representation.

When we read the provisions of section 255 relating to the status of children of unmarried parents, we find that they place the children Joseph and Gloria in the same position as children adopted by strangers under the general adoption laws, that is to say, they are heirs of the adoptive parents but may not take from kindred of the parents by right of representation. Contrary to the contention of the Attorney General it has been held that adopted children may take legacies under section 92 as "lineal descendants" of their adoptive parents, even though they cannot inherit through the parents by right of representation. In Re Estate of Moore, 1935, 7 Cal.App.2d 722, 47 P.2d 533, 48 P.2d 28, and In re Estate of Tibbetts, 1941, 48 Cal.App.2d 177, 119 P.2d 368, it was held that an adopted child is a lineal descendant of its adoptive parents and entitled under section 92 to take a legacy left to a deceased adoptive parent by will of a relative of the latter. In one of these cases the testator was a brother, in the other a sister, of the deceased parent and in neither case was the child an heir of the testator. In re Estate of Pence, 1931, 117 Cal.App. 323, 4 P.2d 202; In re Estate of Stewart, 1939, 30 Cal.App.2d 594, 86 P.2d 1071. Obviously if the right of the adopted children in those cases to take as lineal descendants of the adoptive parents had depended upon their being able to inherit through the parents by right of representation, they could not have qualified to take the legacies. If those cases were correctly decided, as we believe they were, the right to take a legacy under section 92 is entirely independent of a right to inherit through the deceased devisee or legatee.

In view of what we have said as to the inapplicability of section 255 to the facts before us, it is unnecessary to consider whether the section is inapplicable for the additional reason set forth at length in the opinion of the learned Justices of the District Court of Appeal of the First District in Wolf v. Gall, 1916, 32 Cal.App. 286, 163 P. 346, and the opinion of the Supreme Court in denying a hearing, 163 P. 350. The decision in that case was given much attention in the briefs herein, and while we have found the discussion to be interesting, there is no occasion for us to consider whether the section is inapplicable for other reasons than the one upon which our decision is based. As against the State of California the children are entitled to the legacy.

[8] We now consider the appeal of Joseph. The children stood together in resisting the claim of the State, contending that their rights are not controlled by the laws of succession. Joseph upon his appeal claims the entire legacy as against

his sister, upon the ground that she lost her legal status as the child of her natural father upon her adoption by strangers; that she thereby ceased to be a lineal descendant of her father and therefore could not share in the legacy. We find this position to be untenable. It is the grandfather's estate that passes under the will and by force of section 92 of the Probate Code, and the will, as we have stated, is to be read as if the grandchildren had been named in the place of their father. Gloria's adoption by strangers severed her legal relationship toward her natural parents and established a new one with the foster parents, but her status as a relative by blood of the kindred of her parents was not altered. In Re Darling's Estate, 1916, 173 Cal. 221, 159 P. 606, the question was whether an adopted child continued to be "issue" of his natural father after his adoption by others so as to take a share of the estate of the father of his natural father by right of representation. The court said (173 Cal. at page 225, 159 P. at page 608): "The adoption statutes of this state do not purport to affect the relationship of any person other than that of the parents by blood, the adopting parents, and the child. It is the person adopting and the child who, by the express terms of the section, after adoption 'shall sustain towards each other the legal relation of parent and child and have all the rights and be subject to all the duties of that relation,' and it is the parents by blood who, from the time of the adoption, are 'relieved of all parental duties towards, and all responsibilities for the child so adopted, and have no right over it,' and are, in the eyes of the law, no longer its parents. The adoption simply fixes the status of the child as to its former and adopted parents. To its grandparents by blood it continues to be a grandchild, and the child of its parents by blood. It does not acquire new grandparents in the persons of the father and mother of an adopting parent." And again, 173 Cal. at page 227, 159 P. at page 608: "It is stated in the note to Hockaday v. Lynn, supra, in 118 Am.St.Rep. 672, 686, that the adoption of a child does not deprive him of his right to inherit from his relatives by blood, unless the statute provides otherwise, and clearly this must be so. Our statute does in effect provide, as we have seen, that he can no longer inherit from his parents by blood, because so far as they are concerned he is no longer their child. But his relationship to his grandparents by blood on either side is not affected by the adoption. As to them he is, notwithstanding the adoption, the 'issue' or child of their child within the meaning of section 1386, Civil Code." In reaching that conclusion the court noted the decision in Re Estate of Newman, supra, 75 Cal. 213, 16 P. 887, 7 Am.St.Rep. 146, that an adopted child inherits from and as issue or child of its foster parent, and also the decision in Re Estate of Winchester, 1903, 140 Cal. 468, 74 P. 10, that the children of an adopted child take by inheritance from the adopting father as his issue, but in Re Darling's Estate, supra, the right of the child to inherit through its natural parents was held to continue notwithstanding the newly acquired right of inheritance.

[9] In Re Estate of Moore, supra, 7 Cal.App.2d 722, 47 P.2d 533, 48 P.2d 28, and In re Estate of Tibbetts, supra, 48 Cal. App.2d 177, 119 P.2d 368, as already stated, it was held that an adopted child is a "lineal descendant" of its foster parents within the meaning of section 92, Probate Code. We do not question that this was a logical development of the rule first stated in Re Estate of Newman, supra, now found in section 257, Probate Code, that a child when adopted acquires the right to inherit from the adoptive parent the same as a natural child. See also In re Estate of Mercer, 1928, 205 Cal. 506, 271 P. 1067. But it does not follow, because of these privileges conferred by statute upon adopted children as incidents of adoption, that they have ceased to be lineal descendants of their natural parents within the purview of section 92, Probate Code. It has never been held, so far as we are advised, that adoption does more than substitute foster parents for natural parents, without affecting the relationship of the child toward its relatives by blood and without creating new relationships with the kindred of the foster parents. So far as the right of inheritance is concerned, the child does not acquire new brothers and sisters in the persons of the natural children of the adoptive parents (In re Estate of Jones, 1934, 3 Cal.App.2d 395, 39 P.2d 847) nor lose the brothers and sisters of its own blood. It remains the child or issue of its natural parents so far as the latter's parents are concerned, as held in Re Darling's Estate, supra, 173 Cal. 221, 159 P. 606. If that be true, it must remain the lineal descendant of its natural parents because it cannot, in the absence of a distinction declared by law, be the issue of its natural

father and of his father and not their lineal descendant. It is not impossible for an adopted child to be a lineal descendant of two sets of parents for the purpose of taking under a will and by virtue of said section 92. One relationship is natural, the other purely artificial or statutory. The first is not lost because the other is gained, unless the statute so provides (In re Darling's Estate, supra), and there is no such provision. The statutory law, as we have seen, gives the adopted child new rights of inheritance, although not by right of representation, and takes away its right to inherit from the natural parents but not the right to inherit through them. There is no basis in law or reason for saying that the child is not the lineal descendant of its deceased natural father for the purpose of taking a legacy under section 92, Probate Code.

[10] We conclude that the rights which are granted to testators to dispose of their property, subject to the provisions of section 92, Probate Code, and to lineal descendants of devisees and legatees to take under that section, are not swept away by the adoption of such lineal descendants by strangers; that Gloria Rodriguez after her adoption continued to be a lineal descendant of her natural father within the purview of the section and is entitled to share equally with her brother in the legacy.

The judgment and order are affirmed.

DESMOND, P. J., and PARKER WOOD, J., concur.

Hearing denied; EDMONDS and TRAYNOR, JJ., dissenting.



57 Cal.App.2d 630

CLINTON et al. v. SHAW et al.

Civ. 13810.

District Court of Appeal, Second District, Division 3, California.

March 16, 1943.

Hearing Denied May 13, 1943.

1. Courts ⇐85(1)

The rules of practice in appellate courts have the force of positive law so far as the rights of parties are concerned and the rules confer rights which may be enforced by litigants.

2. Appeal and error ⇐629, 772

Appellant's right to relief from default in filing of transcript or brief must be founded on mistake, inadvertence, surprise or excusable neglect. Rules of Supreme Court and District Courts of Appeal, rule 1, § 4, rule 5; Code Civ.Proc. § 473.

3. Appeal and error ⇐629, 772

Where application is made for relief from default in filing of transcript or brief, the court is vested with a large discretion in judging as to sufficiency of showing made in support of application. Rules of Supreme Court and District Courts of Appeal, rule 1, § 4, rule 5; Code Civ.Proc. § 473.

4. Appeal and error ⇐799

In considering motion to dismiss appeal on ground that appellant's brief was not filed within time, presumption existed that appellant's attorney at all times knew the status of the appeal. Rules of Supreme Court and District Courts of Appeal, rule 1, § 4.

5. Appeal and error ⇐771

The fact that appellants' attorney had no secretary during time that brief was required to be filed and that he was during that time engaged in various court proceedings and by reason thereof was unable to prepare brief did not furnish sufficient excuse for failure to comply with court rule regarding filing of briefs or to apply to court for an extension of time. Rules of Supreme Court and District Courts of Appeal, rule 1, § 4, rule 5; Code Civ.Proc. § 473.

6. Appeal and error ⇐773(2)

Where appellants did not present their brief until one day prior to hearing on motion to dismiss appeal on ground that appellants' brief was not filed within time, and where sufficient excuse for failure to timely file brief was not given, the appeal was dismissed. Rules of Supreme Court and District Courts of Appeal, rule 1, § 4, rule 5; Code Civ.Proc. § 473.

7. Appeal and error ⇐641

Where appeal was taken from six separate matters, certificate of judge that transcript contained all of papers used or considered in determination of matters from which appeal was taken was defective in failing to specify the papers used or considered in each of the six separate matters

but defect in certificate was subject to correction. Rules of Supreme Court and District Courts of Appeal, rule 15.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Clifford E. Clinton and others against Frank L. Shaw and others. From judgments of dismissal and from orders denying motions to strike cost bills and retax costs, plaintiffs appeal. On defendants' motion to dismiss appeal.

Motion to dismiss appeal granted.

For prior opinion, see 131 P.2d 58.

A. Brigham Rose, of Los Angeles, for appellants.

S. S. Hahn and W. O. Graf, both of Los Angeles, for respondents.

SHINN, Justice.

Respondents moved to dismiss the appeal upon the ground that appellants' brief was not filed within 30 days after the filing of the transcript on appeal, as prescribed by Rule I, section 4, Rules of the Supreme Court and District Courts of Appeal. Upon the hearing, appellants presented oral, but no written, opposition to the motion and the same was granted. In ordering a rehearing, leave was granted to appellants to present written opposition, which has been done in the form of an affidavit of the attorney for appellants.

The transcript was certified by the trial judge May 4, 1942, and was filed with the clerk of this court July 16, 1942. Appellants' brief was due 30 days thereafter. As it was not filed and no extension of time was granted, respondents on September 3 gave notice of motion to dismiss the appeal. Upon September 15, one day prior to the hearing, appellants presented their brief for filing.

Under Rule V an appeal may be dismissed for failure to file appellants' brief within the prescribed time, although the rule provides that if the brief be on file at the time the notice is given, that fact constitutes a sufficient answer to the motion. Upon the arguments appellants contended that the delivery of the brief to the clerk for filing prior to the hearing on the motion was likewise a sufficient answer and they have cited decisions of the District Court of Appeal in two separate districts in support of their position. In Southern Counties Thrift Co. v. Rairdon, 1941, 43 Cal.App.2d 149, 110 P.2d 679, and some 17 other cases which need not be listed here, the courts have refused to dimiss appeals where the brief or transcript, although not on file at the time of giving of notice, was on file prior to the hearing of the motion. While these cases do support the stand of appellants, there are reasons which impel us to give the rule the construction which it has always been given by the Supreme Court and a stricter application than it received in the cases mentioned. The rule in question has been a rule of the Supreme Court in substantially its present form for all of 70 years. In Welch v. Kenney, 1874, 47 Cal. 414, it was held that where the transcript was not on file at the time of service of notice to dismiss the appeal, the filing of the transcript before the hearing of the motion was not a sufficient answer, the court saying, "Circumstances, if any, going to excuse the apparent default, must, in such case, also be shown by the appellant, the sufficiency of which circumstances must be determined by the Court." The Supreme Court has never given the rule a different construction or departed from the policy first announced of requiring a showing of good cause before excusing the appellant's default, even when the brief or transcript, although not on file at the time of the giving of the notice, is filed or tendered for filing prior to the hearing of the motion. Raisch Improvement Co. v. Arata, 1924, 193 Cal. 573, 226 P. 399; Coats v. Coats, 1905, 146 Cal. 443, 80 P. 694; McCabe v. Healey, 1903, 139 Cal. 30, 72 P. 359; Shain v. People's Lumber Co., 1893, 98 Cal. 120, 32 P. 878; Pio v. Aigeltinger, 1892, 97 Cal. 81, 31 P. 895; Chapman v. Bank of California, 1891, 88 Cal. 419, 26 P. 608; Hoyt v. San Francisco, etc., R. Co., 1891, 87 Cal. 610, 25 P. 160, 1066; Carter v. Paige, 1888, 77 Cal. 64, 19 P. 2; Heinlen v. Southern P. R. Co., 1884, 65 Cal. 304, 4 P. 15; Page v. Latham, 1882, 60 Cal. 601; Smith v. Arnold, 1882, 60 Cal. 234. In the Chapman and Hoyt cases it was held that the filing of a brief or transcript after the service of notice but on the same day was not a sufficient answer to the motion.

The rule as so construed by the Supreme Court has been frequently restated and has been applied in the following cases: Gilbert v. United States F. & G. Co., 1929, 97 Cal.App. 42, 274 P. 1023; Morris v. Craig, 1933, 130 Cal.App. 341, 19 P.2d 1001; Bourne v. Root, 1931, 117 Cal.App. 618, 4 P.2d 264; Pretzer v. California Transit

Co., 1929, 102 Cal.App. 630, 283 P. 361; Butler v. Starkweather, 1929, 101 Cal.App. 608, 281 P. 1074; Schlimper v. Doyle, 1928, 94 Cal.App. 660, 271 P. 538; Welch v. Stratton, 1925, 73 Cal.App. 765, 239 P. 380; Waugaman v. Richardson, 1925, 72 Cal.App. 10, 236 P. 207; Weinmann v. Factor, 1923, 63 Cal.App. 592, 219 P. 461; Berendsen v. Babdaty, 1923, 62 Cal.App. 185, 216 P. 385; Gray v. Yarbrough, 1922, 60 Cal.App. 105, 212 P. 226; Barnhart v. Conley, 1911, 17 Cal.App. 230, 119 P. 200; Gervais v. Joyce, 1911, 15 Cal.App. 189, 114 P. 409.

[1] In Shain v. People's Lumber Co., supra, 98 Cal. 120, page 122, 32 P. 878, it was said: "Rules of court are designed to facilitate the business of the court, as well as for the convenience of litigants, and the rule requiring the points and authorities on behalf of the respective parties to be filed within specified times after the filing of the transcript confers rights which may be enforced by the litigants. * * * The rules themselves provide for additional time to be granted if, by reason of any intervening cause, through no fault of the appellant, he may have been prevented from a strict compliance therewith; but, if the appellant would invoke such provision, he must bring himself within the terms upon which the favor is to be granted." The rules of practice in appellate courts have the force of positive law so far as the rights of the parties are concerned and they have been uniformly held to confer rights which may be enforced by litigants. Wood v. Mesmer, 1918, 39 Cal.App. 108, 178 P. 314, and cases cited.

[2, 3] An application for relief from a default in the filing of a transcript or brief has been likened to one under section 473 of the Code of Civil Procedure. In re Estate of Keating, 1910, 158 Cal. 109, 110 P. 109; Erving v. Napa Valley Brewing Co., 1911, 16 Cal.App. 41, 116 P. 331; Weinmann v. Factor, supra, 63 Cal. App. 592, 219 P. 461; Yolo W. & P. Co. v. Edmands, 1920, 45 Cal.App. 410, 187 P. 755; Paramore v. Colby, 1918, 37 Cal.App. 648, 174 P. 677; Borgmeyer v. Solomon, 1918, 39 Cal.App. 106, 178 P. 544; Brooks v. Union Trust, etc., Co., 1905, 146 Cal. 134, 138, 79 P. 843. The analogy is properly drawn because if an appellant in default moves affirmatively for relief or by opposition to a motion to dismiss, his right to relief must be founded on mistake, inadvertence, surprise, or excusable neglect. The cases all recognize this fact even though, as stated in Gray v. Yarbrough, supra, 60 Cal.App. 105, 212 P. 226, and Pacific Power Co. v. State, 1916, 31 Cal. App. 719, 162 P. 641, the court is vested with a large discretion in judging as to the sufficiency of the showing. The courts as a rule have not insisted that the showing be accompanied by an affidavit of merits as suggested in Re Estate of Keating, supra, 158 Cal. 109, 110 P. 109, and certain later cases.

The affidavit which furnishes the basis of the opposition to the motion contains much irrelevant matter. The pertinent statements read as follows: "Affiant had no secretary during the month of August and not up until the 28th day of September. Affiant was also at the said time engaged in various proceedings, some of which were the cases of Rice vs. White, Gill vs. Hartlein, et al., Estate of Wilson, Mirich vs. Balsinger, Huston vs. Superior Court, Chudnow vs. Bakaleinikoff, Richards vs. Richards, in addition to collateral proceedings arising out of Bixby vs. Hotchkiss, and by reason of having to stenographer affiant was unable to get out the brief herein as well an many other matters requiring typewriting.

"The brief, as will be observed from the record on appeal was due during the month in which affiant had no secretary and he was for that reason unable to even get out a typewritten affidavit in opposition to the motion to dismiss herein."

[4-6] It does not appear that the attorney who now appears was ever substituted out of the case nor just when he withdrew or was reemployed nor that he was not reemployed in ample time to make application to the court for an extension of time. It does not appear who caused the transcript to be filed and it must be presumed that the attorney at all times knew the status of the appeal. The statements in the affidavit that he had no secretary during the month of August and not until the 28th of September, and that he was during that time engaged in various court proceedings and by reason thereof was unable to prepare the brief do not furnish a sufficient excuse for failure to comply with the rule or to apply to the court for an extension of time. The averment that the attorney had no secretary while the time was running to prepare a brief falls far short of a showing that he was unable

to obtain the necessary stenographic assistance.

The facts averred concerning the attorney's being occupied with other court work were wholly insufficient to constitute a valid excuse. Berendsen v. Babdaty, supra, 62 Cal.App. 185, 216 P. 385; Weinmann v. Factor, supra, 63 Cal. App. 592, 219 P. 461; Waugaman v. Richardson, supra, 72 Cal. App. 10, 236 P. 207; Schlimper v. Doyle, supra, 94 Cal.App. 660, 271 P. 538; Pretzer v. California Transit Co., supra, 102 Cal.App. 630, 283 P. 361. In similar situations the courts have required a substantial showing of mistake, inadvertence, surprise or excusable neglect. Yolo W. & P. Co. v. Edmands, supra, 45 Cal. App. 410, 187 P. 755; Borgmeyer v. Solomon, supra, 39 Cal.App. 106, 178 P. 344; Pretzer v. California Transit Co., supra, 102 Cal.App. 630, 283 P. 361; Ventura County Title Co. v. Constance, 1936, 7 Cal.2d 684, 62 P.2d 372. We are aware of no case in which relief has been granted upon a showing as unsubstantial as the one now under consideration.

We do not think it can be said that the cases upon which appellants rely were decided strictly upon a construction of Rule V; it appears that there were other moving considerations. For many years, due to a large accumulation of work in the appellate courts, long delays occurred between the filing of transcripts on appeal and the decision of cases upon the merits. Delays of a few weeks or months did not have the effect of appreciably postponing the ultimate decision of ordinary civil cases. This fact was frequently stated and we think was given definite consideration in the cases upon which appellants rely, especially where it was affirmatively shown that the appeal was believed to be meritorious and that it was taken in good faith. North v. Evans, 1931, 114 Cal.App. 714, 716, 300 P. 893. Courts are not inclined to dismiss appeals upon technical grounds when they can be heard upon the merits and it is not surprising that the rule in question should at times have been given a generously liberal application when the delay, from the standpoint of the individual case, was not important. (It may be observed, in reading the cases cited by appellants, that attorneys have not been backward in advancing their own convenience by depending upon the lenient attitude of the courts with respect to the interpretation and enforcement of Rule V. The result has been that respondents have been required to move to dismiss appeals in order to force the filing of appellants' briefs.) But the condition of the calendars of the appellate courts have undergone a decided change. It is no longer true that the time elapsing between the filing of transcripts and the placing of causes on the calendar is sufficient to warrant indifference to or undue leniency in the enforcement of the rules which limit the time for the filing of briefs. At the same time attorneys have the right to expect the utmost consideration from the courts in the matter of the extension of time for the filing of briefs upon a showing of reasonable necessity therefor.

In the instant case we note that the transcript, instead of being filed within 40 days after certification, was not filed until more than a month later. Further than that, plaintiffs, appellants, wholly neglected for almost three years after the sustaining of a demurrer to their amended complaint, with leave to amend, to take any steps whatsoever in the further prosecution of the action, with the result that it was dismissed for want of prosecution. The judgments of dismissal form in part the basis of the present appeal.

[7] Upon the argument on rehearing, respondents urged as an additional ground for dismissal of the appeal the insufficiency of the judge's certificate to the transcript. This was not a ground stated in the notice of motion to dismiss. The transcript contains seven affidavits, five notices of motion, and four minute orders, all relating to the judgments and orders sought to be reviewed on appeal, which consist of two judgments and four separate orders as specified in the notice of appeal. The certificate of the judge is that the transcript contains "the papers and all of the papers used or considered in the determination of the matters from which this appeal is taken." The certificate is defective in failing to specify the papers used or considered in each of the six separate matters from which the appeal was taken. It is obvious from a casual inspection that all of the papers were not used in all of the proceedings, and an appellate court should not be required to make its own investigation in order to determine what was before the court at the times when the several proceedings were had. However, the defect in the certificate, which was subject to correction under Rule XV of said rules,

having been called to the attention of counsel and the court for the first time on argument of the motion, has not been considered in support of the motion to dismiss.

The motion to dismiss the appeal is granted.

DESMOND, P. J., and BISHOP, J. pro tem., concur.

Hearing denied; CARTER, J., dissenting.



57 Cal.App.2d 737

COOLE et al. v. HASKINS et al.
Civ. 12286.

District Court of Appeal, First District, Division 2, California.

March 23, 1943.

Hearing Denied May 20, 1943.

1. Action ⇐1

Though complaint seeking recovery for injuries sustained by children when bitten by rats, from owners and possessors of adjoining property because of negligence and maintenance of nuisance, was based on unusual set of facts, and though no authority directly in point was called to court's attention, that was no valid objection, provided facts alleged brought causes within recognized general principles of law. Civ. Code, §§ 1714, 3479, 3501; St.1939, p. 519, § 1803.

2. Adjoining landowners ⇐8

One may not use his property in such manner that damage to his neighbor is a foreseeable result.

3. Negligence ⇐111(1)
Nuisance ⇐48

In action by children against owners and occupiers of restaurant adjoining premises rented by owners to children's parents, for injuries sustained by children when bitten by rats, complaint alleging that owners allowed discarded food and vegetable matter to accumulate about restaurant premises so that rats were attracted to and infested premises, despite requests to remedy conditions, was sufficient to state causes of action based on negligence and on maintenance of a "nuisance". Civ. Code §§ 1714, 3479, 3501; St.1939, p. 519, § 1803.

See Words and Phrases, Permanent Edition, for all other definitions of "Nuisance".

4. Negligence ⇐34
Nuisance ⇐3(1)

If owners and occupiers of restaurant negligently allowed refuse to accumulate so as to attract rats which went on adjoining premises, they violated their duty toward persons on adjoining premises.

5. Negligence ⇐85(1), 105

Defense of assumption of risk is closely associated with defense of contributory negligence, and, ordinarily, neither defense may be successfully invoked against a minor of tender years.

6. Negligence ⇐136(1)
Nuisance ⇐53

Children suing owners and occupiers of restaurant adjoining premises rented by owners to children's parents, for injuries sustained by children when bitten by rats, on ground that owners were guilty of negligence and of maintaining a nuisance on restaurant premises, did not as matter of law "assume the risk" involved, though children continued to live and sleep on premises for several months after premises continued to be infested with rats.

See Words and Phrases, Permanent Edition, for all other definitions of "Assume the Risk".

7. Negligence ⇐105
Nuisance ⇐43

In action by children against owners and occupiers of restaurant adjoining premises rented by owners to children's parents, for injuries sustained by children when bitten by rats, alleged assumption of risk by children's parents did not affect children's rights of recovery.

8. Negligence ⇐95(1), 105

Parents' contributory negligence may not be imputed to a child in an action brought by child in its own right, nor does assumption of risk by parents preclude recovery by minor child on his own behalf.

Appeal from Superior Court, San Mateo County; Aylett R. Cotton, Judge.

Action by Rose Marlyne Coole and another, as minors, etc., against Emma

Haskins and others to recover for injuries sustained by plaintiffs when bitten by rats as result of the alleged maintenance of a nuisance by defendants on premises owned by them. From judgment of dismissal of complaint, plaintiffs appeal.

Judgment reversed with directions to overrule demurrer.

Shirley, Robb & Saroyan, of San Francisco, for appellants.

Edmund Scott, of Redwood City, for respondents.

SPENCE, Justice.

Plaintiffs, who were minors of the ages of two and three years respectively, sought to recover damages for personal injuries. Defendants' demurrer to plaintiffs' second amended complaint was sustained without leave to amend and a judgment of dismissal was entered. Plaintiffs appeal from said judgment.

The second amended complaint was in four counts. The first two counts were brought on behalf of one minor plaintiff and the second two counts were brought on behalf of the other minor plaintiff. One count as to each minor plaintiff was based upon alleged negligence of defendants and the other count as to each minor plaintiff was based upon the alleged maintenance of a nuisance by defendants. The counts based upon the alleged maintenance of a nuisance incorporated by reference all the allegations of the counts based upon alleged negligence and included the added allegations that, by reason of the facts alleged, defendants were maintaining a nuisance and that the injuries sustained by plaintiffs were proximately caused thereby.

The facts alleged are rather unusual. Briefly stated, plaintiffs alleged that while sleeping in a portion of the premises owned by defendants and rented to their parents as a residence, plaintiffs were bitten by rats and were seriously injured as a result of the negligence of, and the maintenance of a nuisance by, defendants on the premises owned by them, a portion of which premises was devoted to the operation of a restaurant by defendants. The alleged negligence and alleged maintenance of a nuisance consisted of "allowing discarded food and vegetable matter, refuse and debris to accumulate about said premises and buildings and restaurant" so that rats were attracted to and infested the same thereby causing the premises to become unfit for human habitation; and in allowing said condition to continue, despite requests to remedy it and with knowledge of the facts and of the propensity of rats to bite and of the danger and hazard to plaintiffs caused thereby, without endeavoring in any manner to exterminate said rats. In support of their alleged causes of action, plaintiffs relied in part upon section 1803 of the Health and Safety Code which reads as follows: "Every person possessing any place that is infested with rodents, as soon as their presence comes to his knowledge, shall at once proceed and continue in good faith to endeavor to exterminate and destroy the rodents, by poisoning, trapping, and other appropriate means." It was alleged that the above-mentioned condition commenced in June, 1941, and was known to defendants at all times and that plaintiffs were bitten by the rats on October 15, 1941.

[1-3] Plaintiffs contend that the trial court erred in sustaining defendants' demurrer to said second amended complaint. Considering first the general demurrer, we believe it clear that the allegations of the second amended complaint were sufficient. While the complaint is based upon an unusual set of facts and while no authority directly in point has been called to our attention, this is no valid objection provided the facts alleged bring the causes within recognized general principles of law. Miles v. A. Arena & Co., 23 Cal.App.2d 680, 73 P.2d 1260. As was said in the Miles case at page 683 of 23 Cal.App.2d, at page 1262 of 73 P.2d, "No person is permitted by law to use his property in such a manner that damage to his neighbor is a foreseeable result." We are of the opinion that the allegations of plaintiffs' second amended complaint were sufficient to state causes of action based upon negligence (Civil Code, sec. 1714; 19 Cal.Jur. 665) and also upon the maintenance of a nuisance. Civil Code, § 3479; Civil Code, § 3501.

As we understand the argument of defendants with respect to the charge of negligence, it seems to rest upon the following claims: (1) that the relationship of lessors and lessees existed between defendants and the parents of plaintiffs; (2) that plaintiffs are in the same position with respect to defendants as their parents would have been if the parents had suffered the injuries; (3) that defendants were not liable to plaintiffs or their parents for injuries resulting from the defective condition of the rented premises in the absence of

unusual circumstances not alleged in the complaint. (Nelson v. Myers, 94 Cal.App. 66, 270 P. 719; Priver v. Young, 62 Cal.App. 405, 216 P. 966; Farber v. Greenberg, 98 Cal.App. 675, 277 P. 534); and (4) that it appears from the allegations of the second amended complaint that "the injuries were sustained as a result of a defective condition existing in the premises which had been rented by defendants to the parents of plaintiffs."

It is thus apparent that defendants contend that defendants' duties toward plaintiffs began and ended with defendants' duties as lessors of the portion of the premises in which plaintiffs resided and that the complaint failed to show a violation of defendants' duties as such lessors. This contention is based upon certain allegations of the complaint showing that the relationship of lessors and lessees existed and that defendants failed upon request to close certain holes in the floors and walls of the building in which plaintiffs resided and through which the rats entered said building and also failed to attempt to exterminate the rats. But as we view the complaint, the gist of plaintiffs' causes of action was an alleged violation by defendants of their duties as owners and possessors of the adjoining property rather than an alleged violation of defendants' duties as lessors. Under these circumstances, any allegations relating to the relationship of lessors and lessees were superfluous but such allegations did not render the remaining allegations insufficient to show a violation of the duties of defendants as owners and possessors of the adjoining property.

[4] Turning to the special demurrer, we believe that the only specification which requires comment is the one in which defendants claimed that it did not appear whether defendants negligently allowed the refuse which attracted the rats to accumulate on the premises rented to plaintiffs' parents or on the adjoining premises owned and occupied by defendants. The allegations were that defendants negligently operated and maintained "said premises and the adjacent and adjoining buildings, also owned and possessed by defendants, where, in one of said buildings defendants owned, operated and maintained a restaurant, by allowing discarded food and vegetable matter, refuse and debris to accumulate about said premises and buildings and restaurant. * * *" In this connection, defendants call our attention to the above quoted section 1803 of the Health and Safety Code, which uses the words, "Every person possessing any place that is infested with rodents * * *," and defendants state that they "did not possess the rented premises." The word "possess," however, is defined in said code so as to place the duty imposed by said section 1803 upon the owner of any land or building infested with rats. Health and Safety Code, §§ 1801-1803. Furthermore, without regard to the provisions of said section 1803, we are of the opinion that defendants violated their duty toward persons on adjoining premises if they negligently allowed their refuse to accumulate so as to attract rats as alleged on any property in the vicinity. We therefore find no specification of uncertainty which justified the sustaining of the special demurrer.

Defendants make one further point in support of the trial court's ruling. It is contended that "plaintiffs and their parents assumed the risk arising from the use of the rented premises." They argue that it was shown by plaintiffs' allegations that although defendants failed to endeavor to exterminate the rats and although the premises continued to be infested with rats from June, 1941, to October 16, 1941, plaintiffs, continued to live and sleep in said premises. It therefore appears that defendants claim that as plaintiffs and their parents continued to occupy the premises they assumed, as a matter of law, the risk of being bitten by the rats and therefore the demurrer to plaintiffs' second amended complaint was properly sustained.

[5-8] The defense of assumption of risk is closely associated with the defense of contributory negligence. 38 Am.Jur. 847. Ordinarily neither defense may be successfully invoked against a minor of very tender years and it seems certain that it cannot be said as a matter of law from plaintiffs' allegations that plaintiffs, aged two and three years respectively, assumed the risk involved here. If it can be said that the allegations showed that plaintiffs' parents assumed the risk insofar as the parents were concerned, such assumption of risk by the parents should not be permitted to affect the rights of their minor children. Contributory negligence of parents may not be imputed to a child in an action brought by the child in its own right (Zarzana v. Neve Drug Co., 180 Cal. 32, 179 P. 203, 15 A.L.R. 401; Caraveo v. Pickwick Stages System, 113 Cal.App. 443,

298 P. 516), and by a parity of reasoning, the assumption of risk by parents should not be held to preclude a recovery by a minor child on his own behalf.

The judgment is reversed with directions to the trial court to overrule the demurrer.

NOURSE, P. J., and DOOLING, J. pro tem., concurred.



57 Cal.App.2d 684

JACKLICH et al. v. BAER.
Civ. 6717.

District Court of Appeal, Third District, California.

March 17, 1943.

Hearing Denied May 13, 1943.

1. Account ⇐18
Payment ⇐73(1)

Evidence established that defendant had accounted to plaintiffs and that plaintiffs had been paid amounts agreed to be due them under contract whereby defendant was to pay to plaintiffs 15 per cent. of net proceeds of defendant's boxing contests during a specified five-year period until a specified sum which defendant owed plaintiffs was paid and 10 per cent. thereafter until expiration of the contract, precluding accounting under the contract.

2. Evidence ⇐589

Trial court was not bound to accept plaintiffs' testimony that earlier contract between plaintiffs and defendant for plaintiffs to secure faithful performance of others' agreement to manage defendant in boxing contests was canceled at instigation of defendant, where later contract between plaintiffs and defendant recited that the parties were desirous of executing a new agreement and that it constituted a mutual release of the parties from all claims under the earlier contract.

3. Account ⇐8

In action for accounting, that contract whereby defendant was to pay plaintiffs 15 per cent. of net proceeds of defendant's boxing contests during a specified five-year period until a sum which defendant owed plaintiffs was paid and 10 per cent. thereof until expiration of the contract was entire would not preclude equity court from refusing to enforce provision that, on payment of $5, plaintiffs' right to receive 10 per cent. of defendant's earnings would be extended for an additional five-year term, where such provision was violative of principles of equity. Civ.Code, § 3391.

4. Specific performance ⇐51

Equity will not enforce contracts which upon their face are so manifestly harsh and oppressive as to shock the conscience, and it must be affirmatively shown that such contracts are fair and just.

5. Equity ⇐66

The doctrine that "he who seeks equity must do equity" means that the party asking the aid of an equity court must stand in a conscientious relation toward his adversary and the transaction from which his claim arises must be fair and just and the relief must not be harsh and oppressive upon defendant.

See Words and Phrases, Permanent Edition, for all other definitions of "He Who Seeks Equity Must Do Equity".

6. Specific performance ⇐51

Specific performance will be refused when a contract itself is unfair, one-sided, unconscionable, or affected by any other such inequitable feature, and when specific performance enforcement would be oppressive upon defendant or would prevent enjoyment of his own rights or would in any other manner work injustice.

7. Account ⇐4
Contracts ⇐217

Under terms of contract that defendant would pay plaintiffs 15 per cent. of net proceeds of defendant's boxing contests during a five-year period and providing for an extension, extension option was to be exercised only if defendant's indebtedness was not fully repaid during the term, and hence, where indebtedness had been paid and plaintiffs had received some $20,000 in addition without performing services for defendant, no equities in their favor calling for accounting appeared.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Frank Jacklich and another against Max Baer and another for an accounting under a written contract, where-

in named defendant filed an answer, counterclaim, and cross-complaint. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Dannenbrink, Price & Connella and Leslie Price, all of Oakland, for appellants.

Butler, Van Dyke & Harris and B. F. Van Dyke, all of Sacramento, for respondent.

ADAMS, Presiding Justice.

This is an appeal from a judgment in favor of defendants in an action for an accounting under the terms of a written contract.

On November 22, 1930, plaintiffs Frank Jacklich and Anthony Jacklich, as parties of the first part, entered into a contract with defendant Max Baer as party of the second part, wherein first parties agreed to pay Baer $5,000 upon the execution of the contract, an additional $5,000 within thirty days, and $5,000 three years from date. Said contract recited that Baer had on October 6, 1930, entered into an agreement with H. Lorimer and Ancil Hoffman by which he had obligated himself to engage in boxing contests, etc., under the direction and control of said Lorimer and Hoffman, and it was agreed that first parties would use their best efforts and endeavors "to secure the faithful performance" of said agreement with Lorimer and Hoffman "and to manage, supervise and preserve the property and effects" of second party. Baer on his part agreed that in consideration of the $15,000 "and other valuable consideration," he would pay to first parties ten per cent of the net proceeds of all boxing contests, etc., referred to in the contract with Lorimer and Hoffman. The contract provided that it should bind the parties mutually for ten years, beginning December 1, 1930. There was also a provision that it should, at the option of first parties on sixty days' notice and the payment of five dollars, be extended for another period of ten years. It also provided that should the option provided for in the Lorimer-Hoffman contract not be exercised Baer would, upon the termination of said agreement, execute a similar contract with first parties, except that Baer should have 66⅔ per cent and first parties 33⅓ per cent.

Under the foregoing contract Baer received $10,000 in two different payments.

On January 11, 1932, a new contract was entered into between the parties to the agreement of November 22, 1930. It recited that the parties were desirous of terminating and cancelling the prior contract and executing a new one; that second party was indebted to the first parties in the sum of $13,500; that the prior contract was terminated, cancelled and revoked and of no further force and effect, that none of the parties should have any rights arising out of the terms thereof, and that the new contract should constitute a mutual release of the parties of all claims, demands, etc., thereunder, and an acknowledgment by the parties that each had paid to the other whatever might be due and owing.

It further recited that this agreement should be in effect for five years, commencing December 1, 1930, and ending November 30, 1935, and provided that Baer should pay to first parties 15 per cent of the net proceeds of all boxing contests, etc., in which he should engage during the period specified until the sum of $13,500 should be paid to first parties, and 10 per cent thereafter until the expiration of the agreement. Net proceeds were to be arrived at by "deducting all training expenses, railroad fares and all other expenses and costs" incurred or expended by second party "of every kind and character whatsoever" in the proper exploitation of second party, from the gross income or receipts of all performances, contests and exhibitions mentioned. Payments were to be made to first parties by Baer "on statements rendered by second party within fourteen (14) days after second party shall have received the proceeds" of such contests, exhibitions, and other performances. Said contract also provided that the term thereof should and would at the option of the parties of the first part be extended for a further period of five years, commencing on the 1st day of December, 1935, provided the parties of the first part notified the party of the second part sixty days prior to said date, and paid the party of the second part the sum of Five Dollars at any time before the 1st day of December, 1935.

The action before the court was commenced by plaintiffs September 29, 1937. They alleged the execution of the contract of January 11, 1932, the assignment of an interest therein to plaintiffs Ahlin and Rudolph Jacklich, the exercise by plaintiffs of the option set forth in said contract, and a failure of Baer to account to plaintiffs under said contract or to pay to them the percentage of net proceeds as provided

therein. A decree directing defendant to account to plaintiffs for all contests, exhibitions, exercises and performances engaged in by him from January 11, 1932, to date, and for judgment for the amount found due, was prayed.

Baer filed an "answer, counterclaim and cross-complaint," alleged the payment of the $13,500 provided in said agreement to be paid, that all matters occurring within the term of the contract had been fully accounted for to plaintiffs, and that the total sum of $33,673.43 had been paid to plaintiffs. It was further alleged that the said agreement insofar as it provided for payment of sums in excess of the principal indebtedness and lawful interest thereon was invalid, usurious, and void, and that all payments over and above said indebtedness were without consideration and in violation of section 955 of the Civil Code. (Assignment of wages.) It also alleged that insofar as said contract purported to bind defendant to pay to plaintiffs any greater sum than the $13,500 together with interest, it was "harsh, oppressive, unjust and inequitable and void, and that likewise insofar as said contract purported to grant to plaintiffs an option or right to renew said contract for an additional term of five years notwithstanding the complete repayment of said debt and lawful interest thereon, the same was harsh, oppressive, unjust, inequitable and void." Judgment was prayed that plaintiffs take nothing and that defendant recover of plaintiffs the sum of $20,173.43, with interest.

On July 24, 1939, plaintiffs filed a supplemental complaint bringing their demands up to date, and an amendment to their complaint making Buddy Baer a party defendant, alleging that the latter had received moneys that should have been paid to Max Baer, 10 per cent of which moneys should be paid to plaintiffs.

The action was tried by the court. Findings of fact and conclusions of law were filed wherein it was found that pursuant to the contract of January 11, 1932, defendant had paid to plaintiffs, prior to December 1, 1935, a total sum of $32,738.55, thereby paying the sum of $13,500 provided by said contract to be paid, and the additional sum of $19,238.55; that defendant had engaged in many boxing contests, exhibitions, etc., and that during said period plaintiffs at frequent intervals had demanded, and received, accountings for each and all said contests, exhibitions, exercises, motion pictures, vaudeville and theatrical performances, and such accounts were never refused by defendant; that when said accountings were rendered, the amounts due the plaintiff were in each instance agreed upon between the parties, and the amounts due as so agreed were paid by defendant to plaintiffs. The court found it to be untrue that the defendant had betrayed or violated his obligations under said contract to plaintiffs, untrue that he had refused or failed to render the accountings provided in said contract, and likewise untrue that he had failed to pay plaintiffs a percentage of the net proceeds, as provided in said contract; also that it was not true that any further accounting was necessary between the parties or that anything was owing or unpaid from defendant to plaintiffs by reason of said contract.

It was further found that insofar as said contract purported to grant to plaintiffs an option or right for an additional term of five years, and the right during said additional term of five years to have and receive of defendant 10 per cent of his earnings upon the mere payment to him of the sum of Five Dollars, notwithstanding defendant should have fully performed the said contract during said period from the date thereof to December 1, 1935, and notwithstanding he should have repaid during said first period said sum of $13,500, together with interest thereon, the said contract was harsh, oppressive, unjust, inequitable, fraudulent and void, and that plaintiffs were not entitled to have or receive of defendant any further sums whatsoever from his earnings through activities from and after December 1, 1935.

Judgment having been entered that plaintiffs take nothing, they moved for a new trial contending that no accounting had ever been made under the contract, and that an accounting would disclose a large sum of money due plaintiffs; also that the renewal clause of the contract was valid and that the court erred in denying it any effect. The motion was denied, the trial court rendering an opinion in which it stated that as to settlements during the five year period, the evidence showed they had been made by defendant and accepted by plaintiffs, and that the latter had given receipts in full therefor. As to the so-called "option" provision of the contract the court said that it "was not an option at all, there was nothing to decide, there were no alternatives"; that if it meant that

plaintiffs were, without any benefit moving to defendant and without regard to whether or not the amount recited in the contract as owing plaintiffs had been repaid, to acquire the right to a large share of defendant's earnings for another five years, such construction was so harsh and unjust that the court could not hold that it was in contemplation of the parties; that the only construction to be given it consistent with justice and fair dealing, and exclusive of wrong and exploitation, would be that it was to be operative for a second period in the event that within the five year life of the contract the indebtedness of defendant to plaintiff had not been satisfied; that such construction would be reasonable but would have no operation, as the indebtedness had been fully paid; and that a court of equity would not aid or help to execute the contract if it was intended, as contended by plaintiffs, that they were to be allowed, without regard to whether defendant's debt had been fully and abundantly compensated, to exact from defendant a large share of his earnings for another five years.

[1] We are in accord with the views of the trial court. As to the payments made to plaintiffs during the period prior to December 1, 1935, the evidence is quite sufficient to support the finding that defendant had accounted to plaintiffs and that plaintiffs had been paid in full the amounts agreed by the parties to be due them.

The testimony of Ancil Hoffman was that he had made all the payments that were made; that he always kept the record of his receipts for moneys that he paid out and after any certain fight would bring it back and turn it over to Baer's accountant; that the Jacklich brothers never wanted to wait and would always ask for a settlement before the accountant could really get an actual account of the money; but that he (Hoffman) would have all the checks and the check register showing what each was for, and those were always there for them at any time they wanted to see them, and that that was how they arrived at the payments that were made; that they would look over the records and there would be arguments about them, but the Jackliches would always compromise and finally decide among themselves what the payment would be, and that he (Hoffman) would make payment to them; that he was always present at the conferences with the Jacklich brothers about the statements; that he would exhibit to them vouchers and receipts showing what expenses had been incurred; that they would not pay any attention to some of them but on any large amount would have an argument; that when they would object to an item it was argued out and they would finally hit upon what to do with it and would come to a conclusion of what the payments would be; that when they would finally get together on a settlement duplicate receipts would be written out which would be signed, and the Jackliches would take one and Hoffman the other; that there was nothing said about any further statements to be made and there was no agreement or understanding or undertaking that notwithstanding the receipts any further accounting would be had; that he would ask them if they didn't want to wait and get a statement from Bookman, the accountant, but they would say they would rather "take it up with us" even if it didn't come up to what he would say, and get their money, and that was the way it would be settled; that that sort of thing was gone through with whenever a receipt was taken; that they never asked for any further accountings and there was no agreement that they were to have further statements or accounts; that they would always be satisfied before they would sign a receipt; that he never said that if they would sign a receipt that he would give them further accounts or pay further sums; that it was always understood that they had settled up to the recited date and that no further accounting was required. Regarding the settlement for the Baer-Joe Louis fight, Hoffman testified that there had been $2,000 paid to the Jackliches in New York, as they wanted part of their money to buy some second-hand cars to help pay their expenses in coming to California; that the final receipt was signed in Oakland at a meeting at Baer's house; that they were there two or three hours, at which time he showed them his expenses and they finally arrived at this certain figure, whereupon he drew the check himself, which was supposed to be in settlement in full. He produced checks and receipts showing amounts paid plaintiffs and receipted for by them, which are not disputed by plaintiffs. For instance, the receipt dated October 14, 1935, after the Baer-Joe Louis fight, and signed by Frank and Anthony Jacklich, acknowledged the receipt of $8,969.33, "being payment in full to date in accordance with Agreement en-

tered into the eleventh day of January, 1932, by and between Frank and Anthony Jacklich and Max Baer. The above amount settles in full to date all moneys due by Max Baer and does not effect any moneys that may become due on any work covered by agreement after this date. The above amount is paid in accordance with statement rendered this date showing the amount due." The check for the foregoing amount bore the legend in Hoffman's writing, "Settlement to date in accordance with agreement dated Jan. 11, 1932."

On July 1, 1934, a payment of $6,000 was made on account of the Baer-Carnera fight. The check bore the legend in Hoffman's writing, "On account of Baer-Carnera and Radio to date." Another receipt for $2,747.53, dated September 25, 1934, read: "Received of Ancil Hoffman, for Max Baer the sum of (Twenty seven Hundred forty seven dollars fifty three cents.) ($2747.53) in full to date on contract. This settles any amount past due from Max Baer on account of any contract. this in no way affects the existing contract that is now in force between Jacklich Bros. and Max Baer." A check for a corresponding amount, of same date, bore the legend, "In full to date on contract."

Hoffman testified that after exercise of the so-called option was refused he made no further payments on the contract.

Regarding checks dated subsequent to December 1, 1935, totaling $900, there is testimony that these checks were paid on account of matters not connected with the contract. Endorsements upon them to the effect that they were received on account of the contract were not written thereon by Hoffman who drew the checks, but were added thereafter by someone else.

Conceding that there is a conflict in the testimony as to whether settlements made were final and whether payments made were in full to date thereof, there is ample evidence to support the findings of the trial court that nothing further is owing or unpaid to plaintiffs by reason of said contract.

[2, 3] Regarding the finding of the trial court as to the provision in the contract that on payment of five dollars plaintiffs' right to receive ten per cent of defendant's earnings should be extended for an additional term of five years, that said contract was harsh, oppressive, unjust, inequitable, fraudulent and void, appellants argue that the contract must be considered as an entire contract, supported by adequate consideration. They do not contend that the five dollars provided to be paid for such extension constitutes adequate consideration, and they impliedly concede that the indebtedness of $13,500 recited in the contract is not sufficient to render this provision fair, equitable, just and unoppressive, for they argue that the cancellation of the prior contract must be considered as the real consideration for their entering into the later one, and that in consenting to the cancellation of the earlier one they surrendered the right given thereunder to manage Baer and to receive 33⅓ of the profits. However, this argument ignores the fact that the earlier contract did not give them such right, but provided merely that "in the event" that Lorimer and Hoffman did not exercise the option provided for in their contract with Baer, that the latter would, on termination of that agreement, enter into a contract with first parties. Furthermore, the trial court was not bound to accept the testimony of appellants that the first contract was cancelled at the instigation of respondent. The contract itself recited that the parties were desirous of executing the new agreement, and that it constituted a mutual release of all parties. As to the argument of appellants that the contract must be considered as an entire one, we think this is beside the point. Even if it were considered as entire this would not preclude a court of equity from refusing to enforce a provision thereof that was violative of the principles of equity, though it might, on the other hand, impel a court of equity to hold the whole contract unenforceable if held to be an entirety. Section 3391 of the Civil Code of California provides that specific performance cannot be enforced against a party to a contract if he has not received adequate consideration for such contract, or if it is not as to him just and reasonable.

[4] Equity will not lend its aid to enforce contracts which upon their face are so manifestly harsh and oppressive as to shock the conscience; it must be affirmatively shown that such contracts are fair and just. In re Chicago Reed & Furniture Co., 8 Cir., 7 F.2d 885; Weeks v. Pratt, 5 Cir., 43 F.2d 53, certiorari denied 283 U.S. 892, 51 S.Ct. 106, 75 L.Ed. 786; Gabrielson v. Hogan, 8 Cir., 298 F. 722; Kenyon v. Weissberg, D.C., 240 F. 536;

Clark v. Rosario M. & M. Co., 9 Cir., 176 F. 180, 99 C.C.A. 534; Marks v. Gates, 9 Cir., 154 F. 481, 83 C.C.A. 321, 14 L.R.A.,N.S., 217, 12 Ann.Cas. 120; Agard v. Valencia, 39 Cal. 292, 302; Hobbs v. Davis, 168 Cal. 556, 563, 143 P. 733; Winchester v. Becker, 8 Cal.App. 362, 366, 367, 97 P. 74; Koblick v. Larson, 57 Cal.App. 462, 466, 467, 207 P. 929; Moore v. Heron, 108 Cal.App. 705, 711, 292 P. 136. Also see cases cited 65 A.L.R. 57 et seq.

[5, 6] It is said in Pomeroy's Equity Jurisprudence (5th Ed.), section 400, that the doctrine that he who seeks equity must do equity means that the party asking the aid of the court must stand in conscientious relation towards his adversary; that the transaction from which his claim arises must be fair and just and that the relief itself must not be harsh and oppressive upon the defendant. And that specific performance will always be refused when a contract itself is unfair, one-sided, unconscionable, or affected by any other such inequitable feature, and when specific enforcement would be oppressive upon the defendant, or would prevent the enjoyment of his own rights, or would in any other manner work injustice. Citing Cooper v. Pena, 21 Cal. 403, 411.

And we find in 58 C.J. 951: "It is a rule of early origin and widespread acceptance, even being made the subject of codification in some states, that no matter how sufficient legally, any contract, to be entitled to specific performance must be fair, just and reasonable in all its terms or parts and in its surrounding circumstances." (Also see 23 Cal.Jur. 438.)

In Blattman v. Gadd, 112 Cal.App. 76, 296 P. 681, the court had before it a contract for fees entered into between a reclamation district and an attorney, and which the trial court had held to be unreasonable, unconscionable and void. The opinion states, pages 95–97, of 112 Cal. App., page 689 of 296 P.: "Phrasing it bluntly, the unconscionableness of the entire transaction was manifest, and the proceeding in its inception indicated a scheme rather than a contract. * * * The case, as a whole, in all of its phases, must be considered, and, after such consideration, we agree with the trial court that the contract was unreasonable and unconscionable, and therefore void."

[7] We think the trial court gave to the contract before us a reasonable, fair and just construction when it said that the so-called "option" for the five year extension was to be exercised only in the event that the whole of the indebtedness of Baer recited therein was not fully repaid during the term expiring November 30, 1935. And in view of the fact that said indebtedness has been paid and plaintiffs have received some $20,000 in addition without performing services of any kind on their part, no equities in their favor appear calling for the interposition of a court of equity.

The judgment is affirmed.

THOMPSON, J., and SCHOTTKY, Justice pro tem., concurred.



57 Cal.App.2d 623

BROCKMILLER v. BROCKMILLER.

Civ. 12218.

District Court of Appeal, First District, Division 1, California.

March 15, 1943.

1. Divorce ⚿235, 296

In divorce proceedings, the amounts to be contributed by the husband for the support of his children, or of his wife, are, in the first instance, matters resting in the sound discretion of the trial court.

2. Divorce ⚿286, 312

While there may be room for a difference of opinion in regard to amounts to be contributed by the divorced husband for the support of his children or of his wife, an appellate court may not interfere with the action of the trial court unless, as a matter of law, it has abused its discretion, and all reasonable inferences from the evidence which uphold its conclusion should be indulged.

3. Divorce ⚿296

No arbitrary rule can be laid down as to what particular facts must appear before a court may decide that a divorced husband, a wife, or both, must contribute to the support of the children, but matters of this character, regard being had to the circumstances of the respective parties, are ordi-

narily left to the trial court for decision. Civ.Code, § 139.

4. Divorce ⇐184(12)

In divorce proceedings, it is not ground for reversal that a particular finding was not made, if the decree based on the evidence sufficiently covers a general or specific allegation of the complaint in that regard.

5. Divorce ⇐296

Where trial court awarded custody of minor children to divorced wife and placed whole burden of supporting children on defendant husband, trial court did not, as a matter of law, abuse its discretion, because wife received a larger income than husband, where, although the facts which sustained conclusion that wife should support, or assist in supporting the children, a determination that it was husband's duty to maintain children entirely could also be reasonably made. Civ.Code, §§ 139, 196.

6. Divorce ⇐226

In divorce proceedings, an award of necessary counsel fees to the wife is made prior to the filing of an appearance or the trial only upon presentation of facts which indicate the necessity and probable value of the services to be performed, although supplemental allowances may be made. Civ. Code, § 137.

7. Divorce ⇐226

Although an allowance of necessary counsel fees to the wife for prosecution or defense of a divorce proceeding may not be made for past services, a prayer in the wife's complaint requesting counsel fees may be deferred for final determination until filing of the interlocutory decree. Civ.Code, § 137.

8. Divorce ⇐228, 286

Fact that amount of attorney's fees allowed to wife for prosecution or defense of a divorce proceeding is made in the judgment, rather than in a separate order, is immaterial, and therefore postponement of such matter by stipulation is not prejudicial. Civ.Code, § 137.

9. Divorce ⇐286

An uncontradicted statement in open court prior to trial of divorce proceeding that the fixing of the additional amount of attorney's fees for wife may be postponed by stipulation until after the evidence has been heard is a "stipulation" sufficient for a reviewing court to assume, in absence of contrary circumstances, that the order made pursuant thereto is valid. Civ.Code, § 137; Code Civ.Proc., § 283.

See Words and Phrases, Permanent Edition, for all other definitions of "Stipulation".

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Divorce action by Vera Brockmiller against Harry Brockmiller. From orders requiring defendant to pay $50 counsel fees to the wife's attorney, and $60 a month for support of the two minor children of the marriage, defendant appeals.

Affirmed.

J. W. Jackson, of San Francisco, for appellant.

James D. Lucey and Frank O'Brien, both of San Francisco, for respondent.

WARD, Justice.

Defendant appeals from orders contained in an interlocutory decree of divorce granted to his wife. He does not contest the correctness of the decree insofar as it granted a divorce, but maintains that the court abused its discretion in ordering him to pay $50 counsel fees to the wife's attorney, and $60 a month for the support of the two minor children of the marriage.

Defendant, appellant herein, specifically contends that in an action for divorce the court cannot grant an allowance of counsel fees to a wife (1) without any showing by her of the necessity therefor; (2) when the services were rendered by her attorney prior to the granting of the allowance; (3) where the wife is receiving a substantial income which equals or exceeds that of the husband. Appellant further contends that under the conditions herein the court abused its discretion in decreeing that he should bear the whole burden of supporting the two minor children, citing Civil Code, section 196.

The parties hereto were married in 1938 and separated three years later. Their two children at the time of the trial of the action were two and a half years, and ten months of age, respectively. The parties owned community property consisting of household furniture, and a service station lease the profit from which brought the defendant's income to approximately $130 a month. From this amount he was paying $30 a

month, installments on the purchase price of the lease, $200 to $300 being still due thereon. Plaintiff was employed part of the time during the year 1940, receiving a salary of $900, which she contributed to the family expenses. At the time of the trial she was steadily employed at an income of approximately $1,404 a year. She owed the sum of $70, medical care for one of the children, and was jointly liable for a further doctor's bill of $140. Plaintiff was awarded the custody of the two children, whom, because of her employment, she finds necessary to place in a private home. The cost of such care for them is $60 a month.

[1-5] In a divorce proceeding the amounts to be contributed by the husband for the support of his children, or of his wife, are in the first instance matters resting in the sound discretion of the trial court. While there may be room for a difference of opinion in regard to such amounts an appellate court may not interfere with the action of the trial court unless, as a matter of law, it has abused that discretion. All reasonable inferences from the evidence which uphold its conclusion should be indulged. While the facts as outlined in the transcript would sustain the conclusion that the wife should support or assist in supporting the children, the determination that it is the duty of the father to maintain them entirely can also be reasonably made. No arbitrary rule can be laid down as to what particular facts must appear before a court may decide that a husband, a wife, or both, must contribute to the support of children. Matters of this character, regard being had to the circumstances of the respective parties (Civ.Code, sec. 139) are ordinarily left to the trial court for decision. In a divorce proceeding it is not ground for reversal that a particular finding was not made if the decree based on the evidence sufficiently covers a general or specific allegation of the complaint in that regard. We may not say as a matter of law that the trial court, in placing the whole burden of supporting the children upon the husband, abused its discretion merely because the wife is in receipt of a larger income than the husband.

[6-8] Furthermore, on such a proceeding an allowance of counsel fees to the wife for the prosecution or defense of the action may be awarded when "necessary." Civ.Code, sec. 137. An award prior to the filing of an appearance or the trial is made only upon the presentation of facts which indicate the necessity and the probable value of the services to be performed. However, "supplemental allowances may be made." Collins v. Welsh, 2 Cal.App.2d 103, 109, 37 P.2d 505, 508. An allowance may not be made for past services (Dixon v. Dixon, 216 Cal. 440, 14 P.2d 497), but a prayer in the complaint requesting counsel fees may be deferred for final determination until the filing of the interlocutory decree. Baker v. Baker, 64 Cal.App. 778, 222 P. 863. The fact that the amount of the attorney's fee is made in the judgment rather than in a separate order is immaterial; therefore the postponement of such matter by stipulation is not prejudicial. Farrar v. Farrar, 41 Cal.App. 452, 182 P. 989.

[9] A statement in open court prior to trial that the fixing of the additional amount of attorney's fees may be postponed by stipulation until after the evidence has been heard, which statement is not contradicted during a discussion of the amount to be allowed, is a stipulation sufficient for a reviewing court to assume, in the absence of circumstances to the contrary that the order made pursuant thereto is valid. Code Civ.Proc., sec. 283; Ward v. Goetz, 33 Cal.App. 595, 165 P. 1022.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concurred.



57 Cal.App.2d 753

STEGEMAN v. VANDEVENTER et al.

Civ. 3028.

District Court of Appeal, Fourth District, California.

March 23, 1943.

Hearing Denied May 20, 1943.

1. Brokers ⇐38(4)

In action by client against broker for fraud in turning in to client prospective oil land at many times its reasonable market value, finding that such land had a value of $1,250, and finding that client paid only $2,725 instead of $2,825, were not sustained by the evidence.

2. Brokers ⇐38(7)

A broker who had deliberately defrauded his client should not be allowed

to escape payment of interest which broker had in writing acknowledged to be payable to client.

3. Evidence ⇐113(8)

The cost of land in 1939 when broker acquired it did not necessarily determine its reasonable market value in 1940, when broker fraudulently induced client to buy it.

4. Husband and wife ⇐262(1)

Where wife of broker signed divers deeds with her husband, presumption, in absence of any evidence to the contrary, was that the property involved before execution of joint tenancy deed to them was community property.

5. Husband and wife ⇐232(3)

In action by client against broker and wife for fraud in inducing client to buy prospective oil land at price of many times its reasonable market value, evidence showed that wife joined with husband in acts necessary to the consummation of the fraud and retained much of the benefit growing out of it.

6. Husband and wife ⇐21, 24, 25(1, 6)

A husband or a wife may act as agent for the other, and such agency may be proved by circumstantial as well as by direct evidence.

7. Husband and wife ⇐24, 25(6)

Much less proof is required to establish agency of one spouse for the other than in other cases.

8. Husband and wife ⇐23½, 25(5)

An agency of one spouse for another may be established by proof of ratification of acts already performed without previous authority.

9. Husband and wife ⇐25(5)

Where wife of broker participated in husband's fraud on client and accepted fruits thereof which remained in her possession, wife could not escape liability therefor.

10. Contracts ⇐266(1), 271

As a rule, one attempting to rescind a contract must give notice of rescission to adversary with an offer to restore the consideration received as a "condition precedent" to his bringing an action to rescind.

See Words and Phrases, Permanent Edition, for all other definitions of "Condition Precedent".

11. Contracts ⇐266(1), 271

Where without fault of one wishing to rescind a contract circumstances have arisen that make it impossible to effect a full rescission or where the rights of the other party can be fully protected by a court of equity, as where by reason of a confidential relation court may find that a trust has been created by operation of law, notice of rescission and offer to restore consideration received are unnecessary.

12. Brokers ⇐38(1)

Where client timely brought action against broker for fraudulent inducement of purchase of prospective oil land, and client had no part in transactions which made it impossible to restore the status quo ante, and broker by reason of confidential relation could be held to hold property obtained in trust for client, and no prejudice had resulted from lack of notice to rescind and offer to restore consideration received, such lack could not bar client's action.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by A. E. Stegeman against V. W. Vandeventer and another on account of fraud. From a judgment against named defendant for $1,475 and refusing a judgment against the other defendant and rescission of a contract, the plaintiff appeals.

Reversed.

Alfred Siemon and Bennett Siemon, both of Bakersfield, for appellant.

H. E. Schmidt, of Bakersfield, for respondents.

MARKS, Justice.

This is an appeal from a judgment in favor of plaintiff in the sum of $1,475, and refusing judgment against Cora M. Vandeventer and rescission of a contract.

Defendant V. W. Vandeventer was a duly licensed real estate broker. Cora M. Vandeventer was his wife. They owned their home in Bakersfield. There was an unpaid principal balance of $1,650 of a debt due plaintiff by both defendants secured by a deed of trust on this property.

Early in 1939, plaintiff and Vandeventer entered into an agreement whereby plaintiff paid Vandeventer $750 which the latter was to use in securing oil leases in New Mexico. The two were to share the profits of the venture.

Vandeventer did not secure the leases and did not return the money. In 1940 it was agreed that he purchase prospective oil property in Fresno County for plaintiff at a cost of about $3,000. On April 12, 1940, plaintiff gave Vandeventer an additional $150 to be used in this purchase. Vandeventer gave plaintiff the following instrument:

"Agreement

"I, V. W. Vandeventer, received from A. E. Stegeman $1000.00 in the following manner,

$750.00 from cancelled oil lease sales agreement.
100.00 voluntary interest.
150.00 check.

1000.00

to be used to obtain potential oil land for A. F. Stegeman subject to his approval

"Bakersfield California.

"June, 7, 1940.

"(Signed) V. W. Vandeventer"

Vandeventer represented to plaintiff that he had found ten acres of land in the general neighborhood of the Kettleman Hills oil fields in Fresno County which could be purchased for $3,000. The two went to see the property and plaintiff consented to its purchase. Later Vandeventer reported that developments tended to indicate that this ten acres was not a good prospect for oil development and suggested the acquisition of another ten acres in the same general locality for the same price. Plaintiff consented to this transaction without seeing the land. Vandeventer did not acquire it. He again reported against its purchase because of subsequent unfavorable indications from other drilling operations.

Vandeventer had purchased for himself twenty acres of land northwest of Wasco in Kern County for $1,000 and had sold ten acres of this land as prospective oil property for $2,000. He found a resident of Fresno who owned ten acres of land near Tranquility in Fresno County. The two exchanged their properties without either paying the other any added consideration. The land near Tranquility had cost the owner five dollars an acre and there is evidence in the record that its market value was $35 per acre in June, 1940.

The deed from V. W. Vandeventer and Cora M. Vandeventer conveying the ten acres near Wasco was dated and acknowledged on June 11, 1940. It bore the statement, "Consideration less than $100.00." The deed conveying the ten acres near Tranquility to Vandeventer was dated and acknowledged on June 12, 1940. It also bore the statement, "Consideration less than $100.00." Neither deed had United States Internal Revenue stamps attached at the time of the exchange. On January 20, 1941, Vandeventer attached, and cancelled, revenue stamps of the value of fifty-five cents to the deed which he received.

Vandeventer reported to plaintiff that he could acquire ten acres of land in the Tranquility District in Fresno County for about $3,000. Without inspecting the property, and relying on the statements of Vandeventer that it was prospective oil land that could be acquired for about $3,000, plaintiff agreed to purchase it.

The deed from V. W. Vandeventer and Cora M. Vandeventer conveying this property to plaintiff was dated June 14, 1940, and was recorded June 15, 1940. It had attached to it three dollars in United States Internal Revenue stamps which were cancelled.

Plaintiff gave defendants $2,825 as consideration for the Fresno County property. This was paid in the following manner: Cancellation of the $1,000 debt evidenced by the writing dated June 7, 1940; satisfaction of the debt of $1,650 and the encumbrance on the Bakersfield property and the conveyance of this property to defendants as joint tenants with the right of survivorship; $175 in cash paid by plaintiff to Vandeventer. The joint tenancy deed conveying the Bakersfield home to defendants was dated June 28, 1940, and recorded July 5, 1940. The reconveyance of that property by the trustee under the deed of trust was dated and recorded on the same days.

Under date of July 1, 1940, defendants signed and acknowledged a deed of trust on the Bakersfield property to secure a note for $600 payable to Nellie L. Jones whom it was admitted was an innocent party in the transaction and actually loaned defendants that sum. This deed of trust was recorded on July 5, 1940.

On August 28, 1940, Vandeventer executed and recorded a declaration of homestead on the Bakersfield property in which he estimated its cash value at $4,000.

[1] The complaint alleges fraud on the part of both defendants. The trial court found all of the foregoing facts to be true,

except that it was found that the value of the Fresno County land conveyed to plaintiff was $1,250. We can find no evidence in the record sustaining such an estimate of value. It was particularly found that "defendant did not then or at any time state or declare or otherwise disclose to the plaintiff the manner in which he had acquired said land or the consideration which he had actually paid therefor, but represented, stated and declared to the plaintiff that he had paid the sum of $3,000 for said land; that said representation was false and untrue and was made for the purpose of cheating and defrauding the plaintiff, and that said defendant did not disclose to the plaintiff the manner in which he acquired said land or the consideration which he had paid therefor, in order that plaintiff might believe that he had purchased the same for the sum of $3,000.00; and that the plaintiff did believe such representations and did believe that said defendant had purchased said 10 acres of land in said Section 14 for the sum of $3,000.00." The actual price paid by plaintiff was $2,825 and not $2,725, as found.

The amount of the judgment of $1,475 against Vandeventer was arrived at by the trial court as follows: Paid by Plaintiff: release of the secured debt of $1,650; cash paid in June, 1940, $175; cash paid in April, 1939, $750, and in April, 1940, $150; total, $2,725; less $1,250, which the trial court found was the value of the Tranquility ten acres conveyed to plaintiff. This left a balance of $1,475 which the trial court found was the secret profit made by the agent in the transaction.

[2] That this computation is not correct is clear from what we have already said. It fails to take into consideration the $100 interest which Vandeventer recognized as payable by him in the agreement which he signed on June 7, 1940. It was suggested at the trial that this interest charge was usurious. We find no evidence of usury there. Vandeventer had the use of the $750 for about fourteen months, and of the $150 for about two months. Interest on those sums for those periods at twelve per cent per annum exceeds $100. We see no good reason why the agent who had deliberately defrauded his principal should be allowed to escape payment of this interest which Vandeventer had acknowledged in writing to be payable to plaintiff.

As we have already observed, there is no evidence to sustain the finding that the value of the Fresno County property conveyed by defendants to plaintiff was $1,250. The highest estimate of the reasonable market value of this property in June, 1940, which we can find in the record is $35 per acre, or $350.

In determining the amount of secret profit made by the agent out of the transaction, plaintiff should have been credited with having paid $2,825, instead of $2,725, for the property, and defendants should not have been credited with giving plaintiff a value of $1,250, but a much smaller sum.

[3] The only evidence to the contrary we can find bearing on this question is that of Vandeventer. He testified that he paid Samuel R. Cokely, the former owner, $1,000 for the twenty acres near Wasco, ten acres of which was traded for the property near Tranquility; that he had to borrow the $1,000 and that he paid $1,500 bonus for the loan. Accepting his description of this most unusual transaction as true it does not change the fact that the selling price of the twenty acres was $1,000, or $50 an acre. If all parts of the twenty acres were of equal value, the cost to Vandeventer of the ten acres involved in the trade was $500 and not $1,250. The cost of the land in 1939, when Vandeventer acquired it, does not necessarily determine its reasonable market value in 1940.

Judgment was refused against Cora M. Vandeventer because she was not a party to any of the fraudulent representations which her husband made to plaintiff. While this may be true, she did take an active part in the fraud and now retains the profits, or some of them.

[4, 5] In the absence of all evidence to the contrary we must assume that all of the property of defendants involved in this transaction prior to the execution of the joint tenancy deed to them dated June 28, 1940, was community in which Mrs. Vandeventer had a vested interest. She signed the deed to the ten acres near Wasco which was exchanged for the Fresno County property. She signed the deed conveying that property to plaintiff. That deed bore $3.00 in revenue stamps which, under the federal law, was a representation of a selling price of $3,000. She accepted the deed conveying the Bakersfield property to her as one of the joint tenants and still retains that interest in the property. She has the benefit of the declaration of home-

stead which her husband placed on it. Thus she not only performed acts which were necessary to a consummation of the fraud but still retains much of the benefits growing out of it.

[6-8] It is well established in California that a husband or a wife may act as agent for the other; that the agency may be proved by circumstantial as well as by direct evidence (Puget Sound Lumber Co. v. Krug, 89 Cal. 237, 26 P. 902; Rauer's Law, etc., Co. v. Berthiaume, 21 Cal.App. 670, 132 P. 596, 833; Clendenin v. White, 62 Cal.App. 664, 217 P. 761); that it requires less evidence to establish agency in a case of this kind than in other cases (Rauer's Law, etc., Co. v. Berthiaume, supra; Wagoner v. Silva, 139 Cal. 559, 73 P. 433); that such an agency may be established by proof of ratification of acts already performed without previous authority. Schader v. White, 173 Cal. 441, 160 P. 557.

The case of Althof v. Conheim, 38 Cal. 230, 99 Am.Dec. 363, is persuasive on this question. The wife resided in San Francisco and conducted a business there. While the husband was residing in another state the wife purchased a piece of property partly with her own money and partly with borrowed money. This loan was evidenced by the promissory note of the wife alone. She took the deed to the property in her own name. Later the husband came to California and he and his wife resided on the property and sold part of it, both joining in the deed. The lender of the money sued both the husband and wife for the money loaned and prayed that the judgment be made a lien on the unsold portion of the property. The trial court sustained the demurrer of the husband to the complaint and entered judgment in his favor. In reversing the judgment the Supreme Court said: "But the demurrer of the husband ought to have been overruled. If the wife had no previous authority from the husband to contract the debt to the plaintiff, he adopted and ratified the transaction by using and occupying the lot, selling a portion of it, and appropriating the proceeds to his own use. Whilst dealing with the property as his own, which was in part paid for with the plaintiff's money, borrowed by the wife for that purpose, the law will presume either that the wife had authority to contract the loan, or that the husband has since ratified the transaction and agreed to be bound by it. He will not be allowed to say that he ratifies so much of it as inures to his advantage, by accepting the benefit of a purchase made by his wife partly with the plaintiff's money, but repudiates so much of it as requires the sum advanced by the plaintiff to be refunded. He must take the transaction cum onere, if he adopts it at all. In ratifying the purchase by his wife, he ratifies her engagement to the plaintiff as well, and in adopting one he adopts the other."

The case of Althof v. Conheim, supra, was quoted from and followed in Hulsman v. Ireland, 205 Cal. 345, 270 P. 948, 951, where the husband and wife were sued for the debts of a partnership of which the wife, but not the husband, was a member. The trial court gave judgment against the wife but refused the plaintiffs judgment against the husband. In reversing the portion of the judgment in favor of the husband it was said: "This presents such a clear case of ratification of the acts of the wife as to leave us in no doubt that her action had his express consent. To allow him to stand by and take the profits, had there been any, without assuming the burdens, would be to support a principle which would work an injustice to creditors dealing in good faith with one spouse as the representative of the other."

Meyer v. Thomas, 37 Cal.App.2d 720, 100 P.2d 360, 1066, and Brown v. Oxtoby, 45 Cal.App.2d 702, 114 P.2d 622, are to the same effect.

[9] We therefore conclude that Cora M. Vandeventer, having participated in the fraudulent transaction, having accepted the fruits of the fraud which still remain in her possession, cannot escape liability for the results of the fraud while still retaining parts of the benefits. The judgment in her favor cannot be allowed to stand.

Defendants urge that as the plaintiff gave no notice of rescission before this action was filed, he cannot claim a rescission now. While no notice of rescission was given, the amended complaint upon which the action was tried did allege that the plaintiff was ready, able and willing to reconvey to defendants the ten acres of land near Tranquility which was all that he had received from defendants.

[10, 11] As a general rule it is firmly established in California that a party attempting to rescind a contract must give notice of rescission to his adversary with

an offer to restore the consideration he has received as a condition precedent to his bringing an action to rescind. 4 Cal.Jur. 763. There are equally well recognized exceptions to this rule. Two of these exceptions need be noted here. One of these is where, without fault of the plaintiff, circumstances have arisen that make it impossible to effect a full rescission, and the other is where the rights of the defendant can be fully protected by the decree of a court of equity. Lawrence v. Ducommun, 14 Cal.App.2d 396, 58 P.2d 407; Zeller v. Milligan, 71 Cal.App. 617, 236 P. 349. The latter class of cases may, and sometimes does, arise where there is a confidential relation existing between the parties, and the court may find that a trust has been created by operation of law. More v. More, 133 Cal. 489, 65 P. 1044, 66 P. 76; Donnelly v. Rees, 141 Cal. 56, 74 P. 433; Gatje v. Armstrong, 145 Cal. 370, 78 P. 872; Walsh v. Majors, 4 Cal.2d 384, 49 P.2d 598; Mabry v. Randolph, 7 Cal. App. 421, 94 P. 403.

[12] In the instant case, defendants, at the time they acquired title to the Bakersfield property, borrowed $600 from Nellie L. Jones and placed an encumbrance on the property to secure that debt. That Nellie L. Jones was an innocent party is not questioned. Shortly thereafter Vandeventer placed a homestead on the property. Plaintiff had no part in either of these transactions which made it impossible to restore the parties to the exact position they occupied before the fraud was perpetrated on plaintiff. What was said in Zeller v. Milligan, supra [71 Cal. App. 617, 236 P. 353], should be appropriate here:

"The instant action was commenced on the day following the discovery by plaintiff of the alleged fraud which had been practiced upon her by the defendants. The law abhors idle acts. A formal notice of rescission on the same day on which the suit was instituted would have given the defendants no information differing either in nature or extent from that contained in the allegations of the complaint; nor were defendants' rights in the premises in any manner changed or prejudiced by reason of the plaintiff's failure to give such notice.

"Adopting the language used by the Supreme Court in the case of California F. & F. Co. v. Schiappa-Pietra, 151 Cal. 732, 742, 91 P. 593, 596: 'We are therefore of the opinion that the circumstances shown by the complaint fully justify the failure of plaintiffs to offer to restore possession of the property before the commencement of the action, and bring the case within those classes of cases in which no such offer is necessary as a condition precedent to action.'"

That Vandeventer was the agent of plaintiff in the transaction, and that a confidential relation existed between the parties, cannot be doubted. Here, the agent, by fraud, obtained the property of his principal and may be held to hold it in trust for the principal he defrauded.

Factually, the case of Mabry v. Randolph, supra, is similar to the instant case. In holding that a notice of rescission was not a necessary prerequisite to bringing the action, the court said [7 Cal.App. 421, 94 P. 406]:

"The law prohibits an agent from purchasing property after the creation of the agency and selling it to his principal at an advance without a full disclosure to his principal of all the facts connected with his purchase. Nothing is wanting to establish a case of the grossest fraud. * * *

"The other ground of the motion, that a sufficient notice of rescission was not served by plaintiff, cannot be considered in connection with the facts of this case. Rescission is not an exclusive remedy in cases of fraud of this character. Where a trustee obtains the property of his beneficiary by fraudulent means, a court of equity may direct a reconveyance of the property upon terms appropriate to the case without any previous effort at rescission by the party defrauded."

In the instant case the trial court may find it impossible to restore the parties to the exact position they occupied before the fraud was perpetrated. However, if we understand plaintiff correctly, he may be satisfied with a decree restoring his lien on the Bakersfield property as security for the former debt of $1,650, subject to the incumbrance of Nellie L. Jones, but prior to the declaration of homestead, and reviving the indebtedness of $1,000 and $175; that the decree may order him to convey the ten acres near Tranquility to defendants or either of them. A court of equity should find little difficulty in doing substantial justice between the parties in a case of this kind.

The judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concurred.

57 Cal.App.2d 1021

PEOPLE v. ROY.

Cr. 3676.

District Court of Appeal, Second District, Division 2, California.

March 24, 1943.

Criminal law ⇐1182

Where transcripts on appeal wer filed in District Court of Appeal on November 6, 1942, and the cause was set for hearing on March 24, 1943, and on the latter date there was no appearance on behalf of the defendant, either by brief or otherwise, the judgment and order denying motion for new trial were affirmed. Pen.Code, § 1253.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Proceeding by the People against Robert H. Roy. From adverse judgment, the defendant appeals.

Affirmed.

No appearance for appellant.

Robert W. Kenny, Atty. Gen., for respondent.

PER CURIAM.

November 6, 1942, the transcripts on appeal were filed in this court. Thereafter the cause was set for hearing on March 24, 1943. On the latter date there was no appearance on behalf of appellant, either by brief or otherwise;

Therefore, pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order of the trial court denying motion for new trial are, and each of them is, affirmed.



57 Cal.App.2d 585

PEOPLE v. BATEMAN.

Cr. 3662.

District Court of Appeal, Second District, Division 2, California.

March 9, 1943.

1. Criminal law ⇐1144(13)

On appeal from a conviction, the evidence would be viewed in the light most favorable to the people. Pen.Code § 337a, subd. 3.

2. Gaming ⇐98(3)

Where evidence showed that defendant received from another money and a piece of paper commonly denominated a "betting marker" frequently used by those engaged in bookmaking activities, trial judge was justified in drawing inference that essential elements were present to constitute a violation of the Penal Code, Pen.Code § 337a, subds. 1, 3.

3. Criminal law ⇐472

The testimony of a duly qualified expert is admissible to explain the significance of cryptic letters and figures which appear upon papers, books and paraphernalia customarily used by bookmakers.

4. Criminal law ⇐448(7), 472

Where police officer qualified as an expert upon bookmaking activities, he was properly permitted to identify a yellow slip as a "betting marker" used by bookmakers and to testify what the words and figures appearing thereon meant.

See Words and Phrases, Permanent Edition, for all other definitions of "Betting Marker".

5. Courts ⇐91(1)

Any statements contained in a prior case decided by District Court of Appeal which were contrary to the law laid down in a subsequent case wherein the Supreme Court had denied a hearing would be deemed to have been overruled.

6. Courts ⇐90(1)

A later decision overrules prior decisions which conflict with it whether such prior decisions are mentioned and commented upon or not.

Appeal from Superior Court, Los Angeles County; William R. McKay, Judge.

Benjamin Bateman was convicted of violating Pen. Code § 337a, subd. 3, and his motion for a new trial was denied, and he appeals from both the conviction and order denying motion for a new trial.

Judgment and order affirmed.

Philip S. Schutz, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From judgments of guilty of violating section 337a, subdivision 3 of the Penal Code, after trial before the court without a jury, defendant appeals. There is also an appeal from the order denying defendant's motion for a new trial.

[1] The evidence being viewed in the light most favorable to the People (respondent), the essential facts are:

On May 18, 1942, Officer Boswell of the Los Angeles Police Department saw defendant enter a drug store at 300 South Hill Street. Officer Boswell walked to the doorway of the drug store and saw defendant standing before a counter, on the other side of which was the druggist, Max Fisher. The officer saw Mr. Fisher hand defendant some currency and a yellow slip of paper. The currency defendant placed in the right pocket of his shirt and, as the officer walked into the store and defendant saw him, he started to tear up the yellow sheet of paper. Then he handed it to the officer who placed him under arrest. Sixty-two dollars was found in defendant's right shirt pocket.

After qualifying as an expert upon bookmaking activities in the city of Los Angeles, Officer Boswell identified the yellow slip of paper as a "betting marker" used by bookmakers in the city of Los Angeles. He further testified that names on the betting marker such as "Red Weatherly," "The Finest," and "Saving Grace" were names of horses that were racing on various tracks in the United States on the day defendant was arrested. He also testified that the characters "5-b," "P," and "1-10" appearing below the words "The Finest" indicated that the horse named "The Finest" was to run in the first race at the Belmont race track, and that the amount of the bet was a one dollar insured place wager. He also testified that a horse named "The Finest" was in fact running in the first race at the Belmont Park race track on May 18, 1942.

On the way to the police station Mr. Fisher was shown the betting marker he had handed to defendant and in the presence of defendant was asked what the notations indicated, to which he replied that they indicated horses and races. He was also asked how long he had been placing bets with defendant, to which he replied, "Several days."

Defendant was then asked by the police officer what his employer who owned the parking lot where defendant was employed would do if he knew defendant was out taking bets, to which defendant replied, "He would probably 'can' me."

Defendant urges reversal of the judgment on two propositions which will be stated and answered hereunder seriatim.

[2] *First: Independent of the inferences to be drawn from defendant's conduct when confronted with accusatory statements of the police officer on the way to the police station, there is no substantial evidence to prove the corpus delicti of the crimes of which defendant was convicted.*

This proposition is untenable, in view of the decisions in People v. Newland, 15 Cal. 2d 678, 104 P.2d 778; People v. Kahn, 27 Cal.App.2d 645, 81 P.2d 632; People v. Miropol, 33 Cal.App.2d 297, 298, 91 P.2d 230; and People v. Abraham, 53 Cal.App. 2d 564, 128 P.2d 39. In the cases cited the evidence was no stronger than in the instant case. Nevertheless, the convictions were sustained in the first case by our Supreme Court and in the others by this court.

From the record it appears that defendant received from Mr. Fisher money and a piece of paper commonly denominated a "betting marker," frequently used by those engaged in "bookmaking" activities in the county of Los Angeles. From this evidence the trial judge under the decisions above cited was justified in drawing the inference that the essential elements were present to constitute a violation of section 337a, subdivisions 1 and 3 of the Penal Code.

Second: The trial court committed prejudicial error in permitting Officer Boswell to testify that the yellow slip of paper defendant received from Mr. Fisher was a betting marker, and as to the significance of the letters and figures appearing thereon.

[3, 4] This proposition is untenable. The law is established in California that the testimony of a duly qualified expert such as Officer Boswell, is admissible to explain the significance of cryptic letters and figures which appear upon papers, books, and paraphernalia customarily used by bookmakers (People v. Hinkle, 64 Cal.App. 375, 378, 221 P. 693; see also People v. Pruitt, 1942, 55 Cal.App.2d 272, 277, 130 P. 2d 767).

[5, 6] In view of the fact that our Supreme Court has denied a hearing in the last cited case any statements contained in People v. Davis, 1941, 47 Cal.App.2d 331,

334, 117 P.2d 917, contrary to the rule of law above stated must be deemed to have been overruled. It is an established rule of law that a later decision overrules prior decisions which conflict with it, whether such prior decisions are mentioned and commented upon or not (Asher v. State of Texas, 128 U.S. 129, 131, 9 S.Ct. 1, 32 L.Ed. 368; Kenney v. Antioch L. O. School Dist., 18 Cal.App.2d 226, 231, 63 P.2d 1143; Outer Harbor D. & W. Co. v. City of Los Angeles, 49 Cal.App. 120, 124, 193 P. 137; Palvutzian v. Terkanian, 47 Cal.App. 47, 52, 190 P. 503).

For the foregoing reasons the judgment and order are and each is affirmed.

MOORE, Presiding Justice.

I concur. The record discloses that Officer Boswell qualified as an expert in the methods and practices of bookmakers in Los Angeles County by having testified in 175 cases and by having made a study as to the methods of such bookmakers. All of his testimony relative to documents was as to their meaning when translated into intelligent idiom from the "common parlance" of the bookmaker and interpreted in the light of "common usage" of the bookmaker's world. It was after he had qualified and while in the course of giving such testimony that he stated the meaning of certain digits, letters and words found on the betting marker. He did not in any instance declare what he thought they meant or what he thought they should mean. His testimony was emphatic to the effect only that the symbols appearing on the exhibit were taken from the parlance of the bookmaker and that they have the significance he ascribed to them in ordinary English. In such view his testimony came within the rule of the Pruitt case, (55 Cal.App.2d 272, 130 P.2d 767) and the Hinkle case (64 Cal.App. 375, 221 P. 693) and was competent proof.

By concurring with the statement that the Davis case decided by this court in October 1941 must be deemed to have been overruled by the denial of a hearing in the Pruitt case, decided by this court in October, 1942, I do not mean to hold that every denial of a hearing by the Supreme Court of a case decided by us contrary to another decision of a district court of appeal necessarily signifies an overruling of the older decision. However, upon a more mature consideration of the two opinions it is clear that they hold adversely upon two sets of facts identical in respect to the rulings upon the testimony of experts, and therefore the denial of hearing in the Pruitt case must be construed as a disapproval of the Davis decision. In both cases the prosecution called to the stand officers who qualified by their police experience in the pursuit of such criminals, and by their familiarity with the parlance and the usages, devices and methods common to the bookmakers' paradise. In each case the officer testified to the meaning of no word or symbol appearing upon the exhibit under consideration before he had first qualified as an expert by his knowledge of the bookmaking craft in Los Angeles County. The only differences between the opinions in the two cases are (1) that in the Davis case the court considered the officer's interpretation of the symbols found on the exhibit, apart from his qualification as an expert, while in the Pruitt case we considered the opinions of the witness as those of an expert who knew the meaning of the "letters and digits unintelligible to the layman." (2) Whereas the Davis case was reversed on account of the rulings with respect to the officer's testimony, in the Pruitt case, after announcing the rules which made the officer's testimony proper, we impliedly approved of the Davis decision by denying a reversal by virtue of article VI, section 4½ of the Constitution. We should have omitted reference to the Constitution. There was no error in the court's ruling. If the expert's testimony was competent in the Pruitt case, as we held it to be, then under the cited authority of People v. Hinkle, it was likewise competent in the Davis case. If it had been improperly received in the Pruitt case, surely the Supreme Court would not have permitted the Pruitt decision to stand against a challenge based upon the Davis holding, unless its intention was to indicate a disapproval of the Davis decision. The two held adversely.

The invocation of section 4½ in the Pruitt opinion was unfortunate; also it was unnecessary. If the testimony of the officers who took the stand against Pruitt had been inadmissible there would have been a hiatus in the proof, in which event there could have been no conviction. Therefore, the judgment should have been affirmed solely upon the principle that "letters and digits unintelligible to the layman" is a part of the "expert knowledge gained by those who have devoted years to the pursuit of such criminals and to a study of their devices, crafts and methods". People v.

Pruitt, supra [55 Cal.App.2d 272, 130 P.2d 770].

W. J. WOOD, Justice.

I concur in the judgment of affirmance. The Supreme Court denied applications for hearings in both People v. Davis, 47 Cal. App.2d 331, 117 P.2d 917, 918, and People v. Pruitt, 55 Cal.App.2d 272, 130 P.2d 767, 770. The fact that the denial of a hearing in the Pruitt case was at a date later than the denial of a hearing in the Davis case does not establish the rule that any statements in the Davis opinion which may be contrary to the ruling in the Pruitt case must be deemed to have been overruled. In my opinion, however, there is no occasion to pass upon the effect upon the Davis case of the later denial of a hearing in the Pruitt case, for there is no inconsistency in the rulings of the two cases. The crux of the opinion in the Davis case is found in the following notation from the opinion: "From the foregoing it will be noted that the officer was not asked as to the custom or manner in which alleged bookmakers operated, but was permitted to testify to the meaning of certain numerals and letters. This testimony, in the form here presented, should not have been admitted." In the Pruitt case we held: "But because such officers may so testify does not authorize them to assume the role of omniscience and advise the jury as to the thought recorded by means of such symbols on betting markers found in the possession of the accused. Such testimony is speculation and is not admissible for any purpose." The judgment of the lower court in the Davis case was reversed because of the error in the admission of testimony but in the Pruitt case the judgment was affirmed because there had been no miscarriage of justice as that term is used in article VI section 4½ of the Constitution of California.

In the present case the police officer who was sworn as an expert witness based his testimony concerning the paper found in the possession of defendant upon the usage and custom of bookmakers in Los Angeles. He described the paper as a "betting marker" and stated that in common practice it was used by bookmakers to record wagers. Referring to certain letters and figures on the paper the prosecutor asked the witness, "Now in common usage what do they indicate with respect to bookmaking activities?" An objection was made by defendant and the prosecutor explained: "My question doesn't contemplate the meaning of these particular figures. I am asking him what in common parlance in bookmaking activities generally such a figure means." The question was permitted. The answer given by the witness clearly referred to the significance of the lists and figures in bookmaking activities generally. The court evidently was taking pains to avoid the error of the Davis case, for after some further testimony by the witness the record discloses the following question by the court: "You base your testimony not on this particular memoranda and the marks thereon, but on the customs and usages incident to the bookmaking fraternity in this community or vicinity, as to the manner in which they generally conduct their business?" The witness answered in the affirmative. It is apparent from the foregoing that the court did not err in admitting the testimony of the officer. People v. Hinkle, 64 Cal.App. 375, 221 P. 693.



57 Cal.App.2d 665

MORRIS et al. v. GEORGE et al.
Civ. 6367.

District Court of Appeal, Third District, California.

March 17, 1943.

1. Appeal and error ⇐931(1), 1010(1)

Judgment will not be reversed as not supported by sufficient evidence unless it appears from record that, accepting full force of evidence adduced, with every reasonable inference therefrom favorable to prevailing party, law precludes him from recovering judgment.

2. Appeal and error ⇐931(1)

On appeal, evidence must be construed most strongly against losing party and every inference and presumption fairly deducible from evidence should be resolved in favor of prevailing party.

3. Appeal and error ⇐931(1), 989

On appeal, prevailing party's evidence must ordinarily be accepted as true and contradictory evidence disregarded.

4. Waters and water courses ⇐247(2)

In suit to compel defendants to restore irrigation ditch which conveyed water across defendants' realty to plaintiffs' realty, and concrete boxes in ditch, on ground that plaintiffs had an easement, evidence that ditch was located on defendants' realty and was used to irrigate plaintiffs' realty a number of years before defendants purchased realty, sustained judgment that plaintiffs were entitled to easement.

5. Judgment ⇐21

A judgment must be sufficiently definite and certain to enable it to be enforced and if it is not certain and cannot be made certain by inspection of judgment roll, it is void.

6. Injunction ⇐204

An injunction should contain sufficient information on its face to apprise party on whom it is served of what he is restrained from doing.

7. Waters and water courses ⇐247(2)

Injunctive portions of judgment requiring defendants to restore irrigation ditch destroyed by defendants, and enjoining them from in any way interfering with plaintiffs' use of ditch and irrigation therefrom, was sufficiently clear to enable defendants to know what was required of them and hence judgment was not void for uncertainty.

8. Waters and water courses ⇐247(2)

Portion of judgment requiring defendants to remove from plaintiffs' land a concrete stop-gate constructed by defendants in irrigation ditch was not void for uncertainty because defendants were not informed how much of gate encroached on plaintiffs' realty.

9. Waters and water courses ⇐247(2)

Portion of judgment ordering defendants to maintain boards in drops or gates in irrigation ditch, so as to restrain water in the ditch so that it would not flow too rapidly, was not so indefinite as to be void.

10. Waters and water courses ⇐247(2)

Portion of judgment which by mandatory injunction required defendants to remove portion of wing of concrete headgate encroaching on plaintiffs' land some 15 to 20 inches was not improper under rule that where issuance of injunction works inequitable burden, court may refuse to grant it if injured person may be adequately compensated in damages.

11. Injunction ⇐23

Only where it will involve great difficulty and expense to relieve trivial encroachment on realty of another, causing only slight damage, is court justified in refusing mandatory injunction.

12. Waters and water courses ⇐242

A compromise agreement between plaintiffs and defendants giving plaintiffs right to flow drainage water down ditch, but providing that at no time should flow of drainage water exceed four cubic feet per second, and that no part of bottom of drainage ditches or structures therein should be raised or allowed to fill to greater height than that existing at, or previous to date of agreement, did not authorize defendants to maintain obstructions in ditch, though they may have existed at date of agreement, to prevent water from draining through ditch.

13. Waters and water courses ⇐247(2)

Where change in plaintiffs' method of irrigation did not increase burden of drainage over defendants' realty, but, if anything, lessened it, and agreement between plaintiffs and defendants limited drainage to four cubic feet per second, change of method of irrigation did not create new and additional burden, and court did not err in compelling defendants to change ditch to accommodate drainage after change in method of irrigation.

14. Evidence ⇐448

Evidence showing that for many years drainage ditch over defendants' realty was used to drain excess water from plaintiffs' lands, was not erroneously admitted on ground that it varied terms of written contract, since evidence did not contradict but aided in understanding contract.

15. Waters and water courses ⇐247(2)

Judgment requiring defendants to lower bottom of wooden box in drainage ditch to level of bottom of old concrete box and refrain from maintaining in drainage ditch any obstructions that would prevent excess water of plaintiffs from draining through ditch was not void on ground that it was uncertain.

16. Damages ⇐188(2)

Where evidence showed approximate amount of growing beans destroyed and market value of beans, but there was no

showing as to cost of harvesting and marketing in neighborhood, evidence was insufficient on which to base judgment for damage for loss of bean crop.

Appeal from Superior Court, Stanislaus County; Roy B. Maxey, Judge.

Action by Angelyn Morris, as executrix, etc., and others against A. F. George and another to compel defendants to restore concrete boxes in irrigation ditch, on ground that plaintiffs had an easement over defendants' realty, for an injunction to restrain defendants from maintenance of any part of stop-gate on plaintiffs' realty and the maintaining of a new ditch, and for restoration of old ditch, and for damages and for an injunction against the maintenance of obstructions in ditch, and to restore ditch to its former routing on defendants' realty. From a judgment in favor of the plaintiffs, the defendants appeal.

Judgment affirmed except as to award of damages, and as to that portion judgment reversed and new trial granted on issue of damages only with directions.

Hawkins, Hawkins & Cardozo, of Modesto, for appellants.

Whitehurst & Logan, of Patterson, for respondents.

SCHOTTKY, Justice pro tem.

The Morris Ranch on the west side of Stanislaus County consisted of 359.80 acres. It was bounded on the north by the Crows Landing-Modesto Highway; on the east by a road known as the Kilburn Road; on the south by Orestimba Creek, and on the west by a road known as Crow Lane. After the coming of irrigation to the west side a supply ditch was constructed to bring water from the canal of the San Joaquin and Kings River Canal and Irrigation Company for the irrigation of this and other ranches. This supply ditch entered the Morris Ranch from the west, crossing Crow Lane, and ran through the ranch in a general easterly direction to the Kilburn Road. It then ran along the easterly boundary of the ranch northerly along the Kilburn Road to the northeasterly corner of the ranch where it turned easterly and carried water to other ranches toward the San Joaquin River.

In 1924 Virginia A. Morris, the then owner of the ranch, deeded 191.80 acres lying along the southwest boundary of said ranch to her son Roy L. Morris and his wife, Angelyn H. Morris, respondents here, and the remaining 168 acres to another son, Archer Morris. In both deeds Virginia Morris reserved to herself a life estate which she retained until her death in 1929. In 1930 Archer Morris deeded to appellants Antonio F. George and Maria S. George 85 acres which was the westerly portion of the land he had received from his mother. On April 10, 1933, Antonio F. George brought an action against respondent Roy Morris and his tenants to quiet title to an irrigation ditch marked "Old Ditch" on plaintiffs' Exhibit D, originating at the irrigation company canal on the Roy Morris land and running in a northwesterly direction across said land to the George land and serving a portion of the George land with water for irrigation. The Morrises, defendants in said action, respondents here, filed a cross-complaint in which they claimed the right to drain excess water through a ditch on the George land marked "Drain Ditch" on plaintiffs' Exhibit D, connecting with the "old ditch" just referred to, and claimed that George threatened to obstruct said ditch and prayed that their easement to drain water through said ditch be quieted. A trial was had in the former action, but before a final judgment was entered appellants George purchased from Archer Morris the remaining 83 acres of the Morris Ranch and thus became the owners of all the original Morris Ranch lying easterly from the 191.80 acres belonging to respondents. An agreement of compromise was then entered into on December 11, 1934, by the terms of which appellants George agreed to abandon their claim to the ditch to which they asserted the right to use for irrigating their land, and respondents Morris agreed to build a new ditch for their and appellants' use, said new ditch running from Crow Lane direct to appellants' boundary at the same point where the old ditch entered appellants' land. The agreement provided further that this new ditch was to be constructed by respondents so as to deliver to appellants' land 16 cubic feet of water per second at a height of 5½ inches above the top of the old concrete box marked H on plaintiffs' Exhibit D, which had previously established the height to which water was delivered to the George land. In the same agreement appellants granted respondents the right to flow drainage water through the ditch on appellants' land for the purpose

of draining excess water from respondents' land, but restricting the amount of water that respondents could drain to four cubic feet per second.

Controversies soon developed between the parties both as to the drainage ditch through the first tract purchased by appellants, and as to the main supply ditch through the second tract purchased by appellants, the details of which will be set forth more fully hereinafter; and on October 19, 1936, the instant action was filed by respondents against appellants.

The complaint is in four counts. In the third count respondents claim that appellants failed to build a certain fence, as required by the compromise agreement; but after the complaint was filed the fence was built by appellants and this cause of action was abandoned.

The first count alleges that respondents and appellants own adjoining tracts of land; that for over twenty years respondents have been the owners of an easement to maintain a certain ditch located on second tract purchased by appellants, and of two concrete boxes therein, and to conduct water through said ditch from the main supply ditch of the San Joaquin and Kings River Canal and Irrigation Company for the irrigation of a portion of respondents' land; that appellants removed the concrete boxes from said ditch and destroyed the ditch to respondents' damage in the sum of $1,000; that appellants prevented respondents from using said ditch; and respondents sought damages and the restoration of the said ditch and boxes.

The second count alleges that appellants erected a large concrete stop-gate in said supply ditch next hereinabove mentioned at or near the point where it enters respondents' land, and entered respondents' land and constructed a portion of said stop-gate in and upon respondents' land; that at about the same time appellants changed the course of said supply ditch on their lands and constructed same below said stop-gate with so great a fall that the bottom of the said ditch below said stop-gate has already become badly washed and deepened and that in a few years the sides thereof will wash away and will reach and extend into respondents' land; that the encroachment of the stop-gate constitutes a continuing trespass and the change of the route of the ditch constitutes a nuisance; that by reason of such acts of appellants, respondents have suffered damage in the sum of $1,500 and pray for an injunction restraining the maintenance of any part of the stop-gate on plaintiffs' land and the maintaining of the new ditch on the new course and pray for the restoration of the ditch on the old course and for damages.

The fourth count alleges the execution of the compromise agreement of December 11, 1934; that appellants have obstructed and interfered with the right granted respondents in said agreement to flow drainage water from respondents' land by maintaining obstructions in said drain ditch about 18 inches above the bottom of said ditch constructed by respondents pursuant to said contract at the point where it enters appellants' said land and about 18 inches above the bottom of the old concrete box on appellants' land, which bottom of said concrete box for more than twenty years has established and still establishes the level of the bottom of said ditch at its entrance into appellants' land and through which ditch the excess water from a portion of respondents' land has drained for more than twenty years; that because of said obstruction, placed in said ditch by appellants and maintained by them, excess water which otherwise would have passed down said drain ditch without damage to respondents has backed up and accumulated and remained on respondents' lands and drowned out and destroyed crops of beans growing thereon since the execution of the agreement; that appellants have also changed the routing of said ditch on their land so as to interfere with and prevent the drainage of respondents' land; and respondents pray for $1,000 damages, $2,000 exemplary damages, and for an injunction against maintaining in said ditch any obstruction higher than the bottom of said old concrete box or otherwise obstructing or interfering with respondents' drainage of their land, and to restore said ditch to its former routing on appellants' land.

The answer of appellants raised all material issues. As to Count One, appellants admitted the removal of the concrete boxes and the destruction of the ditch but alleged that respondents did not have any interest or easement in said ditch. As to Count Two, appellants alleged that before re-routing said supply ditch they obtained the consent of respondents and of the San Joaquin and Kings River Canal and Irrigation Company; and appellants justified the encroachment of the concrete box on respondents' land upon the ground that appellants had

an easement and right-of-way for irrigating from the ditch, and the gate was necessary for that purpose.

At the trial respondents did not seek to recover damages as to any count except Count Four, and after a trial lasting three days the trial court found substantially in accordance with the allegations of the complaint and rendered judgment as follows:

"1. On Count No. 1 of said complaint it is ordered, adjudged and decreed that the defendants, A. F. George and Maria S. George be, and they are hereby required to restore the ditch along the boundary line between plaintiffs' and defendants' lands in said complaint and findings and hereinafter described, where destroyed by defendants and to install such boxes, or stop gates, therein as will permit of the irrigation of the property of plaintiffs and as heretofore were installed in said ditch before its destruction by defendants, and that defendants, their successors and assigns, agents, servants and employees, be and they are hereby forever enjoined from in any way interfering with the maintenance and use of said ditch and irrigation of plaintiffs' said field therefrom.

"The land of plaintiffs herein referred to is the following described real property, situated in the County of Stanislaus, State of California, and particularly described as follows, to-wit:"

(Here follows a description of plaintiffs' land, containing 191.80 acres.)

"That the ditch hereinabove referred to is that certain irrigation ditch on defendants' said premises which said irrigation ditch runs through a portion of defendants' said lands adjacent to a portion of the above described boundary line of plaintiffs' said lands specified as follows, to-wit:"

(Here follows a description of boundary line.)

"That the said field of plaintiffs irrigated from said ditch lies immediately southerly from said portion of said boundary line along which said ditch ran as aforesaid.

"2. On Count 2 of said complaint it is ordered, adjudged and decreed that defendants, A. F. George and Maria S. George, their successors and assigns, agents, servants and employees, be, and they are hereby forever enjoined from encroaching upon the land of plaintiffs herein, and it is further ordered, adjudged and decreed that they remove therefrom the concrete portions of that gate installed by them in the irrigation ditch on plaintiffs' land, which conducts water from the main supply ditch of the San Joaquin and Kings River Canal and Irrigation Company and runs in a general easterly direction through plaintiffs' said premises and thence to and through defendants' said premises.

"It is further ordered, adjudged and decreed that the defendants, A. F. George and Maria S. George, their successors and assigns, agents, and employees, be, and they are hereby forever enjoined from constructing or maintaining the said irrigation ditch along the boundary line between plaintiffs' and defendants' land where defendants changed the course of said ditch from its point of entry into their lands from plaintiffs' said lands from the course over which said ditch had heretofore run in any manner that will cause the lateral support of said ditch on plaintiffs' side of said ditch to fall away or subside.

"It is further ordered, adjudged and decreed that defendants A. F. George and Maria S. George, their successors and assigns, agents, servants and employees, be, and they are hereby required to maintain boards in the drops, or gates, in the said main supply ditch so as to restrain water in said ditch hereinabove referred to so that it will not flow too rapidly down said ditch and cause said ditch to wash away and erode.

"3. On Count 4 of said complaint it is ordered, adjudged and decreed that the defendants, A. F. George and Maria S. George, their successors and assigns, agents, servants and employees forthwith restore the drainage ditch on defendants' lands, referred to in said complaint and findings to the condition that it was in previous to the construction of the wooden box therein and that the floor of said wooden box be lowered by defendants to a height not greater than the floor of the concrete box in said ditch; that the defendants, their successors and assigns, their agents, servants and employees, be forever enjoined from maintaining any obstructions in said ditch on defendants' lands higher than the bottom of said old concrete box or otherwise obstructing or interfering with plaintiffs' drainage of their said premises, or from interfering with said ditch in any manner whatsoever or at all other than the upkeep and repair of said ditch.

"The drainage ditch above referred to is that certain ditch on defendants' land through which plaintiffs are granted the

right to flow drainage water for the purpose of draining excess water from plaintiffs' land into the existing ditches or drains in the contract set forth as Exhibit 'A' to the complaint herein, in which ditch is located that certain old concrete box in said contract and hereinabove described, the boundary lines between the lands of plaintiffs and defendants at a point where said ditch leaves plaintiffs' land being described in said contract as being 44 feet, more or less, above said concrete stop gate.

"It is further ordered, adjudged and decreed that plaintiffs have and recover damages against defendants, A. F. George and Maria S. George, in the sum of $500.00 for loss of bean crops in 1935 and 1936 together with the costs herein, which are hereby taxed in the sum of $53.75."

Appellants seek a reversal of the judgment and a retrial of the action as to all three counts, and in their opening brief they make the following points: I. The evidence is insufficient to justify the finding and the judgment based thereon that the plaintiffs were damaged in the sum of five hundred dollars; II. The evidence did not justify the court in ordering defendants to lower the wooden box which was in place on December 11, 1934, the date of the origin of plaintiffs' right, or in ordering defendants to lower the grade of their ditch to an elevation lower than existed December 11, 1934; III. The court erred in compelling defendants to change their ditch and box therein to accommodate an additional burden on the servitude caused by plaintiffs' change in the mode of checking their land and irrigating it; IV. The court erred in admitting evidence, over objection, concerning the prior use of defendants' ditch as a discharge ditch for surplus water; V. The evidence is insufficient to sustain the findings and judgment that plaintiffs are entitled to an easement to irrigate through the ditch on defendants' land acquired in 1934, the field lying "immediately southerly" from said ditch; VI. The court erred in requiring defendants to remove undescribed "portions of that gate installed by them" in the canal of the San Joaquin and Kings River Canal and Irrigation Company; VII. The judgment of the court is void for uncertainty in its injunctive portions. We shall discuss these points in the order that they relate to various causes of action, and not in the order set forth by appellants. Point V relates to the first count; Point VI to the second count; Points I, II, III and IV to the fourth count; and Point VII to all three causes of action.

[1-3] The record in this case is voluminous, the Reporter's Transcript consisting of nearly 500 pages. We have read it with great care and believe that the entire judgment, with the exception of the amount of damages awarded on the fourth count, is abundantly sustained by the record. The evidence was highly conflicting, as is not unusual in cases where the feeling between the parties is such as the record shows it to be in this case. In view of the fact that so great a portion of appellants' argument relates to the insufficiency of the evidence, we deem it proper to repeat what this court said in the recent case of In re Estate of Stahl, 54 Cal.App.2d 565, at page 566, 129 P.2d 475:

"It is a rule too well established to require the citation of authorities that before an appellate tribunal is justified in reversing a judgment upon the ground of the insufficiency of the evidence, it must appear from the record that, accepting the full force of the evidence adduced, together with every inference favorable to the prevailing party which may be drawn therefrom, it still appears that the law precludes the prevailing party from recovering a judgment. The evidence must be construed most strongly against the losing party. Every favorable inference and presumption which may fairly be deduced from the evidence should be resolved in favor of the prevailing party. The prevailing party's evidence must ordinarily be accepted as true, and evidence which is contradictory must be disregarded."

[4] Appellants attack the judgment as to Count One by asserting that "The evidence is insufficient to sustain the findings and judgment that plaintiffs are entitled to an easement to irrigate through the ditch on defendants' land acquired in 1934." The judgment, as hereinbefore quoted in part, requires appellants "to restore the ditch along the boundary line between plaintiffs' and defendants' lands * * * where destroyed by defendants and to install such boxes, or stopgates, therein as will permit of the irrigation of the property of plaintiffs and as heretofore were installed in said ditch before its destruction by defendants."

The evidence shows that this ditch was located on the second tract purchased by appellants as far back as 1919, and that

it was used to irrigate the so-called 40 acre "Creek Field" of respondents up to the time that appellants took the boxes out of it and destroyed it. When appellants purchased the land on which said ditch was located they evidently wanted to get rid of the ditch, and did so, and the trial court was fully justified in requiring them to restore what the trial court found upon sufficient evidence was a right of respondents.

Appellants also attack the judgment as to Count One upon the ground that it is void for uncertainty in its injunctive portions, and a similar attack is made as to the portions relating to Counts Two and Four. Appellants argue that "the judgment is uncertain and deficient in that it does not describe the ditch which defendants are to restore," and "the course of that ditch, the width of that ditch, and the depth of that ditch, are not stated, nor is the field to be irrigated from the ditch described with any certainty whatsoever."

[5, 6] Appellants cite cases which state the familiar rule that a judgment must be sufficiently definite and certain to enable it to be enforced and if it is not certain and cannot be made certain by an inspection of the judgment roll, it is void. The cases cited by appellants are principally to the effect that in actions involving the title to, or possession of, real property, the judgment affecting such property or their possession should be sufficiently definite and certain to enable an officer charged with the duty of executing a writ of possession to go upon the ground, and, without exercising judicial functions, ascertain the locality of the lines as fixed by the judgment. People v. Rio Nido Co., Inc., 29 Cal.App. 2d 486, 85 P.2d 461. But the rule as to judgments involving injunctions is somewhat different as an injunction either restrains a person from doing certain acts or orders him to do certain acts, and the rule in such cases is as stated in Wheeler v. Superior Court, 82 Cal.App. 202, 255 P. 275, 278, cited by appellants: "An injunction should contain sufficient information on its face to apprise the party upon whom it is served of what he is restrained from doing."

In the instant case a reading of the judgment as to Count One shows that it requires appellants to restore the ditch on appellants' land along the boundary line of respondents' land, and adjacent thereto, describing the boundary line, where said ditch was destroyed by appellants and to install such stop-gates therein as were installed in said ditch before its destruction by appellants; and that said judgment provides further that the field of respondents irrigated from said ditch lies immediately southerly from said portion of said boundary line along which said ditch ran.

[7] We believe that the judgment as to Count One was sufficiently clear and definite to enable appellants to know what was required of them, as it was merely to restore what the court found upon sufficient evidence they had destroyed wrongfully. We might add that if appellants desired to have what they were required to do described with such meticulous particularity as their brief would indicate, they should have had a detailed survey and description of said ditch made before they destroyed it. Neither reason nor authority support the contention of appellants, and we need only refer to the following cases: Rosenthal v. Matthews, 100 Cal. 81, 34 P. 624; Humphreys v. Moulton, 1 Cal.App. 257, 81 P. 1085; Allen v. Stowell, 145 Cal. 666, 79 P. 371, 68 L.R.A. 223, 104 Am.St. Rep. 80; Fresno v. Fresno Canal & Irrigation Co., 98 Cal. 179, 32 P. 943; Byers v. Colonial Irrigation Co., 134 Cal. 553, 65 P. 732; Williams v. Blue Bird Laundry Co., 85 Cal.App. 388, 259 P. 484. None of the cases cited by appellants are contrary to our conclusion upon this point and we deem it unnecessary to prolong this opinion by discussing them.

Appellants attack the judgment as to Count Two by stating that "The Court erred in requiring defendants to remove" from plaintiffs' land "undescribed 'portions of that gate installed by them' in the canal of the San Joaquin and Kings River Canal and Irrigation Company."

The evidence showed and the court found that after appellants acquired the second tract of land in 1934 they re-routed the main supply ditch of the San Joaquin and Kings River Canal and Irrigation Company on their land and built a new concrete stop-gate at the point where said ditch entered their land, said gate encroaching upon or extending over into the land of respondents approximately 20 inches. The court further found that the said re-routed ditch was constructed by appellants in such a manner and with so great a fall below said stop-gate that it caused the bottom of said ditch to wash away, and would in time, if so maintained by appellants, cause the banks to fall away adjacent to respond-

ents' land and cause great damage to respondents' land; and the court found further that the construction and maintenance of said stop-gate on respondents' land constituted a continuing trespass on respondents' said land.

The judgment as to Count Two ordered appellants to remove from respondents' land the concrete portions of the stop-gate installed by them in said ditch, and enjoined them "from constructing or maintaining the said irrigation ditch along the boundary line between plaintiffs' and defendants' land where defendants changed the course of said ditch from its point of entry into their lands from plaintiffs' said lands from the course over which said ditch had heretofore run in any manner that will cause the lateral support of said ditch on plaintiffs' side of said ditch to fall away or subside"; and said judgment further ordered appellants to "maintain boards in the drops, or gates, in the said main supply ditch so as to restrain water in said ditch * * * so that it will not flow too rapidly down said ditch and cause said ditch to wash away and erode."

[8] Appellants argue that this portion of the judgment is likewise void for uncertainty because they are not informed therein how much of the concrete gate encroaches upon the land of respondents. This contention is devoid of merit. All appellants have to do is to change the location of the gate so that no part thereof will be upon the land of the respondents, and appellants can easily ascertain where their boundary line is.

[9] Appellants also argue that the part of the judgment which orders them to "maintain boards in the drops or gates * * * so as to restrain water in said ditch * * * so it will not flow too rapidly" is so indefinite as to be void. However, Mr. Sherman, the engineer, testified that the flow of water could be so controlled by the use of such boards that the danger of washing respondents' land would be greatly reduced, and it is clear to us that this clause was incorporated in the judgment to compel appellants to so control the flow of the water in said ditch that respondents would not be damaged. If the court had not believed from the evidence that the water could be so controlled, it would no doubt have ordered appellants to put the re-routed ditch back in its former location, as the evidence showed that it did not damage respondents' land until re-routed by appellants. In fact, the findings as to this count recite that appellant stated in open court that they "since the commencement of the said trial have installed certain boards in said concrete box * * * and in certain boxes in said ditch having for their purpose the retaining of the water in said ditch so that it would not flow too rapidly down said ditch and cause said ditch to wash away and erode both above and below said concrete box." We find no uncertainty in this part of the judgment.

Appellants argue further that the judgment as to Count Two must be reversed because the court has by mandatory injunction required appellants to remove a portion of a wing of a headgate encroaching on respondents' land some 15 to 20 inches, which headgate, appellants assert, causes no damage. In support of this contention appellants cite numerous cases, most of which are cited in the case of Ukhtomski v. Tioga Mutual Water Co., 12 Cal.App.2d 726, 55 P.2d 1251, also cited by them. In that case the court said at page 728, of 12 Cal.App.2d, at page 1251 of 55 P.2d:

"The remedy of injunction is a drastic one, and where its issuance will work an inequitable burden upon the defendant, the court may, in the exercise of a sound discretion, refuse to grant it where the injured party may be adequately compensated in damages. Heilbron v. [Fowler, etc.] Canal Co., 75 Cal. 426, 17 P. 535, 7 Am.St. Rep. 183. The principle is aptly illustrated in the so-called 'encroachment cases' where one party builds his wall partly on the land of his neighbor. It being shown that the injury suffered by such encroachment is small and the harm to be suffered by compelling its removal great, the courts have uniformly refused to issue an injunction, leaving the complaining party to his action for damages. Rothaermel v. Amerige, 55 Cal.App. 273, 203 P. 833; Blackfield v. Thomas Allec Corp., 128 Cal.App. 348, 17 P.2d 165; McKean v. Alliance Land Co., 200 Cal. 396, 253 P. 134. It is true, as pointed out by appellants, that the amount of land taken in the decisions cited, supra, is considerably less than that here involved. This difference is merely one of fact, however, and does not change the legal principle involved that an injunction should not issue where its issuance would cause serious harm to the defendant and the injury caused by his inadvertence and mistake can be fully compensated by damages."

[10, 11] Respondents do not question the rule just stated but contend that it is not applicable to the instant case, and we agree with respondents. Appellants have without right built a concrete box partly upon the property of respondents and it cannot be said that an injunction compelling them to move it so it will be entirely upon their own property will impose an inequitable burden upon appellants. It is only in cases where it would involve great difficulty and expense to relieve a trivial encroachment causing only slight damage that a court is justified in refusing a mandatory injunction where one party has invaded the property rights of another. Boundary lines are still boundary lines and an adjoining landowner may not without right build a concrete stop-gate in a ditch so that it extends over into and encroaches upon the property of his neighbor, and then prevent his neighbor from securing an injunction ordering its removal to the extent that it does encroach.

As hereinbefore set forth in detail the judgment as to Count Four ordered appellants to restore the drainage ditch to the condition it was in previous to the construction of the wooden box therein; that the floor of said wooden box be lowered to a height not greater than the floor of the concrete box in said ditch, and that appellants be forever enjoined from maintaining any obstructions in said ditch higher than the bottom of said old concrete box.

Appellants urge that the rights of respondents as to said drainage ditch were fixed as of December 11, 1934, the date of the compromise agreement, and point out that such agreement contains a clause which provides that "no part of the bottom of said drain ditch or structures therein shall be raised or allowed to fill to a greater height than that existing at, or previous to this date," and that there was no evidence that the floor of the wooden box was raised or the ditch allowed to fill in after that date. Appellants contend that, therefore, respondents were not entitled to a judgment that the floor of said box be lowered, even though the evidence showed that the bottom of the wooden box constructed by appellant was 18 inches above the bottom of the old concrete box and effectively prevented the drainage of the low land of respondents through said ditch, as said land had been drained for more than twenty years.

The entire paragraph of the compromise agreement relating to the drainage of respondents' land is as follows:

"The parties of the first part grant to the parties of the second part, their heirs, assigns and successors, the perpetual right to flow drainage water down through the ditch now constructed upon the land of the parties of the first part for the purpose of draining excess water from the land of the parties of the second part down through the ditch on the land of the parties of the first part and from thence into the existing ditches or drains now in use, provided, however, that at no time shall the flow of drainage water exceed four cubic feet per second of water, and the parties of the second part, in the drainage of their said land into said ditch, shall use extreme care and caution so that said drainage water will not become bunched and none of said drainage water, as it flows onto the land of the parties of the first part, shall exceed four cubic feet per second. No part of the bottom of said drain ditches or structures therein shall be raised or allowed to fill to a greater height than that existing at, or previous to this date."

[12] It is quite clear to us, as it no doubt was to the trial court, that a proper construction of said paragraph was that respondents should have the right to continue to drain their excess water up to four cubic feet per second "down through said ditch" and "down through the land" of appellants, and that it was not the intention of anyone that respondents should only be given the right to drain their excess water into the ditch and then have appellants maintain in said ditch an obstruction which prevented the water from draining through, thereby preventing the drainage of respondents' land. To believe that appellants had any other intention would be to attribute to appellants a degree of bad faith bordering on deliberate deception. We believe that the trial court was fully justified under the agreement and under the evidence in ordering appellants to lower the bottom of the wooden box to the level of the bottom of the old concrete box, which had fixed the level of the bottom of the ditch for many, many years, and in enjoining appellants from maintaining any obstruction in said ditch higher than the bottom of said old concrete box.

[13] Appellants contend also that after the agreement of December 11, 1934, re-

spondents changed their mode of checking their land and irrigating it, and that this created a new and additional burden and an increase in the amount of drainage, and that the court "erred in compelling defendants to change their ditch and box therein to accommodate an additional burden." The answer to this contention is that Mr. Sherman testified that such change in method of irrigation did not increase the burden of drainage, but, if anything, lessened it; also the fact is that the agreement itself limits the drainage to four cubic feet per second.

[14] Over the objection of appellants the court admitted evidence showing that for many years the said drainage ditch was used to drain the excess water from the lands of respondents and that said excess water had drained down through said ditch and down through the land now owned by appellants. Appellants contend that the admission of this line of testimony was error because it varied the terms of a written contract. This contention is without merit. It was quite proper for the trial court to receive such evidence to aid it in determining what land was to be drained, what the contract referred to, or what the height of the ditch bottom and structures had been previous to the date of the contract. Such evidence does not contradict but does aid in understanding the written agreement.

[15] Appellants contend also that the judgment as to Count Four is void for uncertainty, but it is quite clear to us that all that is required of appellants is that they lower the bottom of the wooden box to the level of the bottom of the old concrete box, and refrain from maintaining in said ditch any obstructions that will prevent the excess water of respondents from draining down through said ditch and down through the land of appellants. There is nothing uncertain or indefinite about this part of the judgment.

[16] The final contention of appellants that we shall discuss is that the evidence is insufficient to justify the finding, and the judgment based thereon, that respondents were damaged in the sum of $500 for loss of bean crops in 1935 and 1936. The evidence shows that the land of respondents was farmed by a tenant on a crop share basis but the record is silent as to what the share of respondents was. The tenant did not join in the action nor is there any allegation or proof that it was brought in his behalf also. Consequently respondents could only be damaged to the extent of their share in the crop, and could only recover for their share, and there is nothing in the record to show what that share was. The evidence showed that in the years 1935 and 1936 "around 2 acres or so" of beans were destroyed because the drainage of land was prevented by appellants; that the average production of this portion of the land was 20 to 25 sacks of beans per acre when there was drainage; that the market price of beans in 1935 was $4 a sack, and in 1936, $6.05 a sack. There was no evidence as to what the cost of harvesting and marketing was in the neighborhood during those seasons, and consequently there was no evidence as to what amount should be deducted from the market value.

In the case of Teller v. Bay & River Dredging Co., 151 Cal. 209, at page 213, 90 P. 942, at page 944, 12 L.R.A.,N.S. 267, 12 Ann.Cas. 779, the court said:

"The true rule in arriving at the value at the time of destruction is that laid down by the trial court and abundantly supported by authority. The Supreme Court of Utah well states the proposition (Lester v. Highland Boy Gold Min. Co., 27 Utah, 470, 76 P. 341, 101 Am.St.Rep. 988 [1 Ann.Cas. 761],): 'In cases of destruction of growing crops it is proper and important to introduce and admit evidence showing the kind of crops the land is capable of producing, the kind of crops destroyed, the average yield per acre of each kind on the land not destroyed and on other similar lands in the immediate neighborhood, cultivated in like manner, the stage of growth of the crops, at the time of injury or destruction, the expense of cultivating, harvesting and marketing the crops, and the market value at the time of maturity, or within a reasonable time after the injury or destruction of the crops. And,' proceeds that court, 'while all such evidence may be considered by the jury in determining the amount of damages, if any, still the true measure of compensation is the value of the crops in the condition they were in at the time of their injury or destruction.' In Shoemaker v. Acker, 116 Cal. 239, 48 P. 62, the introduction of such evidence as the means of arriving at value is distinctly approved, and the same proposition is recognized as containing the true element for determining damage in Ellis v. Tone, 58 Cal. 289. And that such is the generally accepted rule is abundantly established. 8 Am.

& Eng.Ency. of Law, p. 330; Jones on Ev., § 384; Sutherland on Dam. §§ 120, 1023; Sedgwick on Dam. § 191." See, also, Dennis v. Crocker-Huffman, etc., Co., 6 Cal. App. 58, 91 P. 425.

We must, therefore, agree with appellants' contention that the evidence is insufficient to sustain that part of the judgment awarding respondents damages in the sum of $500 for loss of bean crops.

In view of the foregoing, the judgment is affirmed in all respects except as to the portion thereof awarding respondents damages in the sum of $500, and as to such portion the judgment is reversed and a new trial granted as to the issue of damages only, with directions to the trial court to ascertain the amount of damages sustained by respondents, in accordance with the views herein expressed, and thereupon to enter judgment in favor of respondents and against defendants for such amount. Appellants and respondents are each to bear their own costs on appeal.

THOMPSON, J., and ADAMS, P. J., concurred.



57 Cal.App.2d 1020

PEOPLE v. WILLIAMS.

Cr. 3659.

District Court of Appeal, Second District, Division 2, California.

March 24, 1943.

Criminal law ⇐1182

Where, on date to which hearing on appeal was continued, there was no appearance on behalf of defendant, either by brief or otherwise, judgment was affirmed. Pen.Code, § 1253.

Appeal from Superior Court, Los Angeles County; William R. McKay, Judge.

Proceeding by the People against Isaac Williams. From a judgment and an order denying a new trial, the defendant appeals.

Judgment and order affirmed.

See, also, 125 P.2d 9.

No appearance for appellant.

Robert W. Kenny, Atty. Gen., for respondent.

PER CURIAM.

November 24, 1942, the transcripts on appeal were filed in this court. Thereafter the cause was set for hearing on January 25, 1943, when, at the request of counsel for appellant, the hearing was continued to March 24, 1943. On the latter date there was no appearance on behalf of appellant either by brief or otherwise;

Therefore, pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order of the trial court denying the motion for a new trial are, and each of them is, affirmed.



57 Cal.App.2d 557

LADY v. WORTHINGHAM.

Civ. 13814.

District Court of Appeal, Second District, Division 2, California.

March 8, 1943.

Hearing Denied May 7, 1943.

1. Attorney and client ⇐106, 143, 166(1)

The relation of attorney and client is one of special trust and confidence and where, after the relation has been established, an agreement with reference to attorney's compensation is made, the burden is on attorney to show that agreement was fair and openly made with client's full knowledge of the facts and his legal rights, and the attorney is bound to act in "uberrima fides", that is, with the most scrupulous good faith toward his client.

See Words and Phrases, Permanent Edition, for all other definitions of "Uberrima Fides".

2. Attorney and client ⇐123(1)

When an attorney attempts to enforce a contract entered into with his client after the relationship of attorney and client has arisen, the presumption arises that the contract was without sufficient consideration.

3. Attorney and client ⇐123(1)

The burden of proof rests with the attorney to overcome the presumption of lack of consideration to support contract entered into after relation of attorney and client has arisen.

4. Attorney and client ⇐166(1)

Evidence sustained finding that there was no consideration for note for $2,000 given to attorney by client after relationship of attorney and client had arisen in payment of fees for services in probating estate.

5. Appeal and error ⇐1046(1)

In action by attorney on note given by client after relation of attorney and client had arisen, trial judge's attitude toward attorney in subjecting attorney while on witness stand to the limitations imposed on witnesses did not constitute prejudicial error in view of fact that findings of fact and conclusions of law were unbiased and judgment was sustained by the overwhelming weight of the evidence.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by William Ellis Lady against Catherine A. Worthingham on a promissory note in the sum of $2,000. From a judgment denying recovery on note but awarding plaintiff judgment in the sum of $361.37, the plaintiff appeals.

Affirmed.

See, also, 130 P.2d 435.

William Ellis Lady, of Los Angeles, in pro per., and Webster Hazlehurst, of Los Angeles, for appellant.

Howe & Finch, of Palo Alto, and Horowitz & McCloskey, of Los Angeles, for respondent.

McCOMB, Justice.

Plaintiff filed an action on a promissory note in the sum of $2,000 executed in his favor by defendant. After trial before the court without a jury, the trial court found that there was not any consideration for the promissory note and that plaintiff was not entitled to recover thereon. The trial judge, however, gave judgment against defendant in the sum of $361.37, which was equivalent to the amount allowed by the probate court to an attorney for probating an estate of the value of the one hereinafter described.

The evidence being viewed in the light most favorable to defendant (respondent), the material facts are:

May 6, 1936, Alice A. Williams died testate naming defendant executrix of her will and also the principal beneficiary of her estate, which consisted of property in California of the appraised value of $8,284.36, land in Texas of the appraised value of $29,470.50, and property located in the state of Illinois of approximately $20,000 value. Defendant, an assistant professor of physical education and hygiene at Leland Stanford Junior University, had not had any experience in business matters and was not familiar with the necessary procedure in order to obtain title to the property which had been devised to her. She consulted Mr. Canavan, the husband of one of her personal friends, who advised her that it would be necessary to institute probate proceedings, and for such purpose she should employ a lawyer. Mr. Canavan arranged an appointment between defendant and plaintiff, an attorney at law who had been practicing his profession in Los Angeles for more than twenty-nine years.

In this interview plaintiff suggested to defendant that, since she had no business experience and Mr. Canavan was an experienced person in handling estates, she should renounce her right to act as executrix under the will of Mrs. Williams and nominate Mr. Canavan as administrator with the will annexed. This procedure was followed and plaintiff was employed to take the necessary legal proceedings and represent defendant in connection therewith.

Plaintiff told defendant that the fees for his services could be arranged either by allowing the probate court to fix the amount thereof or by agreement between herself, himself, and Mr. Canavan, but that it would be to her advantage if the fee were fixed by arrangement between themselves rather than to have the probate court fix it. At this first meeting there was no discussion as to the amount of the fee. Some weeks later at Mr. Canavan's house, after a discussion with reference to the amount of the fee, Mr. Canavan stated to defendant that a fee of $2,000 for himself and a like amount for plaintiff would be a reasonable fee.

July 8, 1936, Mrs. Williams' will was admitted to probate and Mr. Canavan qualified as administrator with the will an-

nexed. The ordinary probate proceedings followed, there being no litigation, claims or special proceedings in connection therewith. However, the final account and petition for distribution had not been filed January 28, 1938, at which time plaintiff sent defendant, who was in Palo Alto, two promissory notes each in the sum of $2,000, one in his own favor and one in favor of Mr. Canavan, and asked her to sign them. On the following day plaintiff wrote defendant another letter reading in part as follows: "I suggest you sign the notes I sent you with my letter of yesterday, one in favor of Mr. Canavan and one in favor of me, and return same, and thereupon I will file the account, and set it for hearing, and get the matter under way."

The notes defendant signed and returned to plaintiff with a letter in which she said: "I am enclosing the signed note that you requested covering your fees, with the understanding that this money will come out of the sale of properties of the estate."

January 31, 1938, a final account and petition for distribution was filed with the probate court, in which it was alleged that the attorney and administrator had been paid the fees for their services. On March 9, 1938, the account was approved and a decree of distribution entered, and thereafter exemplified copies of the probate proceedings in this state were recorded in Texas and Illinois. An attorney was employed in Illinois for the purpose of representing the estate there, receiving $150 for his services, which was paid by defendant. An attorney was also employed in Texas for a like purpose, who was paid a fee of $50 by defendant.

In May of 1939 the property in Texas, title to which was now vested in defendant, was sold. Upon plaintiff's learning of the sale of the Texas property, he held a conference with defendant and stated that he was entitled to more compensation, to wit, that he should receive $3,000. After this conversation defendant sought the advice of Mr. Howe, another attorney. Subsequently negotiations took place between plaintiff and Mr. Howe for the purpose of settling plaintiff's claim. These negotiations failed and a settlement of the differences between plaintiff and defendant was not consummated.

Thereafter plaintiff instituted the present action, which terminated in the trial court as stated above.

There are presented for our determination two questions which will be stated and answered hereinafter seriatim.

First: Was there substantial evidence to sustain the trial court's finding that there was not any consideration for the note which was the basis of the present suit?

This question must be answered in the affirmative and is governed by the following pertinent rules of law:

[1] (1) The relation of attorney and client is one of special trust and confidence and where, after the relationship has been established, an attorney and client enter into an agreement with reference to the attorney's compensation, the burden is on the attorney to show that the agreement was fair and openly made with full knowledge upon the part of the client of the facts and of his legal rights with relation thereto. The attorney in such case is bound to act in uberrima fides, that is, with the most scrupulous good faith toward his client (Stieglitz v. Settle, 50 Cal.App. 581, 585, 195 P. 705).

[2] (2) When an attorney attempts to enforce a contract entered into with his client after the relationship of attorney and client has arisen, the presumption arises that the contract was without sufficient consideration (Shahabian v. Najarian, 14 Cal.App.2d 435, 443, 58 P.2d 396).

[3] (3) The burden of proof rests with the attorney to overcome the presumption referred to in the foregoing rule, to wit, that there was no consideration for the transaction (Shahabian v. Najarian, supra; Brydonjack v. Rieck, 5 Cal.App.2d 219, 223, 42 P.2d 336; Thornley v. Jones, 96 Cal. App. 219, 227, 229, 274 P. 93).

[4] Applying the foregoing rules to the facts of the instant case, it is clear that plaintiff did not sustain the burden of proof in accordance with the third rule stated above, and therefore the presumption set forth in the second rule supra constituted substantial evidence to sustain the trial court's finding that there was not any consideration for the note defendant had executed in favor of plaintiff. In addition, however, the uncontradicted evidence, which supports the facts stated above, shows that plaintiff did not meet the requirements of the first rule above mentioned, in that he did not tell defendant that, if the court fixed the fee, the amount thereof would be only $361.37 and that the

probating of the estate was a very simple matter. From the record before this court it appears that a finding by the trial court that there was sufficient consideration for the note would have been unsupported by the evidence and contrary to the overwhelming weight thereof.

Second: Did the trial judge's attitude toward plaintiff, which is exemplified by a portion of the record hereinafter set forth, constitute prejudicial error?

[5] This question must be answered in the negative. The following is an excerpt from the record which discloses the unhappy relationship which existed between plaintiff and the trial judge at the time of the trial:

"Mr. Lady: May I suggest—

"The Court: You may not suggest anything, but answer the questions. You are here as a witness.

"The Witness: I would like to suggest—I would like to address the court.

"The Court: All right; go ahead.

"Mr. Lady: Now, if the court please, if your Honor is taking that attitude, you indicate there is something wrong with us before we get an opportunity to complete the evidence. I ask your Honor to disqualify yourself.

"The Court: I repeat the statement, you made a technical objection. You are supposed to be a lawyer. Your duty to your client is that of the very greatest type of fiduciary relation. An honest lawyer, I would think, would be willing to answer every question to every fact before the court. However, you have made the objection.

"Mr. Lady: Does your Honor mean to say I am a dishonest lawyer?

"The Court: Mr. Bailiff, would you make this man sit down?

"Mr. McCloskey: Will you take the stand?

"Mr. Lady: Would you mind—

"The Court: Another word from you and you are going to be sentenced to jail for contempt. You answer the questions. You are a witness, and that is all."

Although it appears to us that the trial judge should have been more temperate in his conduct of the trial, we find nothing in the record to indicate that his judgment as reflected in the findings of fact and conclusions of law was biased or prejudiced against plaintiff. In fact, as stated heretofore, we are of the opinion that the overwhelming weight of evidence sustains the findings of fact and judgment predicated thereon.

Since neither party is urging that it was error for the trial judge to give judgment in favor of plaintiff for $361.37, while finding that there was not any consideration for the note upon which the action was founded, it is unnecessary for us to determine whether such judgment was proper in this proceeding, which was solely one to enforce payment of a promissory note.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.

Hearing denied; CURTIS and CARTER, JJ., dissenting; SCHAUER, J., not participating.



57 Cal.App.2d 1019

In re COLDEN'S ESTATE.

COLDEN v. COSTELLO et al.
Civ. 14020.

District Court of Appeal, Second District, Division 2, California.

March 24, 1943.

Appeal and error ⇐773(2)

Where appellant, after filing transcript on appeal, allowed time for filing of briefs to elapse and made no appearance on return date of order to show cause why appeal should not be dismissed for want of prosecution, appeal was dismissed. Rules of Supreme Court and District Courts of Appeal, rule 5, § 3.

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Proceedings in the matter of the estate of Charles J. Colden, deceased, by Clara N. Colden, decedent's widow, against John M. Costello and others. From an adverse judgment, Clara N. Colden appeals.

Appeal dismissed.

See, also, 50 Cal.App.2d 363, 122 P.2d 959.

No appearance for appellant.

Stewart, Shaw & Murphy, of Los Angeles, and Mark J. Costello for respondents.

PER CURIAM.

December 3, 1942, the transcript on appeal was filed. Thereafter, the time for filing of briefs having elapsed, an order to show cause why the appeal should not be dismissed for want of prosecution was issued, returnable March 24, 1943. On the latter date there was no appearance on behalf of appellant, either by brief or oral argument;

Therefore, pursuant to the provisions of sec. 3, rule V, Rules of the Supreme Court and District Courts of Appeal, it is ordered that the appeal from that portion of the order of the superior court from which this appeal is taken be, and the same hereby is, dismissed.

21 Cal.2d 767

In re RUSSELL'S GUARDIANSHIP. CLARK v. BOSWORTH. S. F. 16424.

Supreme Court of California.

March 29, 1943.

1. Insane persons ⇐38

In proceeding to remove incompetent's guardian, appointed after conveyance to him of all of incompetent's property in trust, his failure to have such deed set aside until after institution of removal proceeding was proper subject for court's consideration in determining whether he performed his duties as guardian. Probate Code, § 1580.

2. Insane persons ⇐38

Though unfitness of incompetent's guardian may not be shown by his conduct before his appointment, evidence of facts antedating appointment, such as his knowledge that ward was incompetent when she executed deed conveying all her property to him in trust before appointment, may be considered in determining propriety of his conduct after appointment. Probate Code, § 1580.

3. Insane persons ⇐38

In proceeding to remove incompetent's guardian, court was justified in considering guardian's neglect to include large amount of ward's jewelry, silverware, books, and other articles in inventory until fact of such omission was developed in removal proceeding as factor tending to show guardian's continued failure to perform his duties. Probate Code, § 1580.

4. Insane persons ⇐38

In proceeding to remove incompetent's guardian, whether guardian failed to use due diligence to lease building owned by ward was fact question for trial court to decide on conflicting evidence. Probate Code, § 1580.

5. Insane persons ⇐38

In proceeding to remove incompetent's guardian, evidence and trial court's findings *held* sufficient to support court's conclusions that guardian was guilty of mismanagement of ward's estate and continued failure to perform his duties. Probate Code, § 1580.

6. Insane persons ⇐38

The probate court retains continuing supervisory jurisdiction over affairs of incompetent's estate and guardian's handling thereof, and removal of guardian for mismanagement of estate and failure to perform his duties rests within such court's broad discretion. Probate Code, § 1580.

7. Insane persons ⇐38

In proceeding to remove male guardian of aged incompetent woman, whether ward required personal attention of some one who could render delicate and disinterested services, which could not be rendered by such guardian, was for trial court to determine. Probate Code, § 1580.

In Bank.

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

In the matter of the guardianship of the person and estate of Lillian Russell, an incompetent person. From a judgment removing George M. Clark as guardian on the petition of Katherine Russell Bosworth, the guardian appeals.

Affirmed.

For prior opinion, see Cal.App., 127 P.2d 60.

Morrison Hohfeld, Foerster, Shuman & Clark, of San Francisco, for appellant.

Linforth, Cannon & Miller, of San Francisco, William C. Stein, of Los Angeles, and Long & Levit, of San Francisco, for respondent.

GIBSON, Chief Justice.

This is an appeal from a judgment removing appellant as guardian of the person and estate of Lillian F. Russell. The petition for removal was filed by respondent. The court found, among other things, that appellant had mismanaged the estate and failed to perform his duties as guardian in violation of section 1580 of the Probate Code. Appellant contends the findings relating to mismanagement are not supported by the evidence and that the other findings do not sustain the conclusions of law and the judgment.

The incompetent is over eighty years of age and is now under the continual care of a doctor and nurses. She is unable to recognize people or to talk rationally and is confined to bed in a practically helpless condition. From 1918 until 1937 her property was managed by one Williams. On May 5, 1937, Mrs. Russell executed a deed

conveying all her property, real and personal, to appellant in trust with power of sale to manage and control the trust estate and pay to her the income derived therefrom during her lifetime. The property was to revert to Mrs. Russell's estate upon the termination of the trust at her death. Appellant recorded the deed and demanded from Williams all property belonging to Mrs. Russell. Williams refused to comply unless he were furnished with the certificate of a physician that Mrs. Russell was competent at the time of the execution of the deed. On August 26, 1937, Mrs. Russell was adjudged incompetent and appellant was appointed guardian of her person and estate. Williams then relinquished to appellant the control and management of the affairs of the incompetent. The petition to remove appellant as guardian, filed some eight months later, alleged among other things that Mrs. Russell was incompetent, to appellant's knowledge, when she executed the deed of trust and that the trust gave appellant an interest in the estate adverse to his duties as guardian, but that he nevertheless permitted the trust to remain a cloud upon the title of the property after his appointment as guardian. It was also alleged that he had mismanaged the estate and had negligently failed to rent certain real property belonging thereto. During the hearing the petition was amended to state that appellant had wilfully concealed from the court his possession of some jewelry and other articles belonging to the estate. It was further alleged that appellant was not a fit or proper person to remain guardian of the person of Mrs. Russell.

After this proceeding for removal was instituted the deed of trust was set aside in a suit brought by a guardian ad litem appointed for that purpose at the instance of appellant.

Some questions presented by the record which are argued at great length in the briefs will not be referred to here for the reason we do not consider their determination necessary to the disposition of this appeal. Our discussion will be limited to those findings of fact and conclusions of law which in our opinion sustain the decision of the trial court and require an affirmance of the judgment.

[1, 2] The trial court found that Mrs. Russell was incompetent when the deed of trust was executed and that appellant then knew or should have known this fact. Appellant does not challenge the sufficiency of the evidence to support these findings. Nor is it denied that he did not reveal to the court the existence of the deed of trust or make any effort to have it canceled until after the petition for removal was filed. It is contended by appellant, however, that these facts do not justify the removal of a guardian under section 1580 of the Probate Code. The trust deed, which had been recorded, constituted a cloud on the property and if valid would have placed the entire estate of the incompetent beyond the control and supervision of the court in the guardianship proceeding. It was the duty of appellant to have the deed set aside and thereby clear the title to the property and prevent the development of any possible adverse interest which might arise by reason of his dual position as trustee under the deed of trust and guardian of the estate and person of the incompetent. The failure of appellant to correct this situation until after proceedings were instituted for his removal was a proper subject for consideration by the court in determining whether he had performed his duties as guardian. Appellant claims the court erred in admitting evidence tending to show that he knew Mrs. Russell was incompetent when she executed the deed, and in support thereof cites authority to the effect that a guardian's unfitness may not be shown by his conduct prior to appointment. Evidence of facts antedating such appointment may be considered, however, in determining the propriety of appellant's conduct after appointment. Cf. In re Snowball, 156 Cal. 240, 243, 104 P. 444; 3 Schouler on Wills (6th ed. 1923), § 1881, pp. 1919-1920.

[3] The court also found: "As guardian of the estate of said incompetent, said Clark obtained possession of a large amount of jewelry, silverware, books and other articles belonging to his ward, and after his possession thereof was discovered, he filed an amended inventory in said estate, in which he included the said property as a part of the estate of said incompetent. In the inventory and appraisement first filed by him as such guardian he failed to include as a part of the estate of said incompetent the said jewelry, silverware, books and other articles belonging to his ward. In verifying said first inventory, said Clark stated, under oath in substance and effect, that said inventory described all of the property of said incompetent which had come into his possession, whereas, in

truth and in fact, as said Clark well knew, he had in his possession at the time of filing said inventory, all of said jewelry, silverware, books and other articles belonging to his ward. At the time of verifying said inventory said Clark knew that it did not contain or describe all of the property of said incompetent which had come into his possession. His explanations for this failure were (1) that he thought he had told attorneys that he had possession of this property, (2) that he did not think it was of sufficient value to require its inclusion in said inventory, and (3) that said property was like rings and other jewelry in the possession of the incompetent, and not required to be included. The said jewelry, silverware, books and other articles are appraised at $330.18." Appellant does not claim that this finding is not supported by evidence but contends he failed to include the property in the first inventory by mistake and that since it was listed in a supplemental inventory no harm has resulted to the estate and therefore this does not constitute cause for removal. The court was surely justified, however, in considering the neglect of appellant to include this property in the inventory until the fact of such omission was developed at these proceedings, as an additional factor tending to show continued failure of appellant to perform his duties as guardian.

[4] The court further found that appellant failed to use due diligence in leasing certain property, located in Stockton. Appellant contends this finding is not supported by the evidence. The property consisting of a two-story building had been leased for many years for $750 per month. The lease expired two months after appellant's appointment as guardian and although the income produced therefrom had been the principal source of revenue for the support of Mrs. Russell, the property remained vacant during the entire period appellant acted as guardian. Appellant, a mining engineer, maintained an office in San Francisco. He dealt with Stockton real estate brokers by letter and at times met them in San Francisco or Stockton. There is evidence that letters from agents stating they had clients interested in the property or requesting immediate information were left unanswered for two or three weeks. In some of these belated replies appellant stated he was busy and would be unable to see the agent in Stockton until a still later date. Some letters were never answered. Appellant insisted that all proposals be submitted directly to him and did not authorize anyone in Stockton to conduct negotiations for leasing the property. On one occasion an agent suggested that appellant contact a firm in San Francisco who had an interested client but appellant neglected to do so. He explained his failure to follow this lead by stating at the trial that he had told this agent and others "they were not entitled to a commission for making suggestions * * * or giving me introductions to somebody; I wanted them to work out a deal." There was also some question whether appellant exercised good business judgment in managing this property. The evidence indicates that he may have been demanding a higher rental than reasonably could be expected for the property unless the building was remodeled or divided into smaller stores, which he refused to do without first obtaining a tenant. Appellant rejected the proposal of one agent who produced tenants agreeing to take one-third of the building, if remodeled, for $300 per month. On another occasion he refused a plan to divide the building into four stores even if tenants were provided for two of them. While appellant urges that the financial condition of the estate would not have permitted remodeling, he testified that the necessary funds were available after certain assets of the estate had been sold. There was, of course, other evidence indicating appellant had been diligent in his efforts to lease the property and that his failure to do so was due to circumstances over which he had no control. This conflict presented a question of fact for the trial court to decide and we cannot say the finding of the court is without substantial support.

[5, 6] We are satisfied that the evidence and findings as a whole are sufficient to support the trial court's conclusion that appellant was guilty of mismanagement and continued failure to perform his duties within the meaning of section 1580 of the Probate Code. The Probate Court retains a continuing, supervisory jurisdiction over the affairs of the estate and the guardian's handling thereof, and the removal of a guardian for the reasons specified in the code rests within the broad discretion of that court. In re Whittaker's Estate, 19 Cal.App.2d 373, 65 P.2d 373; cf. In re Guardianship of Howard, 218 Cal. 607, 24 P.2d 486.

[7] In determining that appellant should be removed as guardian of the person of the incompetent the court concluded that the incompetent required "the personal attention of someone who can render for her such delicate and disinterested services as could not be rendered by [appellant], and that such person should be someone disinterested in her property, and not likely to become involved in litigation over her estate." It was for the trial court to determine the incompetent's requirements, and under all the circumstances, including the reasons for which appellant was removed as guardian of the estate, we cannot say that it erred.

The judgment is affirmed.

SHENK, CURTIS, EDMONDS, CARTER, and TRAYNOR, JJ., and GRIFFIN, Justice pro tem., concurred.



57 Cal.App.2d 820

SMITH v. SAN MATEO COUNTY.

Civ. No. 12341.

District Court of Appeal, First District, Division 2. California.

March 29, 1943.

1. Appeal and error ⇐878(6)

Whether evidence sustained trial court's finding that death was proximate result of defendant county's negligence was not at issue on plaintiff's appeal from judgment that cause of action was barred by limitations, since county, not being a "party aggrieved" by the judgment, could not attack finding of negligence. Pol. Code, § 4078.

See Words and Phrases, Permanent Edition, for all other definitions of "Aggrieved Party".

2. Statutes ⇐225¾

The legislature is deemed to have been cognizant of a judicial interpretation of a statute so that subsequent re-enactment of such statute or enactment of another statute in similar language is to be construed as an adoption of such judicial interpretation.

3. Death ⇐39

Action on claim against county for wrongful death which was commenced within one year after injuries causing death were sustained was not barred by one-year statute of limitations as to wrongful death. Code Civ.Proc. § 340.

4. Counties ⇐216

Where supervisors failed to act on claim against county for wrongful death, action thereon was not barred by statute requiring such action to be commenced within six months after "final action" of the board, though not commenced until more than 6 months after expiration of 90-day period from filing of claim, at which time claimant could elect at his option to deem board's failure to act equivalent to a final action and rejection. Pol. Code, § 4078.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Action".

5. Damages ⇐95

The amount of damages to be awarded in a particular case should be left to the trier of the facts and should be determined upon the circumstances of each case.

6. Death ⇐98

An award of $5,000 for death of a minor child was not inadequate.

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Action by Peter L. Smith against the County of San Mateo for the wrongful death of plaintiff's minor son when a tree fell across the cabin in which minor was sleeping while a member of a summer camp conducted in a public park maintained by defendant county. Judgment for defendant, and plaintiff appeals.

Judgment reversed with directions.

Walter McGovern, James F. Brennan, and Harrison W. Call, all of San Francisco, for appellant.

George M. Naus, of San Francisco, and Gilbert D. Ferrell, of Redwood City, for respondent.

NOURSE, Presiding Justice.

Plaintiff has appealed from an adverse judgment in an action for damages for the wrongful death of his minor son.

The death occurred while the minor was a member of a summer camp conducted by the defendant Young Men's Christian Association (as to said defendant the action was dismissed with prejudice) in a public park maintained by the defendant county of San Mateo. At the time of the accident the child was sleeping in a cabin in the park. A large redwood tree, without any disclosed external cause, fell across the cabin causing the fatal injury. The injury occurred on June 22, 1939. A claim against the county was filed on September 18, 1939. The ninetieth day thereafter was December 17, 1939. Six months after that day was June 17, 1940. The complaint was filed on June 20, 1940.

The trial court found that the death was a proximate result of the negligence of the respondent and that the plaintiff had been damaged in the sum of $5,000, but it further found that the cause of action was barred for failure to commence the action within six months from the implied denial by the county of a claim for damages as provided by section 4078 of the Political Code.

[1] The appellant has devoted the greater part of his brief to an attempt to show that the finding of negligence is supported by the evidence, but the respondent answers correctly that the question of negligence is not at issue on this appeal as it cannot attack the finding since it is not a party aggrieved by the judgment.

Appellant also contends that the amount of the judgment is inadequate. To sustain the contention he cites a number of cases wherein judgments for the death of a minor child ranging in amount from $7,833 to $15,000 have been held to be not excessive.

The principal question presented is the statute of limitations. The trial court held that the action was barred, and this issue depends upon the interpretation of the code section relating to a failure of the supervisors to act upon the claim. Section 4078 of the Political Code provides: "If the board refuse or neglect to allow or reject a claim or demand for ninety days after the same has been filed with the clerk, such refusal or neglect may, at the option of the claimant, be deemed equivalent to a final action and rejection on the ninetieth day, and a claimant dissatisfied with the rejection of his claim or demand, or with the amount allowed him on his account, may sue the county therefor at any time within six months after the final action of the board, but not afterwards * * *." It is respondent's theory that an election to exercise the option to treat the failure to act as a rejection is necessarily an election to treat it as a rejection "on the ninetieth day" and that the six months' time within which suit may be brought commences to run on the ninetieth day. Respondent does not cite any authority to support the contention but merely cites cases on the general question of the construction of the statute. Appellant's principal argument is based upon an analogy to sections 712 and 714 of the Probate Code and the cases construing these sections, and his theory that the rejection dates from the time of the actual election to treat nonaction as a rejection rather than the expiration of the ninety day period.

The history of the Probate Code sections is that they were based upon sections 1496 and 1498 of the Code of Civil Procedure. Section 1496 provided that if the executor or administrator refused or neglected to approve a claim against the estate "such refusal or neglect may, at the option of the claimant, be deemed equivalent to a rejection on the tenth day;" (1906). Section 1498 required that a suit on a claim be commenced "within three months after the date of its rejection." In Bank of Ukiah v. Shoemake, 67 Cal. 147, 148, 7 P. 420, the supreme court said: "But the period in which the action is barred does not commence to run in any event until after the actual rejection of the claim by an indorsement to that effect. It does not appear from the complaint that the claim has ever been actually rejected. We therefore think the action was commenced in time, though it was brought more than three months after the deemed rejection." In Cowgill v. Dinwiddie, 98 Cal. 481, 486, 33 P. 439, 441, the court said: "Under what is believed to be the rule established by Bank of Ukiah v. Shoemake, it is held that a claimant, who has not elected to consider his claim rejected upon the tenth day after presentation may subsequently thereto, and at any time before official action by the executor or administrator thereon, elect, at his option, to consider his claim as rejected, and may, under section 1498, bring an action thereon within three months thereafter, and, in the absence of other proof, suit brought is conclusive evidence of such election, and notice thereof."

It will be noted that in both of these cases the court draws a distinction between actual rejection and deemed rejection and assumes that the deemed rejection took place at the date when the claimant exercised his option. Neither of the cases discusses the meaning of the language that the exercise of the option should be equivalent to a rejection "on the tenth day." In Barclay v. Blackinton, 127 Cal. 189, 193, 59 P. 834, 835, these cases were cited as authority for the statement that the claimant could bring his suit "after the tenth day without any formal rejection of the claim." It was thereupon held that the claimant in that case could bring his suit at any time up to the expiration of one year after letters issued in accordance with the general limitations found in section 353 of the Code of Civil Procedure. It is significant that following these decisions section 1498 was amended to read as section 714 of the Probate Code now reads providing that the claimant could sue within three months "after the date of service" of notice of rejection.

[2-4] But section 4078 of the Political Code is based upon the County Government Act of 1897 (Stats.1897, p. 452), section 43 of which is identical with section 4078 of the Political Code in respect to the right of the claimant against a county to deem non-action equivalent to a final rejection. When we recall that Bank of Ukiah v. Shoemake was decided in 1885 and that Cowgill v. Dinwiddie was decided in 1893, we are faced with the doctrine that the Legislature is deemed to have been cognizant of the judicial interpretation of the statute and that a re-enactment of the same statute, or an enactment of another in similar language, is to be construed as an adoption of such judicial interpretation. Upon the rule of the cases cited above we conclude that plaintiff, having exercised his option when he filed his action on June 20, 1940, to recover for injuries which were sustained on June 22, 1939, was within the limitations of section 340 of the Code of Civil Procedure and was also within the period of six months "after the final action of the board" fixed by section 4078 of the Political Code.

As heretofore stated, the question of negligence is not before us on this appeal. Neither the statutes nor the rules of court provide for cross appeals in situations of this kind. When judgment is entered against the county it should not be prejudiced by anything said at this time if it should elect to appeal, and thereupon put in issue the finding of negligence.

[5, 6] Appellant's third point does not require extended discussion. Cases cited by him hold that the particular judgments for the death of a minor child were not excessive in amount. But it has been held repeatedly that the amount of damages to be awarded in a particular case should be left to the trier of the facts and should be determined upon the circumstances of each case. What might not be excessive in a particular case is no proof that a smaller amount is inadequate where the circumstances and conditions are not the same.

The judgment is reversed with directions to enter judgment for the plaintiff on the findings in the sum heretofore fixed by the trial court.

SPENCE, J., and DOOLING, Justice pro tem, concur.



57 Cal.App.2d 910

BASTAJIAN v. BROWN et al.
Civ. 13875.

District Court of Appeal, Second District, Division 2, California.

March 31, 1943.

As Modified on Denial of Rehearing April 22, 1943.

Hearing Denied May 27, 1943.

1. Appeal and error ⇐1010(1)

In suit to cancel deed, findings of trial court, which were supported by evidence, were binding on reviewing court.

2. Evidence ⇐11

It is a matter of common knowledge that the country was in a financial depression in 1931.

3. Mortgages ⇐297

In suit to cancel deed executed by 80-year-old woman to holder of trust deeds so as to avoid foreclosure of trust deeds, evidence supported finding that grantor had mental capacity to execute deed.

4. Mortgages ⇐297

In suit to cancel deed executed by 80-year-old woman to holder of trust deeds so as to avoid foreclosure of trust deeds, evidence supported finding that no undue influence was exercised on grantor.

5. Evidence ⇐11

It is common knowledge that in 1934 a great many property owners were in financial distress.

6. Mortgages ⇐297

In suit to cancel deed executed in 1934 by 80-year-old woman to holder of trust deeds for release of trust deeds, assumption of delinquent taxes, and $25, evidence showing that, although realty might actually have been worth more than amount of trust deeds, foreclosure sale would probably have resulted in deficiency judgment enforceable against grantor's other property, in view of depression, supported finding that deed was given for adequate consideration.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Suit by Blanche H. Comstock against James E. Brown and wife for the cancellation of a deed, wherein, on the death of plaintiff and named defendant, S. B. Bastajian, as administrator with the will annexed of plaintiff's estate, and Margaret Brown and Thomas Reynolds, as executors under named defendant's will, were substituted. From a judgment for defendants, plaintiff appeals.

Affirmed.

Paul Vallee, Astor Elmassian, Geo. C. Woods, and C. P. Von Herzen, all of Los Angeles (Burton B. Crane, of Los Angeles, of counsel), for appellant.

Reynolds & Painter, of Los Angeles, for respondents.

W. J. WOOD, Justice.

Plaintiff has appealed from a judgment whereby the trial court denied plaintiff's petition for the cancellation of a conveyance of real estate and quieted title in defendants.

The action was tried on May 6, 1936. Upon the conclusion of the trial the court made a minute order by which judgment was ordered for defendants. Because of the illness and death of the chief counsel for defendants, proposed findings were not seasonably delivered to the judge, and on May 11, 1937, counsel for plaintiff prepared findings. These findings and the accompanying judgment were signed and filed by the judge but upon motion of defendants the court on September 29, 1937, made an order vacating the findings and judgment and directing counsel for defendants to prepare findings. This order was made on the grounds that the findings prepared by counsel for plaintiff had been inadvertently signed and that deception had been practiced upon the court in inducing the acceptance of the findings. An appeal was taken from the order of September 20, 1937, resulting in the affirmance of the order upon the ground that the findings and judgment had been inadvertently filed. Bastajian v. Brown, 19 Cal.2d 209, 120 P.2d 9. Thereafter the court filed the findings and judgment from which the present appeal is prosecuted. After the trial of the action Mrs. Comstock, who had filed the complaint, died and the principal defendant, James E. Brown, also died. The administrators of their respective estates have been substituted as parties.

The complaint contains two causes of action. In her first cause of action Mrs. Comstock alleged that she was a woman "over 80" years of age and suffering from "the usual infirmities of mind and body attended by reaching said age"; that on December 2, 1931, the defendants James E. Brown and his wife, Margaret Brown, had "represented and stated to the plaintiff that it was necessary to sign some 'papers' in order to accomplish the payment to her of a monthly income for the balance of her natural life and for the purpose of paying taxes on said property and that it was necessary for the plaintiff to sign a trust deed with respect to said property so as to accomplish said ends and that the defendants would pay the interest on said encumbrance and pay said encumbrance when the same became due and that her property would not be jeopardized thereby; * * *"; that the plaintiff believed and relied upon these representations and signed a trust deed upon 40 acres of ranch land to secure payment of a note in the principal sum of $5,000 with interest at the rate of twelve per cent per annum; that the representations were false and untrue and made for the purpose of defrauding the plaintiff who received no consideration for signing the trust deed. It is further alleged in the first cause of

action that "thereafter at various times the defendants presented to the plaintiff various papers and documents the content and purport of which is unknown to the plaintiff, but plaintiff has since ascertained that among such papers and documents there was a note and trust deed in the principal sum of $550.00, with interest thereon at the rate of twelve per cent (12%) per annum, in favor of the defendants, but that plaintiff received no consideration therefor and signed such papers and documents only upon the representations of the defendants that she would not in any way be jeopardizing her property by the signing thereof and that all the said defendants were accomplishing was to relieve her of the obligation of the payment of taxes and insuring her that she would not be in want during her old age. * * *"

It is further alleged in the first cause of action that in the month of November, 1934, defendants "had the plaintiff sign a deed" to the property upon the representation that it was "the only method by which she could save her property from foreclosure and from becoming impoverished"; that no consideration was received for the deed and that the representations of defendants were false and untrue and were made with the intent of defrauding the plaintiff of her property.

In the second cause of action plaintiff sets forth the usual allegations in an action to quiet title.

[1] In their briefs counsel for plaintiff present the picture of an enfeebled and impoverished old lady who by the conveyance to defendants was deprived of property of the value of $14,000 to $16,000 by an artful creditor to whom there was due at the time of the transaction only the sum of $5,938.43. On the other hand, counsel for defendants insist that the transaction was fair and honest in all respects, conducted by the parties at arm's length, both of whom were fully capable of understanding and did understand the full meaning of the papers signed; that the conveyance was given for an adequate consideration and that no undue influence was used. The allegations of the pleadings presented issues of fact for the determination of the trial court, which made findings covering the allegations in favor of defendants. These findings are supported by the evidence and are binding upon the reviewing court.

[2] In November of 1931 Mrs. Comstock desired to borrow $5,000 on her 40 acres. Before the money was borrowed from Mr. Brown she sought a loan elsewhere but without success. The witness B. F. Meagher testified: "I called up several mortgage companies and the mortgage companies wouldn't make any loans, wouldn't make any loans on any country property, and I finally thought of Mr. Brown, and called him and asked him if he would make a loan on 40 acres of ground in Downey, * * *." Mrs. Comstock appointed two agents, a Mr. Lusink and a Mr. Polman, and requested them to procure a loan on her property. They contacted Mr. Brown, who looked at the land and made the loan. Mr. Brown did not meet Mrs. Comstock until after the loan was made. Lusink and Polman absconded with Mrs. Comstock's money. At the time the loan was made, as is a matter of common knowledge, the country was in a financial depression. Times became worse rather than better and Mrs. Comstock became delinquent in the payment of taxes and interest on the trust deed. On August 31, 1934, Mrs. Comstock gave to Mr. Brown a second trust deed in the principal sum of $550 to secure the amount for which she was then delinquent, the rate of interest being at 7% per annum from its due date. Mrs. Comstock was unable to make further interest payments and on November 23, 1934, she gave to Mr. Brown the conveyance of the property which plaintiff sought to have cancelled in her action.

Plaintiff introduced no evidence whatever in substantiation of her charge that representations had been made that she would receive a monthly income for the balance of her life. Mr. Brown testified that the conveyance of November, 1934, was made after Mrs. Comstock had been delinquent nearly two years; that she had told him that she had tried to sell the property and had also tried to get a loan elsewhere for the purpose of paying off the Brown loan, all without success. He further testified that Mrs. Comstock called him on the telephone and asked him to "come over". She then asked him, "Wouldn't I have this property?" He told Mrs. Comstock that he would release her two trust deeds and give her $25 in cash. She asked, "This will clean up everything?" and he replied, "Yes, if I buy it". They arranged to go to the title company

the next day to consummate the transaction. Mr. Loughlin, attorney and "title man" for the title company, testified that when Mrs. Comstock and Mr. Brown came to the office of the title company he "took Mrs. Comstock aside from Mr. Brown, over to another department in which she and I were alone". They had a conversation in which Mr. Loughlin became "perfectly satisfied that she knew what she was doing". She told Mr. Loughlin that she had other property and that she did not want to risk losing it by reason of a deficiency judgment in case the trust deeds were foreclosed.

[3] Plaintiff asserts that the evidence is insufficient to justify the court's finding that Mrs. Comstock was not suffering from any infirmities of mind or body and that Mr. Brown did not take advantage of plaintiff or exercise undue influence upon her. The only direct testimony concerning Mrs. Comstock's mental condition was from the witness Hoxie, an old friend and acquaintance, who testified over objection that in his opinion she was easily influenced. Assuming, without deciding, that the statement of Mr. Hoxie was properly before the court, it was not binding upon the judge in deciding the issue of Mrs. Comstock's mental capacity. The judge doubtless gave such weight to the testimony as he deemed it entitled to. He saw and heard Mrs. Comstock testify and relate her various business experiences. He also heard the testimony of others concerning her business activities. The fact that Mrs. Comstock was over eighty years of age does not compel a finding that she was mentally feeble. The finding as to her mental capacity is not without evidentiary support.

[4, 5] We find no merit in plaintiff's attack upon the finding that no undue influence was exercised on Mrs. Comstock. Mr. Brown did not seek the loan but application was made to him for a loan at twelve per cent interest after a failure to secure a loan elsewhere. When payments of taxes and interest became delinquent it was Mrs. Comstock who first proposed to Mr. Brown that he take a conveyance of the property. If Mrs. Comstock was in financial distress it could not be charged to Mr. Brown. It is common knowledge that at that period a great many property owners were in financial distress. Transfers of mortgaged properties by mortgagors to mortgagees for the purpose of avoiding foreclosure proceedings and deficiency judgments have not been uncommon occurrences, especially in periods of financial distress. Transfers in such circumstances have been held valid by the courts where the transactions were fair and honest, free from improper influence and based upon adequate consideration. Baldwin v. American Trading Co., 76 Cal. App. 80, 243 P. 710; Deming v. Smith, 19 Cal.App.2d 683, 66 P.2d 454; Watson v. Edwards, 105 Cal. 70, 38 P. 527; Phelan v. De Martin, 85 Cal. 365, 24 P. 725; 18 Cal.Jur. 68 et seq. In passing upon the issue of undue influence the court was doubtless mindful of the rule that as mortgagor and mortgagee the parties were not in a fiduciary relationship but were dealing at arm's length. De Martin v. Phelan, 115 Cal. 538, 47 P. 356, 56 Am.St.Rep. 115; Wright v. Security-First Nat. Bank, 35 Cal.App.2d 264, 95 P.2d 194.

[6] Plaintiff also criticizes the finding of the court that the conveyance was given for an adequate consideration. Although a finding that the value of the property at the time of the conveyance was no greater that the amount due from Mrs. Comstock would have been supported by the testimony of Mr. Brown, the court made a finding that at the date of the conveyance the land "had an actual value of approximately ten thousand dollars $10,000.00, but that during all of said times, due to the then existing unfavorable economic conditions, the market value and the loan value of said land were adversely affected to an extent impossible of accurate determination". The question whether an adequate consideration was received was for the determination of the trial court whose determination will not be disturbed on appeal where as in the instant case there is any evidence to sustain its findings. The court found that Mr. Brown agreed to assume and pay the delinquent taxes on the property and to pay Mrs. Comstock the sum of $25; and that Mrs. Comstock received the further consideration of avoiding foreclosure and was also relieved of distress and anxiety in connection with the property. The court doubtless took into consideration the fact that the trust deed did not carry a period of redemption such as is usual with mortgages and that Mrs. Comstock's rights would cease upon a sale under the trust deed; and that because of the difficult financial conditions then prevailing there was a greater prob-

ability of a deficiency judgment which could be enforced against other property of Mrs. Comstock than that she could have obtained from any other party a sum greater than the amount then due Mr. Brown.

At the time set for the oral argument plaintiff presented a belated motion in this court asking that evidence be taken by this court pursuant to section 956a of the Code of Civil Procedure to establish that on February 5, 1938, the sum of approximately $7,000 had been tendered to defendants to pay any sum due under the terms of the trust deed, and that defendants had refused the tender. In order to prevail plaintiff should have made the tender at or before the trial of the action. We need not pass upon the question whether the motion should now be given further consideration, for in view of our disposition of the points made on appeal as above set forth it is apparent that the motion should be denied.

The motion to take additional evidence is denied. The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; CURTIS, J., dissenting.



57 Cal.App.2d 788

PEOPLE v. GABRIEL et al.

Civ. 6831.

District Court of Appeal, Third District, California.

March 26, 1943.

1. Appeal and error ⇐1011(1)

Conflict between oral stipulation of facts and other documents was for trial judge.

2. Appeal and error ⇐1011(1)

Appellate court is bound by determination of trial court in regard to conflict in evidence.

3. Stipulations ⇐18(6)

Stipulation of counsel, at trial of cause, that specified matters are true and may be considered as evidence ordinarily binds parties and court and evidence tending to refute such matters is inadmissible.

4. Trial ⇐396(4)

Trial court may not adopt findings which are in conflict with the stipulated facts.

5. Licenses ⇐32(2)

Evidence sustained finding that purchasers of soft drink business merely purchased fixtures and equipment and did not purchase seller's business or become seller's successors in the business so as to become liable for retail sales taxes subsequently levied which seller should have paid and which purchaser failed to withhold from purchase price. Gen.Laws Supp.1935, Act 8493, §§ 17, 26.

6. Evidence ⇐334(1)

In action to recover increased retail sales taxes on ground of purchasers' failure to withhold sufficient funds from purchase price, certificate of officer of board of equalization, averring that levy of taxes was made at some undisclosed time, and not purporting to cover copy of judgment or records of board of equalization levying the tax or creating a lien therefor, was not competent evidence of records of board of equalization showing that additional taxes involved were imposed against seller. Gen. Laws Supp.1935, Act 8493, §§ 17, 26.

Appeal from Superior Court, Stanislaus County; B. C. Hawkins, Judge.

Action by the People against John Gabriel and another to recover increased retail sales taxes. Judgment for defendants, and plaintiff appeals.

Affirmed.

Earl Warren, Atty. Gen., H. H. Linney, Asst. Atty. Gen., and Adrian A. Kragen, Deputy Atty. Gen., for appellant.

Harold L. Hjelm, of Turlock, for respondents.

THOMPSON, Justice.

The State of California has appealed from a judgment which was rendered against it in a suit to recover from alleged purchasers of a soft drink business at Turlock, called the "Giant Orange," increased retail sales taxes levied by the State Board of Equalization, under section 17 of the Retail Sales Tax Act of California (Stats. 1933, p. 2599, as amended Stats.1935, p. 1256, Deering's Supp. of 1935, p. 1956, Act 8493), after the transfer of the fixtures and equipment had been consummated. The plaintiff's theory of liability on the

part of the defendants is based on their failure to withhold sufficient funds from the purchase price of the property to cover the subsequent levy, as required by the third paragraph of section 26 of the act.

For several years prior to 1937, Andrew J. Hansen operated a seasonal soft drink business in a structure called the "Giant Orange" located on leased land adjacent to the highway at Turlock, Stanislaus County. He owned the structure and equipment consisting of a cash register, beer cabinet, refrigerator, juice extractor and other necessary devices. In the fall of 1937 he became involved in domestic trouble which resulted in his divorce. At the end of the business season of that year he "closed his place of business and left Turlock." The following March he returned to Turlock and on March 19, 1938, he sold and conveyed to the defendants Mary Gabriel and her son "all of the fixtures, equipment and building" called the "Giant Orange" for the sum of $2,250. He informed the defendants that his lease on the real property had expired and that he then had no lease. It was stipulated that the defendants paid to Mr. Hansen $2,250 in cash for "the Giant Orange building, a beer cabinet, a cash register, and an icebox, and an extractor, juice extractor."

The defendants took possession of the property and arranged to rent the real estate upon which the Giant Orange was located from the owner Jesse Santos for $25 per month. They began to sell beverages on April 10, 1938, making their first quarterly report to the Board of Equalization under Mr. Hansen's permit. The complaint alleges, and the plaintiff concedes, that Mr. Hansen regularly rendered his reports of sales quarterly and fully paid all taxes in accordance therewith to the time of his sale of the fixtures and equipment to the defendants. No objection was made to any irregularity in those reports or payments until after the sale of the fixtures and equipment to the defendants. Prior thereto no unpaid sales taxes appeared on the records of the Board of Equalization. The defendants had no notice or knowledge of any claim of delinquent taxes prior to their purchase of the property. An examination of the records of the Board would have disclosed no such delinquent taxes. The additional taxes sought to be recovered in this action were not levied until after the sale of the fixtures and equipment was consummated. This subsequent levy included taxes for alleged sales which occurred from and after March 1, 1935, three years before the purchase of the equipment occurred. The defendants had no way of acquiring knowledge of such claims. It is true that the defendants failed to withhold any portion of the purchase price of the property.

November 18, 1938, the defendants, as co-partners, applied to the Board of Equalization and were granted permission to sell soft drinks at said "Giant Orange" in Turlock. They have fully paid all taxes levied against them for sales of beverages. February 23, 1939, the State filed the complaint against the defendants in this action to recover additional sales taxes incurred by Andrew J. Hansen in the aggregate sum of $509.47.

[1] A special and general demurrer to the complaint was overruled. The defendants answered denying the material allegations of the complaint. The cause was tried upon an oral stipulation of facts, together with the introduction of three documents, including defendants' application for permission to sell beverages and two certificates of tax levies by the Board of Equalization. The stipulation of facts is meager and unsatisfactory. It does, however, definitely appear therefrom that in 1937 Andrew J. Hansen, who had formerly owned and operated the Giant Orange business, was involved in a divorce suit and that he then "closed his place of business and left Turlock"; that thereafter in March, 1938, he returned to Turlock and sold and conveyed to the defendants "the Giant Orange building, a beer cabinet, a cash register, and an icebox, and an extractor, juice extractor, for the sum of $2,250"; that Mr. Hansen then told the defendants he did not have a lease on the real property upon which the structure was located. In the stipulation of facts no mention was made regarding a sale of the soft drink business as distinguished from the fixtures and equipment. The clear import of that stipulation is that Hansen had abandoned his business on account of domestic trouble and that he did not pretend to sell the business to the defendants. The stipulation specifically enumerates the items of personal property which were sold to the defendants for the aggregate sum of $2,250. This precludes the inference that the sale included either the soft drink business or the good-will thereof. It is true that defendants' application for permission to sell

beverages, which was received in evidence, contains some answers to printed interrogations which may appear to be inconsistent with the stipulation of facts. That fact merely raises a conflict of evidence. The question of reconciling these statements with the stipulation of facts is a matter solely within the province of the trial judge. The court found that the defendants on March 19, 1938, purchased from Andrew J. Hansen "a Giant Orange building and structure, a beer cabinet, a cash register and ice box, and extractor and a juice extractor" for the sum of $2,250; that the defendants did not purchase the business or good-will of the vendor; that they were not "the successors in interest or purchasers or assignees of any business or stock in trade" and that defendants were not indebted to the plaintiff for the subsequent levy of sales taxes against the former owner Andrew J. Hansen. Judgment was accordingly rendered to the effect that plaintiffs take nothing by this action. From that judgment the State of California has appealed.

[2] Since the answers of Mrs. Gabriel to the interrogatories propounded to her in her application for permission to sell beverages at the Giant Orange merely create a conflict of evidence, this court is bound by the determination of the trial court in that regard.

[3] A stipulation of counsel, at the trial of a case, that specified material facts are true and may be considered as evidence is ordinarily binding on the respective parties and upon the court. Haese v. Heitzeg, 159 Cal. 569, 114 P. 816; 23 Cal.Jur. 826, § 12; 2 Jones, Comm. on Evidence, 2d Ed., 1759, § 9551; 60 C.J. 78, §§ 68–71. When the facts of a case are clearly stipulated, evidence which tends to refute such facts is inadmissible. 60 C.J. 82, § 71. In the authority last cited it is said in that regard: "Evidence to disprove or which has a tendency to disprove the facts admitted, or to limit the effect of the stipulation agreement, is not admissible."

[4] Nor is the trial court authorized to adopt findings which are in conflict with the stipulated facts. Wilson v. Mattei, 84 Cal.App. 567, 573, 258 P. 453.

[5] The only question is whether the defendants are liable under section 26 of the Retail Sales Tax Act for taxes levied subsequent to their purchase of the fixtures and equipment on account of failing to withhold a sufficient portion of the purchase price thereof with which to pay the subsequent levy against the former owner of the property. The third paragraph of section 26 reads: "If any retailer liable for any tax, interest or penalty levied hereunder shall sell out his business or stock of goods or shall quit the business, he shall make a final return and payment within fifteen days after the date of selling or quitting business. His successor, successors or assigns, if any, shall withhold sufficient of the purchase money to cover the amount of such taxes, interest or penalties due and unpaid until such time as the former owner shall produce a receipt from the board showing that they have been paid, or a certificate stating that no taxes, interest or penalties are due. If the purchaser of a business or stock of goods shall fail to withhold purchase money as above provided, he shall be personally liable for the payment of the taxes, interest and penalties accrued and unpaid on account of the operation of the business by any former owner, owners or assignors."

It is our opinion that the evidence amply supports the court's findings and judgment that the defendants did not purchase Andrew J. Hansen's business or become his successors *in said business,* but upon the contrary that they merely purchased the fixtures and equipment. Mr. Hansen was not conducting a business at the time of the sale. It follows that the defendants are not liable for a subsequent levy of sales taxes of which they had no notice or knowledge until after the purchase of the property.

The levy of taxes which is involved in this suit was made by the Board of Equalization pursuant to section 17 of the Retail Sales Tax Act, which provides in part:

"If the board is not satisfied with the return and payment tax made by any retailer, it is hereby authorized and empowered to make an additional assessment of tax due from such retailer based upon the facts contained in the return or upon any information within its possession or that shall come into its possession. * * *

"If any part of the deficiency for which the additional assessment is imposed is due to negligence or intentional disregard of the act or authorized rules and regulations, a penalty of ten per cent of the amount of

the additional assessment shall be added, plus interest as above provided. If any part of the deficiency for which the additional assessment is imposed is due to fraud or an intent to evade the tax, a penalty of twenty-five per cent of the amount of the additional assessment shall be added, plus interest as above provided.

"The board shall give to the retailer written notice of such additional assessment. Such notice may be served upon the retailer personally or by mail; if by mail, service shall be made in the manner prescribed by section 1013 of the Code of Civil Procedure and addressed to the retailer at his address as the same appears in the records of the board."

[6] In the present case there is no competent evidence of the records of the Board of Equalization showing that the additional taxes which are involved in this suit were imposed against Andrew J. Hansen. There is no evidence of the date when that levy was made, if at all. There is no evidence that the retailer was ever served with notice of the levy as required by section 17, supra. All that appears in evidence to indicate the existence of such a levy is a certificate of an officer of the Board of Equalization dated November 30, 1938, averring that a levy for a specified sum was made against Andrew J. Hansen. This certificate is a mere conclusion of the officer that a levy of taxes was made at some undisclosed time. This certificate does not purport to cover a copy of the judgment or records of the Board of Equalization levying such tax or creating a lien therefor. These certificates are therefore not competent evidence to prove the actual levying or existence of the taxes in question or the obligation alleged to have occurred thereby. Section 1923 of the Code of Civil Procedure provides:

"Whenever a copy of a writing is certified for the purpose of evidence, *the certificate must state in substance that the copy is a correct copy of the original,* or of a specified part thereof, as the case may be. The certificate must be under the official seal of the certifying officer, if there be any, or if he be the clerk of a court having a seal, under the seal of such court." (Italics added.)

For the foregoing reasons the judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

57 Cal.App.2d 700

Ex parte HADLEY.
Cr. 3670.

District Court of Appeal, Second District, Division 2, California.

March 18, 1943.

1. Habeas corpus ⇐92(3)

A finding in an order of commitment for contempt that petitioner was able to comply with the order was an adjudication which was conclusive on subsequent habeas corpus proceeding.

2. Habeas corpus ⇐94

In habeas corpus proceeding, the court is concerned only with the jurisdiction of the court which issued the commitment.

3. Habeas corpus ⇐4

In habeas corpus proceeding to obtain release from custody after commitment for contempt, petitioner cannot be discharged from custody if the facts showing jurisdiction appear upon the record, since writ of "habeas corpus" cannot be used as a basis for review as upon appeal.

See Words and Phrases, Permanent Edition, for all other definitions of "Habeas Corpus".

4. Contempt ⇐66(7)

Whether one committed for contempt for failure to comply with order requiring payment of money had the ability to comply with order was a "question of fact" for determination of court that issued the commitment, and its decision thereon was conclusive.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

5. Contempt ⇐61(6)

Court's finding of ability to pay was sufficient to support order of commitment for contempt without stating evidence upon which its finding was based.

McCOMB, J., dissenting.

Proceeding in habeas corpus by George Hadley to secure petitioner's release from custody after commitment for contempt.

Writ discharged and petitioner remanded.

Wm. Christensen, of Los Angeles, for petitioner.

John F. Dockweiler, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

W. J. WOOD, Justice.

In his petition for a writ of habeas corpus petitioner alleged that he had appeared in the superior court pursuant to an order which had been issued commanding him to show cause why he should not be adjudged guilty of contempt for wilfully disobeying an order made on April 9, 1942, and another order made March 16, 1942, by which he was required to make certain payments to the court trustee for the benefit of Helen Hadley and by which he was ordered not to take the minor child of the parties out of the State of California. Petitioner has not furnished us with a copy of the affidavit upon which the order to show cause was issued, the petition being silent on that subject. He does not set forth any evidence verbatim and does not allege that his petition contained the substance of all the evidence adduced at the hearing. He does allege that Helen Hadley testified at the hearing that she had not received the payments mentioned in the order to show cause but that there was no evidence that the payments had not been made to the trustee and he alleges that there was no evidence of the ability of petitioner to make payments. He further sets forth that he testified at the hearing that Helen Hadley had given consent to the removal of the minor child from the State of California. It is set forth in the petition that petitioner was adjudged guilty of contempt of court and ordered to pay a fine in the sum of $500 or in default thereof to serve one day in the county jail for every $5 of the fine not paid. A copy of the commitment signed by the judge is attached to the petition.

The sheriff made his return showing that he was holding petitioner by virtue of a commitment of the superior court, from which it appears that the court had made orders for the payment by petitioner of certain sums for the support of the minor child and also had made an order concerning the child's custody; that a copy of the orders had been served on petitioner and that he had wilfully refused to comply with the orders in that he had refused to support the child as ordered and had not complied with the court's order regarding visitation and had violated the order by taking the child from the State of California; that petitioner had been ordered to show cause why he should not be punished for contempt and upon his appearance the court found that he had the ability to comply with the order of the court but had wilfully failed and refused and continues to fail and refuse to comply with the order of the court. The commitment sets forth the court's order for the payment of the fine and for the imprisonment of petitioner in case of his failure to pay the fine.

[1] Petitioner now contends that the finding in the commitment that petitioner had the ability to comply with the court order is insufficient to support the judgment finding him guilty of contempt. In the Matter of Carpenter, 36 Cal.App.2d 274, 97 P.2d 476, it was alleged in the affidavit which formed the basis of the court's order that the petitioner "has the ability to pay the aforesaid sum * * * and refuses and neglects to pay said sum." The court found the petitioner guilty of contempt, the order of commitment reciting that the petitioner, "with knowledge of the making of said order and being able to comply with the terms thereof, disobeyed and is on this day and in the immediate view and presence of this Court disobeying said order and wilfully refusing and failing and neglecting to obey said order." In answer to the attack made on the commitment the reviewing court said: "In this proceeding it is the contention of petitioner that the recital of ability to pay contained in the commitment is totally unsupported by any evidence. The respondent contends that in this proceeding the adjudication of ability to comply with the order is conclusive. With this contention we are in accord. The proper rule supported by the citation of many cases, in a case factually similar to the instant case, is thus succinctly stated by the Supreme court in Ex parte Levin, 191 Cal. 207, 208, 215 P. 908: 'The court found as a fact in its order of commitment that the petitioner was able to comply with the order, and this adjudication is conclusive on habeas corpus.'" See also In re Wilson, 123 Cal.App. 601, 603, 11 P.2d 652; Ex parte Von Gerzabek, 63 Cal.App. 657, 660, 219 P. 479; Ex parte Spencer, 83 Cal. 460, 23 P. 395, 7 Am.St. Rep. 266; In re McCarty, 154 Cal. 534, 98 P. 540. Petitioner relies upon In re Cardella, 47 Cal.App.2d 329, 117 P.2d 908, which supports his contention that the court's finding of inability to pay was a

mere conclusion. The decision in the Cardella case, in which no reference was made to the Carpenter case, supra, was based upon In re Meyer, 131 Cal.App. 41, 20 P.2d 732, 733, and it is claimed that the identical point was there presented. It is true that in the Meyer case the court stated that a finding that the petitioner has had and now has the ability to comply with the previous order was "more of a conclusion than a finding" but an examination of the facts in the Meyer case discloses that the petitioner then before the court was discharged because he had not been served with the prior order of the court and because the specific findings showed inability to comply with the court's order between the date of service of notice of the order and the date of the contempt hearing.

[2-5] We are satisfied that the holding in the Cardella case is contrary to the great weight of authority and is not supported by sound reasoning. In habeas corpus proceedings the court is concerned only with the jurisdiction of the court which issued the commitment. In re Carpenter, supra; In re Wilson, supra. The petitioner cannot be discharged from custody if the facts showing jurisdiction appear upon the record. Ex parte Von Gerzabek, supra. The writ of habeas corpus cannot be used as a basis for review as upon appeal. Ex parte Levin, 191 Cal. 207, 215 P. 908. The question whether the petitioner had the ability to comply with the order was one of fact for the determination of the court that issued the commitment and its decision on this point is conclusive. The finding of ability to pay is a finding of ultimate fact, and such a finding is sufficient without the addition of probative or evidenciary facts. 24 Cal.Jur. 968 and cases there cited. It was not necessary for the court to state in the commitment the evidence upon which its finding of ability to pay was based, to detail the amount of the salary or other income of petitioner and of his numerous personal expenses or to set forth the mathematical calculations thereon. The court's finding of ability to pay was sufficient to support the order committing petitioner.

The writ is discharged and the petitioner is remanded.

MOORE, P. J., concurred.

McCOMB, Justice (dissenting).

I dissent. In my opinion In re Cardella, 47 Cal.App.2d 329, 117 P.2d 908 and In re Meyer, 131 Cal.App. 41, 20 P.2d 732, correctly state the law and pronounce a rule contrary to that announced by the majority opinion in the present case.



57 Cal.App.2d 782

In re HOOD'S ESTATE.

SLATER et al. v. BROWER et al.
Civ. 3055.

District Court of Appeal, Fourth District, California.

March 25, 1943.

Hearing Denied May 24, 1943.

1. Wills ⇐675

Even precatory words are regarded as creating a "trust" when it clearly appears that testator intended to impose imperative obligation, and to exclude exercise of discretion on part of person to whom they are addressed.

See Words and Phrases, Permanent Edition, for all other definitions of "Trust".

2. Wills ⇐675

Usually, expression of desire on part of testator is a mere request when addressed to devisee, but is a command when addressed to executor.

3. Wills ⇐675

Usually, a testator's expression of a desire should be construed as a command when addressed to a trustee, particularly when it is expressly set forth as a part of directions to trustee and as stating one of purposes of trust.

4. Charities ⇐31

Gifts to charitable uses are favored, and language of wills is to be liberally construed in support of trusts established for such purposes.

5. Charities ⇐4

A residuary bequest to trustees, authorizing them to pay income or principal to such charities or individuals as they should see fit, but expressing desire that funds be used for certain charitable pur-

poses, was not void as attempt to mingle charitable trust with noncharitable trust, but was valid as creating only a "charitable trust".

See Words and Phrases, Permanent Edition, for all other definitions of "Charitable Trust".

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Proceeding in the matter of the estate of Sarah C. Hood, deceased, on the petition of Catherine Brower and another for construction of decedent's will. From a judgment for petitioners, Louis Slater and another, as trustees, etc., appeal.

Reversed.

Milton M. Dearing, of Fresno, for appellants.

Thos. F. Lopez and Lawrence W. Young, both of Fresno, for respondents.

BARNARD, Presiding Justice.

Sarah C. Hood died on October 21, 1940, leaving as her sole heirs two aunts, who are the respondents here. In her will she mentioned the respondents and stated that she was leaving them nothing for the reason that they have sufficient means of their own. After making certain specific bequests, which are not here in question, she left the remainder of her estate in trust for certain named purposes, and with directions to the trustees. Upon the filing of a final account and petition for distribution the respondents filed a "Petition to Construe Will" in which it was alleged, in substance, that the trust provisions of this will are invalid, that under a proper interpretation of said provisions it should be held that the decedent died intestate as to the residue of her estate, and that said petitioners are entitled to have the residue of the estate distributed to them share and share alike. Answers to this petition were filed and, after a hearing, findings were made and a judgment was entered in which it was adjudged and decreed that the trust provisions of said will are illegal and void, that the respondents are the sole heirs of the said decedent, and that they are entitled to share equally in the residue of said estate. The trustees named in the will have appealed from these portions of the judgment.

The ninth subdivision of the will, which is material here, reads as follows:

"In the event that there are any moneys or property in the hands of my executors after the payment of the bequests as hereinabove set forth, then and in that event I herewith give, devise and bequeath all of said money and property to Louis Slater of Fresno, California, and Gilbert H. Jertberg of Fresno, California, or the survivor of them, in trust, however, under the following directions and for the following purposes, to-wit:

"My said Trustees are authorized and empowered to take over any and all property or moneys which I may have and, without the necessity of first obtaining any court order therefor, pay either the income therefrom or the principal thereof to such charities or to such individuals or to such charitable organizations as they shall see fit. They may turn over said moneys in such sums or amounts as they shall see fit, having in mind at all times, however, that it is my express intention and desire to have said moneys and property used by my said Trustees for such purposes as shall do the most good to charities or individuals who are in need of assistance. It is further my desire that my Trustees shall try to aid those individuals and those organizations and those charities where the moneys which are given to them shall do the most direct good, it being my intention and desire that said moneys shall be used for such purposes as will secure a direct benefit to the sick, blind, and those in need of support, and that such moneys shall not go to any organization which has an overhead to carry on, but shall go, as hereinbefore specified, where said moneys and all thereof can do the most direct good.

"It is my express desire that my said Trustees shall use up the principal and the income from said property for the purposes as hereinabove set forth within a reasonable time after the same is distributed to them in trust, and in no event shall said trust estate be held open or operated for a longer period than five years from the date of the distribution of said trust estate to them, and it is further my desire and wish that in the spending of any and all of the said sums by my said Trustees that they use said moneys locally in and around the City of Fresno, inasmuch as I desire most of all to benefit those in the community where my husband and myself made our home."

The controlling question here presented is as to whether the above quoted portions of this will create a valid charitable trust.

The respondents contend that the first sentence of the second paragraph is the only part of these provisions which contain directions as to what the trustees are authorized and empowered to do; that this authorization is in the disjunctive and permits the trustees to pay the trust funds to such charities or such individuals as they shall see fit; that the remainder of the provisions in this subdivision of the will are precatory in nature, being merely recommendations and not express directions; that these precatory provisions are not binding upon the trustees; that the trustees are thus left free to give the money either to charities or to such individuals as they shall see fit; and that it having been attempted to mingle a charitable trust with a noncharitable trust the entire bequest is void, citing such cases as In re Estate of Hinckley, 58 Cal. 457 and In re Estate of Sutro, 155 Cal. 727, 102 P. 920.

In Re Estate of Marti, 132 Cal. 666, 61 P. 964, 64 P. 1071, it is said: "The cardinal rule for the construction of all wills is to ascertain the intention of the testator, and this intention is to be ascertained from the words of his will, taking into view, when necessary or appropriate, the circumstances under which it was made."

[1] Even precatory words are regarded as creating a trust when it clearly appears that the testator intended to impose an imperative obligation and to exclude the exercise of discretion on the part of the person to whom they are addressed. In re Estate of Purcell, 167 Cal. 176, 138 P. 704; In re Estate of Browne, 175 Cal. 361, 165 P. 960. Some of the rules of interpretation are thus stated in Re Estate of Mitchell, 160 Cal. 618, 117 P. 774, 775: "Precatory words may or may not create a trust, according as they are used, and whether, in any particular will, they have been used for this purpose, will depend upon the construction to be given to that will. The question for determination is whether the devisee or legatee is the beneficiary, or merely a trustee for others, of the gift bestowed upon him; whether the wish or desire or recommendation that is expressed by the testator is meant to govern the conduct of the party to whom it is addressed; or whether it is merely an indication of that which he thinks would be a reasonable exercise of the discretion of that party, leaving it, however, to the party to exercise his own discretion. In order to make him a trustee, it must appear that the testator intended to impose an imperative obligation upon him, and for that purpose has used words which exclude the exercise of discretion or option in reference to the act in question."

[2, 3] The usual rule is that an expression of desire on the part of a testator is a mere request when addressed to his devisee but is to be construed as a command when addressed to his executor. In re Estate of Lawrence, 17 Cal.2d 1, 108 P.2d 893; In re Estate of Mallon, 34 Cal.App.2d 147, 93 P.2d 245. No good reason appears why the expression of such a desire should not similarly be construed as a command when it is addressed to a trustee, particularly when it is expressly set forth as a part of the directions to the trustee and as stating one of the purposes of the trust. In Re Estate of Tsheppe, 19 Cal.App.2d 314, 65 P.2d 830, 831, the court said: "The authorities are numerous construing precatory words and in this connection it should be noted that in each case, almost without exception, the ultimate determination of the question involved depended upon the context of the will and the circumstances surrounding the use of the precatory word."

[4] Gifts to charitable uses are favored and the language of wills is to be liberally construed in support of trusts established for such purposes. In re Estate of DeMars, 20 Cal.App.2d 514, 67 P.2d 374. In Re Estate of Somerville, 12 Cal.App.2d 430, 55 P.2d 597, 598, it is said: "The question is one of intention, to be collected from the language of the whole will; and where the general intention of the testator to create a charity appears therefrom, the courts, in dealing with an ambiguous residuary clause, will lean in favor of a broad rather than a restricted construction." And in the article in 115 A.L.R. 1124, it is said: "* * * the decisions which hold a bequest void for uncertainty because of the possible inclusion of noncharitable purposes or beneficiaries would seem, in the final analysis, to rest on the premise that the testator's underlying intention that only valid charitable purposes should be served is not clearly established."

[5] Applying these principles to the problem before us we think the testatrix's intention clearly appears and that these provisions of this will should be upheld as creating a charitable trust. It seems obvious that the decedent was attempting

to create such a trust. It also seems clear from the language used that her intention was to establish a trust solely for charitable purposes, and that she did not intend to authorize the trustees to turn over any part of the residue of her estate to any individual who did not come within the class described in that part of the subdivision which the respondents contend is merely precatory in nature. The entire subdivision should be construed together and, thus construed, it discloses an intent on the part of the testatrix to outline a charitable plan which is to govern the actions of the trustees in administering the trust. It further appears that there was an intention to make the charitable plan thus outlined applicable to all of the residue of the estate which is affected by the trust, and that there was no intention to empower the trustees to use any portion of the residue for the benefit of individuals who did not come within the charitable class which is clearly shown to have been within the contemplation of the testatrix. The devise or bequest is made to the named trustees in trust "under the following directions and for the following purposes, to-wit:". While the next sentence provides that the trustees may pay the funds of the trust to such charities or to such individuals or to such charitable organizations as they shall see fit, the remaining provisions are not to be ignored. These provisions not only express the purpose for which the trust is created, but are a part of the directions to the trustees and are clearly intended to set forth the extent and nature of the powers given to the trustees. The following provisions disclose the express intentions and desires of the testatrix in creating the trust, which are that the trustees shall use such funds for the purpose of doing the most good to charities or to individuals who are in need of assistance and that such funds shall be used exclusively for such purposes as will secure a direct benefit to the "sick, blind and those in need of support." All of these latter provisions are expressly made a part of the directions given to the trustees. It would do violence to the clearly expressed purpose and intention of the testatrix to regard the first sentence of the second paragraph of this subdivision of the will as alone containing the directions to the trustees, and to regard all of the remaining provisions of this subdivision as merely precatory in nature. All of these provisions must be read together and, in their entirety, they constitute the directions to the trustees. They not only clearly express the intention of the testatrix with respect to the purposes for which the trust was established, but they limit the powers and outline the duties of the trustees. The trustees cannot comply with the express terms of their trust except by devoting the funds of the trust to charitable purposes, whether these funds be turned over to charitable organizations or to individuals in need of charity. They have no discretion in this regard and the entire bequest to them is charitable in nature, and no part thereof can reasonably be construed as noncharitable. It follows that the court erred in holding that the ninth subdivision of this will is illegal and void.

The judgment is reversed, the appellants to recover their costs on appeal.

MARKS and GRIFFIN, JJ., concurred.

Hearing denied; GIBSON, C. J., and EDMONDS and TRAYNOR, JJ., dissenting.



57 Cal.App.2d 652

In re YULE'S ESTATE.

MOORE et al. v. DURYEE et al.
Civ. 13913.

District Court of Appeal, Second District, Division 2, California.
March 17, 1943.

1. Colleges and universities ⇐6(3)

The University of Washington is an institution which by will can take gift of residue of testatrix' estate to aid women students who are partially or wholly self-supporting. Probate Code, § 27; Rem.Rev. Stat.Wash. §§ 4544, 4545, 4554, 4557, 4560.

2. Evidence ⇐35

California courts take judicial notice of the laws of Washington. Code Civ. Proc. § 1875.

3. Charities ⇐31

Gifts for charitable purposes are highly favored.

4. Charities ⇐31

A will providing for gifts for charitable purposes will be liberally construed in order to accomplish testator's intent.

5. Charities ⇐12

Testamentary gift by testatrix of residue of estate to University of Washington, to invest and pay the income therefrom to aid women students who are partially or wholly self-supporting, is valid as a gift for "charitable purposes". Probate Code, § 27; Rem.Rev.Stat.Wash. §§ 4544, 4545, 4554, 4557, 4560.

See Words and Phrases, Permanent Edition, for all other definitions of "Charitable Purpose".

6. Colleges and universities ⇐6(3)

Statute providing that testamentary disposition may be made to corporations formed for charitable and specified public purposes includes such institutions as the University of Washington whether or not they are designated as corporations by specific legislative enactment. Probate Code, § 27.

7. Wills ⇐13(1)

Where testatrix left neither spouse, child, grandchild, or parents, and will was executed more than six months before her death, gift of residue of estate to the University of Washington was not limited to one-third of testatrix' estate. Probate Code, §§ 41, 43.

8. Charities ⇐4

Provision in will that officers of the University of Washington should have authority to make loans as well as gifts to women students from income given by testatrix to the university did not render the bequest invalid on ground that the making of a loan could not be "charitable" in character. Probate Code, § 27.

9. Pleading ⇐192(3)

Broad statements in the pleading concerning matters before the court, and which were largely conclusions on pleader's part, could properly be disposed of by ruling on demurrer to pleadings.

Appeal from Superior Court, Los Angeles County; Jess E. Stephens, Judge.

Proceeding in the matter of the estate of Emma Sarepta Yule, deceased, wherein the University of Washington filed a petition for ratable distribution. From an order granting the petition, Grace Hart Moore and others, opposed by Daniel A. Duryee and others, appeal.

Order affirmed.

William Ellis Lady, of Los Angeles, for appellants.

Smith Troy, Atty. Gen., of Washington, Harold A. Pebbles and John Spiller, Asst. Attys. Gen., and Combs & Murphine, of Los Angeles, for respondents.

W. J. WOOD, Justice.

Emma Sarepta Yule died on April 16, 1939, leaving a will bearing date September 27, 1922, which was duly admitted to probate. She left the residue of her estate "to the University of the State of Washington, in trust, to be known as the Emma Sarepta Yule Fund and to be expended as hereinafter directed. Fourth: I further direct that said residue so devised, given and bequeathed to the said University of the State of Washington be held in trust by the said University and invested by the proper officers of said University, and the income therefrom be used and expended in aiding girl and women students who are partially or wholly self-supporting and who are then attending the said University of Washington; said aid to be furnished as aforesaid to girl and women students may be in the form of a gift or loan as, in the discretion of the proper officers of said University, may be deemed wisest, but in no event is any portion of the principal of said Emma Sarepta Yule Fund to be expended for any purpose. * * *" The probate court made an order granting the petition of the University of Washington for ratable distribution and from this order certain heirs at law have appealed.

[1] We find no merit in the contention of appellants that the University of Washington is not an institution which can take by will. Appellants refer to section 27 of the Probate Code, which provides: "A testamentary disposition may be made to * * * corporations formed for religious, scientific, literary, or solely educational or hospital or sanatorium purposes, or primarily for the public preservation of forests and natural scenery, or to maintain public libraries, museums or art galleries, or for similar public purposes. No other corporation can take under a will, unless expressly authorized by statute."

[2] The courts of California take judicial notice of the laws of the State of Washington (Code Civ. Proc., sec. 1875). The organization, purpose and method of government of the University of Washington are provided in sections 4544, 4545, 4554, 4557 and 4560 of Remington's Revised Statutes, the official code of the State of Washington. In these code sections it is provided that the name of the institution shall be "University of Washington"; that the aim and purpose of the university shall be to provide for students of both sexes a liberal education in the different branches of literature, science, art, law, etc.; that the institution shall be governed by a board of regents appointed by the governor of the state; and that the board of regents is authorized to receive such bequests and gratuities as may be granted to the university and to invest or expend the same according to the terms of the bequests. The attorney general of the State of Washington is made the legal advisor of the board of regents and is authorized to "institute and prosecute or defend all suits in behalf of the same." The university is supported by the State of Washington.

[3-6] The general rule that gifts for charitable purposes are to be highly favored is followed by the California courts. A will providing such gifts will be liberally construed in order to accomplish the intent of the donor. Collier v. Lindley, 203 Cal. 641, 654, 266 P. 526. The testamentary provisions now before us unquestionably provide a gift for charitable purposes to a legally constituted institution. We entertain no doubt that the Legislature in enacting section 27 of the Probate Code intended to include such institutions as the University of Washington whether or not they be designated as corporations by specific legislative enactment. In Re Estate of Halm, 196 Cal. 778, 239 P. 307, the trial court found: "That the University of Heidelberg is in the fullest sense of the word a state institution of the free state of Baden of the German Republic formed for scientific, literary, and purely educational purposes; and that its expenses and costs of upkeep are defrayed by the said free state of Baden, without any donations or endowments from any source whatever, and that the said university is and was not incorporated nor is the same conducted for profit, nor is any profit derived from the conduct thereof. * * *" The Supreme Court held that under these findings the University of Heidelberg was a charitable or benevolent institution and was "placed in the same category with any other educational institution, whether founded by or under the provision of the state or by private gift, bequest, or trust," and that it could take by will except for the fact that the will had been executed within thirty days before the death of the testator. Section 27 of the Probate Code was based upon former section 1275 of the Civil Code, in force at the time of the decision in the Halm case, which contained a provision permitting testamentary dispositions to "corporations formed for scientific, literary, or solely educational or hospital purposes, or primarily for the public preservation of forests and natural scenery." In Re Estate of Royer, 123 Cal. 614, 56 P. 461, 44 L.R.A. 364, it was held that the University of California is a public corporation capable of taking by bequest notwithstanding the requirement that the regents of the university become incorporated under the name of "Regents of the University of California."

[7] Appellants asked the probate court to limit the disposition to the University of Washington to one-third of the estate in case the gift should be held valid, relying upon the restriction contained in section 41 of the Probate Code. It is provided in section 43 of the Probate Code that the restriction referred to in section 41 shall not be applicable to bequests or devises made by will executed at least six months prior to the death of a testator who leaves neither spouse, child, grandchild or parent. The will now before us was executed more than six months before the death of decedent, who left none of the relatives listed in section 43 of the code. It follows that the gift in question is not limited by the restrictions of section 41.

[8] Appellants contend that the provision in the will which gives the officers of the University of Washington authority to make loans as well as gifts to students makes the bequest invalid because, it is argued, the making of a loan "could not be said to be charitable in character." We see no merit in this contention. The provision authorizing the officers to make loans in some cases to students, rather than gifts, unquestionably promotes the purposes of the testatrix to make the bequest as helpful as possible to the students. The provision for the return of the funds by the recipients naturally permits a larger number

to be aided by the bounty of the testatrix and at the same time encourages the formation of proper habits on the part of the recipients. It cannot in any sense be considered as authorizing a commercial undertaking.

[9] Appellants complain of the action of the trial court in sustaining the demurrer of respondents to their objections to the petition for ratable distribution. They assert that their petition contained statements which for the purposes of the demurrer must be considered as true. In ruling upon the demurrer to appellants' objections the trial court ruled only upon questions of law. The broad statements in the pleading of appellants concerning matters before the court were largely conclusions on their part which could properly be disposed of by the ruling on the demurrer.

The order is affirmed. Respondents shall recover costs on appeal.

MOORE, P. J., and McCOMB, J., concurred.



57 Cal.App.2d 763

KNIGHT v. BERGER.
Civ. 3025.

District Court of Appeal, Fourth District, California.

March 24, 1943.

Hearing Denied May 20, 1943.

1. Names ⇐18

Where there was a deed of mining interest to "L. E. Cullen" and a subsequent deed of the same interest by "Leslie E. Cullen" and both deeds were acknowledged before the same notary public there was a presumption that L. E. Cullen and Leslie E. Cullen were the same person. Code Civ.Proc. § 1963.

2. Mines and minerals ⇐38(16)

In action to quiet title to mining claim, evidence showed that plaintiff had sole title to claim involved.

3. Appeal and error ⇐187(1)

In action to quiet title contention that L. E. Cullen and Leslie E. Cullen were not the same person could not be made for first time on appeal.

4. Boundaries ⇐37(3)

In action to quiet title to mining claims dependent upon location of true boundary line, evidence sustained findings with respect to the position of the boundary line.

5. Mines and minerals ⇐38(16)

In action to quiet title to mining claims, defendant was not entitled to disputed area on ground of "adverse possession" where she failed to prove either continuous or exclusive possession and failed to prove that she had paid the taxes or that none had been assessed and also failed to establish that plaintiff knew or had any means of knowing that any partial possession on defendant's part was adverse.

See Words and Phrases, Permanent Edition, for all other definitions of "Adverse Possession".

6. Mines and minerals ⇐38(16)

In action to quiet title to mining claims evidence failed to establish a valid relocation of claim by defendant.

7. New trial ⇐144

Where every material statement in the affidavits relied upon by defendant for a new trial on ground of newly discovered evidence was categorically denied by counter affidavits such denial alone was sufficient to justify the denial of the motion.

8. New trial ⇐102(3)

Where defendant had made no effort to produce allegedly newly discovered evidence during the more than 19 months which elapsed between the date the action was filed and date of trial and the evidence was found within about a month after substitution of counsel, "lack of diligence" clearly appeared which required denial of motion.

See Words and Phrases, Permanent Edition, for all other definitions of "Lack of Diligence".

9. New trial ⇐108(1)

Where evidence by plaintiff was so convincing that allegedly newly discovered evidence by defendant would not have changed the result if it had been produced at the trial, there was no abuse of discretion

in denying defendant's motion for a new trial.

10. Estoppel ⇐118

In action to quiet title to mining claims where estoppel was not pleaded and no element of estoppel was proved, and evidence was at least conflicting with respect to every fact in that connection, contention of defendant that plaintiff was estopped from asserting title to disputed area could not be sustained.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Goodwin J. Knight against D. Berger to quiet title to certain mining claims. From a judgment for plaintiff and from an order overruling a motion for a new trial, the defendant appeals.

Purported appeal from order denying motion for new trial dismissed and judgment affirmed.

H. E. Schmidt, of Bakersfield, for appellant.

George W. Wilson, of San Francisco, and Borton, Petrini, Conron & Borton, of Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is an action to quiet title to certain mining claims in Kern County. The plaintiff is the owner of the Elephant Lode, the Hope Lode and the Excelsior Lode mining claims, having acquired title through mesne conveyances running back to the original locators. The Elephant and Hope claims were located on December 1, 1896, and the Excelsior claim on April 4, 1898. The defendant is the owner of the Bob-tail claim which was originally located on March 25, 1897. The Bob-tail claim lies to the west of the main portion of the Elephant claim and of the northerly part of the Hope claim, and to the north of the Excelsior claim. While small portions of the Hope and Excelsior claims are involved in this action the main controversy, and the only one requiring consideration on this appeal, is as to the location of the boundary line between the Elephant claim and the Bob-tail claim, being the westerly line of the Elephant claim and the easterly line of the Bob-tail claim.

There is no evidence of any conflict with respect to this boundary line at the time these various claims were located and the uncontradicted evidence shows that at least as early as 1900 the northwest and the southwest corners of the Elephant claim, upon the location of which this controversy depends, were marked by monuments upon the ground in the exact position found by the court as the northwest and southwest corners of the Elephant claim. The location of this boundary line, as thus indicated, was not questioned by any of the successive owners of these claims for some 38 years. Sometime before 1924 the owners of the Elephant claim constructed a tunnel on that claim with its portal near the boundary line between that claim and the Bob-tail claim and running in a southeasterly direction. A short distance southeasterly from the portal of this tunnel a drift was constructed running to the right from this tunnel and toward the Bob-tail claim. In 1924 a former owner of the Bob-tail claim obtained permission from the owners of the Elephant claim to use the front portion of this tunnel and the drift to the right for the purpose of extending that drift under the Bob-tail claim and removing ore from the Bob-tail claim by taking it through the drift and tunnel to the portal thereof. In 1926, a subsequent owner of the Bob-tail claim was given like permission to use this tunnel and drift and it seems to have been thus used for some years thereafter. It seems apparent that the use of this portion of the tunnel and of the drift by the owners of the Bob-tail claim eventually led to the claim of title now made by the defendant in the present controversy.

In 1930, the defendant became interested in the Bob-tail claim and later became its sole owner. In spite of the long continued recognition by her predecessors in interest of the boundary line between the Elephant claim and the Bob-tail claim, in the position as found by the court, the defendant in 1935 erected new corner monuments as the northeast and southeast corners of her claim, which monuments were well within the area of the Elephant and Hope claims as theretofore recognized. The new easterly boundary line of the Bob-tail claim, as thus claimed by the defendant, would take in a large portion of the Elephant claim, including the drift to which we have referred and that portion of the tunnel between its portal and a point well beyond the place where the drift takes off from the tunnel. The defendant then executed new location notices renaming her claim the "New Bob-tail" and describing its posi-

tion by reference to the new corner monuments which she had erected. In 1936 the defendant applied to the United States Land Office for a mineral patent to the area within the lines of the New Bob-tail as marked on the ground by her in 1935, which area included portions of the Elephant, Hope and Excelsior claims. This action followed and in her answer the defendant alleged that since 1930 she is and has been in the continuous and exclusive possession of the New Bob-tail claim, as above described. The court found in all respects in favor of the plaintiff and the defendant has appealed from the judgment with an attempted appeal from an order denying her motion for a new trial.

[1-3] The appellant, relying upon the well-known rule that the plaintiff in such an action must recover upon the strength of his own title and not upon the weakness of the title of his adversary, first contends that the finding that the respondent is the sole owner of the Elephant claim is not supported by the evidence since an undivided one-fourth interest in the Elephant claim was conveyed in 1897 to one S. E. Cullen and that this interest has never been acquired by the respondent. It is claimed that by a deed dated April 27, 1897, one of the original locators of the Elephant claim conveyed an undivided one-fourth interest therein to one S. E. Cullen and that by another deed dated May 8, 1897, one Leslie E. Cullen conveyed this one-fourth interest to one George Tanner. While Tanner's interest passed by later conveyances to the respondent it is argued that there is no evidence that S. E. Cullen and Leslie Cullen were the same person, and no evidence of any conveyance from S. E. Cullen to Leslie E. Cullen covering this one-fourth interest. While the reporter's transcript shows the deed of April 27, 1897, as conveying this interest to S. E. Cullen the record conclusively shows that the name of the grantee was incorrectly copied by the reporter and that that deed actually conveyed the property to L. E. Cullen. It appears that the deeds of April 27, 1897, and of May 8, 1897, which had been recorded, were copied in longhand and certified by a deputy recorder and introduced in evidence and used in the trial of this action. These original exhibits, with others where the copying was done by the same deputy recorder, are before us. While the first initial of the grantee in the deed of April 27, 1897, as written by the deputy recorder, could be read as either an "S" or an "L" it appears beyond question, both from that exhibit and these other exhibits, that that initial was written for and intended to be an "L" and that the grantee in the deed of April 27, 1897, was L. E. Cullen and not S. E. Cullen. This appears from the way the capital letter "S" is written in this deed and in these other exhibits, and also from the way the letter "L" was written in other places by this deputy recorder. For instance, in the words "Los Angeles County" the capital "L" is identical with the first initial of the grantee in the deed of April 27, 1897, and the same situation appears in connection with the word "Lancaster" as written in one of these exhibits. The evidence shows that this one-fourth interest was conveyed to L. E. Cullen and that eleven days later Leslie E. Cullen conveyed that interest to Tanner. Both deeds were acknowledged before the same Notary Public. There is not only a presumption that these parties were identical, Code Civ.Proc., § 1963; McKinley Bros. v. McCauley, 215 Cal. 229, 9 P.2d 298, but the other evidence, with the only reasonable inferences therefrom, amply support that conclusion. Moreover, no attempt was made in the trial court to show that S. E. Cullen and Leslie E. Cullen were not the same person, no objection was made in the trial court when further evidence could have been produced, and such an objection may not be first urged on appeal. Shain v. Sullivan, 106 Cal. 208, 39 P. 605. It may be further observed in this connection that in addition to proving a complete record title the respondent proved a title in himself by adverse possession and the court so found upon ample evidence.

[4] It is next urged that the evidence does not support the court's findings with respect to the position of the boundary line between the Elephant claim and the Bob-tail claim, upon the location of which this entire controversy depends. The record and briefs are voluminous and we will refer briefly and in general terms to portions of the evidence without attempting a complete summary. The testimony of many witnesses, including some of the former owners of the Bob-tail claim, clearly discloses that since 1900 the northwest and southwest corners of the Elephant claim have been clearly marked and identified by monuments on the ground, which have remained in the same place, and from which the westerly boundary line of the Elephant claim has been not only clearly ascertainable but obvious to anyone interested in discovering

its location. Three maps made by United States mineral surveyors in 1924, 1932 and 1936, respectively, were introduced in evidence. All of these show the boundary line between the Elephant claim and the Bob-tail claim as found by the court. Another surveyor, who made the map accepted by the court, testified that he surveyed the property in 1936 and that all of the corner monuments of the Elephant claim were then in position and as shown by him on his map. One of the surveyors testified that he surveyed the property in 1936 on the order of the Department of the Interior and that he found the corner posts and the west line of the Elephant claim as fixed and found by the court. Another surveyor testified that he surveyed the Bob-tail claim in 1932 at the request of its owner who desired to apply for a patent, that one of the original locators of that claim and this appellant assisted him and gave him information, that he found the corners and side lines of the Elephant and Hope claims from marked posts set in the ground, and that his survey corresponded exactly with the boundary line as found by the court. Another witness testified that in 1900, while he was lessee of the Bob-tail claim, he asked the then owner of the Elephant claim to help him locate the line between the two claims; that they found certain monuments and "sighted" the line, finding it in the position as now found by the court; and that from 1900 to 1916 he had never heard anyone claiming the existence of any different line. He further testified that in 1915 he bought the Elephant and Hope claims and that the monuments were then in the same position as in 1900 and 1912, and where, he again saw them in 1938, all being in accordance with the line as found by the court. Another former owner of the Bob-tail claim testified that in 1923 the stakes which are material here were in the same position, that in 1924 he had a survey made which confirmed the same line and that in 1938 these stakes were in the same position, all in accordance with the finding of the court. He also testified that in 1924 while he was operating the Bob-tail claim he got permission from the owners of the Elephant claim to use the tunnel and drift on that claim for the purpose of extending the drift on and under the Bob-tail claim and taking ore out through that tunnel. Also, that two years later, after he had sold the Bob-tail claim, the new owner thereof received permission to do the same thing. He further testified that in 1924, the owners of the Elephant and Bob-tail claims met and went over the ground, finding all corners and tracing the boundary line as now found by the court.

The original location notice of the Bob-tail claim, which was located after the Elephant claim, recites that it "joins the Elephant mine on the west." An amended location notice for the Bob-tail claim was filed in 1901, giving a specific description of the property, and the easterly line thereof corresponds exactly with the westerly line of the Elephant claim as found by the court. Nearly all of the subsequent deeds covering the Bob-tail claim, including a deed in 1936 by which this appellant acquired a part of her title to that claim, refer to the specific description given in the amended location notice filed in 1901, which corresponds with the line as found by the court.

There is abundant evidence that from 1900 to the date of the trial all corners which are material here have been visibly monumented, that the position of these monuments corresponds to the court's finding, that numerous predecessors of the appellant have known of the presence of these monuments and have recognized the boundary line as being in the position found by the court, and that the material facts were not questioned for nearly forty years. The appellant made no effort to prove that the corners of the Elephant claim had not remained monumented all these years in the position which supports the court's finding, and the uncontradicted evidence shows that there were not in 1935, and had not been from 1900 to 1935, any monuments or evidence of the existence of monuments at the points where she placed new monuments in 1935 in support of her claim to what she now calls the "New Bob-tail" claim. The appellant herself testified that the first time any monuments were erected to mark the New Bob-tail claim, as outlined by her, was in 1935 when she erected them.

The appellant incidentally claims that there is some evidence of an agreed boundary line in the position which she claims to be the actual boundary. There is no evidence of any such express agreement and her claim of an implied agreement rests on supposed inferences from a part of the evidence when other inferences therefrom are possible, and when the bulk of the evidence is directly to the contrary. The evidence discloses that prior to 1935 she herself did not believe that the line had

been agreed upon in the position she now relies on and there is ample evidence that the line as fixed by the court has, since 1901, been indicated by continuously existing monuments, has been easily ascertainable and has been recognized by all.

[5, 6] The appellant's claim that she established a title to the disputed area by adverse possession is without merit. This claim largely rests on her use of the tunnel and drift to which we have referred. Not only was any such use a permissive one but, aside from the matter of conflicting evidence, she failed to prove either continuous or exclusive possession, failed to prove that she had paid the taxes or that none had been assessed, and failed to establish that the respondent knew or had any means of knowing that any partial possession on her part was adverse to him. For similar reasons, her contention that the evidence establishes a valid relocation of the New Bob-tail claim, insofar as it affects the disputed area, cannot be sustained.

[7-9] The appellant next contends that the court erred in denying her motion for a new trial, it being argued that her affidavits used in that connection disclose evidence "of such compelling force" as to require that a new trial be granted. It seems to be contended that this new evidence would demonstrate that the owners of the Bob-tail claim and not the owners of the Elephant claim made the excavations in the tunnel, to which we have referred, from the portal to a point past the mouth of the drift to the right and also in that drift itself. Not only is this contrary to the uncontradicted evidence in the record but certain proofs of labor relied upon as showing that fact were not only uncertain and indefinite as to where the labor was done but were filed before that tunnel and drift were excavated. Some of the evidence sought to be produced was actually introduced at the trial, much was a matter of record and readily available, and all of it is either cumulative, corroborative of testimony that was produced, or contradictory to evidence produced on the same subject and going to the same issues. Every material statement in the affidavits thus relied upon by the appellant was categorically denied by counteraffidavits, which fact is sufficient in itself to justify a denial of the motion. Monnette v. Title Ins., etc., Co., 107 Cal.App. 313, 290 P. 668. Moreover, there is an entire absence of any showing of reasonable diligence in discovering the alleged new evidence. The only reason given in this connection is that the appellant changed counsel after the trial of the action and that until she obtained new counsel she did not know the relevancy or materiality of the evidence in question. Lack of diligence clearly appears in that no effort was made to produce this evidence during more than nineteen months which elapsed between the date the action was filed and the date of trial, while she easily found the witnesses and the other evidence within about a month after the substitution of counsel was made. The evidence said to be newly discovered so far as material, directly relates to the issues of the proper position of the boundary lines and the possession of the disputed area, which issues were thoroughly gone into during the trial, including the matter of the construction of this tunnel. It may be further observed that in view of the convincing nature of the evidence produced by the respondent it could not be reasonably expected that this new evidence, if it had been produced at the trial, would have affected or changed the result as reflected in the judgment which was rendered. No abuse of discretion appears in this regard. Waer v. Waer, 189 Cal. 178, 207 P. 891; Pandolfo v. Jackson, 12 Cal.App.2d 232, 55 P.2d 550.

[10] Some contention is made that the respondent is estopped from asserting title to the disputed area, based on the claim that the former owners of the Bob-tail claim excavated the tunnel and drift and removed ore from the disputed area without objection. Estoppel was not pleaded, no element of estoppel was proved, and the evidence is at least conflicting with respect to every fact in that connection. If the appellant and her predecessors actually took any ore out of the disputed area there is no evidence that such fact was known to the respondent or his predecessors. At all times the appellant and her predecessors knew or had ready means of ascertaining the position of the true boundary line between these properties and no valid reason appears for their doing any work on the disputed area, if we assume that such work was done.

All of the material findings are amply sustained by the evidence. The purported appeal from the order denying the motion for a new trial is dismissed. The judg- is affirmed.

MARKS, and GRIFFIN, JJ., concurred.

57 Cal.App.2d 918

In re PARDUE'S ESTATE.

TOWNER v. HEITMAN et al.

Civ. 13954.

District Court of Appeal, Second District, Division 2, California.

March 31, 1943.

Hearing Denied May 27, 1943.

1. Executors and administrators ⇐504(5)

The superior court sitting in probate was not without jurisdiction to pass upon written "objections" filed to administratrix' accounts on ground that Probate Code provides that interested party may file written "exceptions" to an account, since in practice the quoted words are equivalent, although technically they differ. Probate Code, § 927.

The word "exception" is defined as an objection, oral or written, taken, in course of an action or proceeding, as to bail, to the decision or a ruling of a judge, or to something in his charge to a jury.

See Words and Phrases, Permanent Edition, for all other definitions of "Exception" and "Objection".

2. Executors and administrators ⇐131

Where administratrix, who was also devisee of half interest in decedent's property, was required to retain possession of property during period of administration to obtain rents and profits or to sell property for purpose of liquidating claims against the estate, her possession of property was in her capacity as administratrix and not as "tenant in common" with co-devisees, and hence administratrix was chargeable with rent for use of property. Probate Code, § 582.

See Words and Phrases, Permanent Edition, for all other definitions of "Tenant in Common".

3. Appeal and error ⇐1011(1)

The trial court's determination on conflicting evidence is binding.

4. Executors and administrators ⇐131

An administratrix who failed to try to rent or sell property of the estate which administratrix occupied was properly charged with reasonable rental value thereof. Probate Code, § 582.

5. Appeal and error ⇐909(4)

It will be presumed that trial court in fixing reasonable rental value of decedent's property which administratrix occupied, took into consideration any advances of administratrix' personal funds that benefited the property. Probate Code, § 581.

6. Executors and administrators ⇐225(4)

An administratrix' claim for credit of sum which she had paid to attorney on account of fees earned in connection with administration of estate was properly disallowed where no application was made to probate court for an order allowing attorney's fees and no such order was ever made. Probate Code, § 911.

Appeal from Superior Court, Los Angeles County; Arthur S. Guerin, Judge.

In the matter of the estate of John Andrew Pardue, deceased, wherein Naomi Towner, individually and as administratrix of the last will and testament of John Andrew Pardue with will annexed, filed accounts which were objected to by Pansy Phillips Heitman and others. From portions of orders approving the account, Naomi Towner, individually and as administratrix, appeals.

Affirmed.

L. E. Dadmun, of Los Angeles, for legatee and appellant.

Marshall Stimson and Noel Edwards, both of Los Angeles, for objecting heirs and respondents.

Earl D. Killion, of Los Angeles, in pro. per.

McCOMB, Justice.

This is an appeal from portions of orders approving the account of the special administratrix of the last will of John Andrew Pardue, deceased, and of an account of the administratrix of his estate, wherein:

(1) The account of the administratrix is charged

(a) $800 as the reasonable rental value for the use of a parcel of property of the estate for a period from February 1, 1937, to September 30, 1938, and

(b) $1,600.40 as the reasonable rental value for the use of the same parcel of property for the period from October 1, 1938, to February 28, 1942;

(2) The administratrix is not allowed a credit for the sum of $290.50 paid to her

attorney on account of fees in connection with the administration of the estate.

These are the essential facts:

On November 8, 1936, John Andrew Pardue died testate. Part of the property of his estate consisted of a parcel of land upon which was located a dwelling house. This the administratrix, appellant, occupied from February 1, 1937 to and including February 28, 1942. During this period the administratrix with her own personal funds paid for necessary repairs and the general upkeep of the building.

March 11, 1942, the amended account of Naomi Towner, the special administratrix, and her first amended account as administratrix with the will annexed, together with written "objections", filed by certain devisees of the decedent, were heard before the superior court sitting in probate. After receiving evidence on the accounts and in support of the objections, the court approved the accounts with certain exceptions among which were these:

(1) It charged the administratrix

(a) $800 as the reasonable rental value for the use of a parcel of property of the estate for a period from February 1, 1937, to September 30, 1938, and

(b) $1,600.40 as the reasonable rental value for the use of the same parcel of property for the period from October 1, 1938, to February 28, 1942;

(2) It disallowed the administratrix credit for the sum of $290.50 paid to her attorney on account of fees in connection with the administration of the estate.

Appellant urges, for reversal of the portions of the orders set forth supra, three propositions, which will be stated and answered hereunder seriatim.

[1] *First: The court was without jurisdiction to hear and pass upon the written "objections" which were filed to the accounts of the administratrix for the reason that the probate code does not authorize filing of "objections" to an account, but does provide that an interested party may file written "exceptions" to an account. (Sec. 927, Prob.Code.)*

This proposition is untenable. Technically there is a difference between an exception and an objection. (See Wigmore on Evidence, vol. I, Third Ed. (1940), 353, sec. 20.) In practice, however, the two words have been held to be equivalent. (Ranahan v. Gibbons, 23 Wash. 255, 62 P. 773, 775.) As they are applied to the instant case, we are satisfied that the words are synonymous in their meaning.

This conclusion finds ample support in recognized lexicons. For example, in volume I, Webster's New International Dictionary, Second Edition (1939), page 889, after the word "exception", the following definition is given: "An *objection,* oral or written, taken, in the course of an action or proceeding, as to bail, to the decision or a ruling of a judge, or to something in his charge to a jury." (Italics added.)

In III, The Oxford English Dictionary (1933), page 374, after the word "exception" appears the following definition: "An *objection* made to the ruling of a court in the course of a trial." (Italics added.)

Second: Since the administratrix, Naomi Towner, was a devisee under the will of decedent of a half interest in the property which she occupied during the period of administration, she was a tenant-in-common with her co-devisees, and was not chargeable with rent for the use of the property.

This position is likewise untenable for the reason that the administratrix's possession of the property in the instant case was not in her individual capacity as a tenant-in-common, but as administratrix of the estate.

Section 582 of the Probate Code reads: "When the time to file or present claims has expired, the executor or administrator must deliver possession of the real property to the heirs or devisees, unless the income therefrom for a longer period or a sale thereof is required for the payment of the debts of the decedent."

[2] It is conceded that up to the time the orders in question were made there were unpaid claims outstanding against the estate. Therefore, under the code section above quoted, it was necessary for the administratrix to retain possession of the property during the period of administration to obtain rents and profits from the use of the property or to sell the same for the purpose of liquidating claims against the estate. Hence her possession of the property was in her capacity as administratrix and not as a tenant-in-common with her co-devisees. (Brazil v. Silva, 181 Cal.

490, 499, 185 P. 174.)* This being true, it was the administratrix's duty to try to rent the premises or sell it for the purpose of obtaining funds with which to liquidate debts of the estate.

The trial court properly found that the administratrix did not attempt during the period of administration either to rent or sell the property, she having testified with reference to the property of the estate which she occupied as follows: "I did not try to rent the premises and I do not want to sell it."

[3, 4] Testimony which she may have given to the contrary presented merely a conflict in the evidence, the trial court's determination of which is binding on this court. It follows that, since the administratrix failed either to try to rent or sell the property of the estate which she occupied, the trial court properly charged her with the reasonable rental value thereof.

[5] It was also the duty of the administratrix under section 581 of the Probate Code to keep the property in good and tenantable repair. Had she rented or sold the premises, it would have been unnecessary for her to advance or use her own funds to keep the property in repair. It will be presumed that the trial court in fixing the reasonable rental value of the property which she occupied took into consideration any advances of her own personal funds that benefited the property of the estate.

Estate of Rindge, 136 Cal.App. 263, 28 P.2d 705, relied upon by appellant is inapplicable to the facts of the instant case, because in Estate of Rindge the executor made every attempt to obtain a tenant for the property of the estate, and only occupied it after having failed to obtain a suitable tenant and for the purpose of saving the estate the expense of a care-taker.

[6] *Third: The trial court committed prejudicial error in disallowing the executrix's claim for a credit of $290.50, which sum she had paid to her attorney on account of fees earned in connection with the administration of the estate.*

This proposition is also untenable. Section 911 of the Probate Code provides that, after six months has elapsed from the date of issuance of letters of administration, the probate court may make an order, after notice to persons interested in the estate, requiring an administratrix to pay her attorney, from funds of the estate, compensation on account of services rendered to the time of the order.

In the instant case no application was made to the probate court for an order allowing attorney's fees, nor was any such order ever made. Therefore the trial court properly disallowed appellant credit for the amount she had paid to her attorney.

Upon the filing of her final account the administratrix can be given credit for any fees properly paid for legal services rendered on behalf of the estate.

For the foregoing reasons the orders appealed from are and each is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.

* The provisions of section 1452 of the Code of Civil Procedure, referred to in the cited case, are now embodied in section 582 of the Probate Code.



57 Cal.App.2d 721

BRANT v. RETIREMENT BOARD OF SAN FRANCISCO et al.

Civ. 12287.

District Court of Appeal, First District, Division 1, California.

March 22, 1943.

1. Municipal corporations ⇐220(9)

If charter of city of San Francisco conferred judicial power on Retirement Board, board's findings of fact, based on conflicting evidence, would be binding on the courts.

2. Municipal corporations ⇐200

Under charter of city of San Francisco providing for a pension for family of member of fire department who dies as result of injury received during performance of his duty or from sickness clearly resulting from discharge of such duty, fact that 11 months expired between exposure while fighting a fire and fireman's death did not militate against claim of fireman's

family for pension, if evidence produced established proper causal relation.

3. Municipal corporations ⇐220(9)

Pension laws should be liberally construed.

4. Evidence ⇐574

As against positive, uncontradicted factual evidence applicable to the particular case, particularly when given by attending physicians, opinions of experts as to probabilities or possibilities create no conflict.

5. Appeal and error ⇐1011(1)

Although an appellate court has no power to set aside findings of a judicial body vested with fact finding power when such findings are based on conflicting evidence, in order for such rule to apply, the conflict must be substantial and real.

6. Municipal corporations ⇐200

Evidence justified an award of pension to dependents on ground that fireman's death was result of complications which followed an illness contracted from exposure while fighting fire.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Proceedings by Josephine Brant against Retirement Board of San Francisco and others for writs of review and mandate to review the denial of a pension to petitioner. From a judgment directing issuance of writ of mandate, the defendants appeal.

Affirmed.

John J. O'Toole, City Atty., and Reynald J. Bianchi, Deputy City Atty., both of San Francisco, for appellants.

Milton Marks and Morris Lowenthal, both of San Francisco, for respondent.

PETERS, Presiding Justice.

The Retirement Board of San Francisco, on which there are seven qualified members, by a vote of three to two (two members being absent) denied the application of respondent Josephine Brant for a pension. A rehearing was denied by a vote of two to two. Thereafter, respondent filed petitions for writs of certiorari and mandate with the superior court to secure a review of the board's ruling. The court ruled that petitioner was entitled to a writ of mandate compelling the granting of the pension, and denied certiorari because the requested relief had been granted by mandate. From this judgment the board appeals.

[1] The board contends that it is a local quasi-judicial body, and that its findings may be disturbed by a court only if there is no substantial evidence before the board in their support. There can be no doubt that, if the city charter confers judicial power on the board, its findings, based on conflicting evidence, are binding on the courts whether review is sought by mandate or certiorari. Naughton v. Retirement Board of San Francisco, 43 Cal. App.2d 254, 110 P.2d 714; Walker v. City of San Gabriel, 20 Cal.2d 879, 129 P.2d 349, 142 A.L.R. 1383. The question as to whether the charter of San Francisco confers judicial power on the appellant board is not free from doubt. The trial court assumed that the board exercised judicial functions. For the purposes of this opinion we will indulge in the same assumption. The exact question presented, therefore, is whether there was any substantial evidence to support the determination of the board.

The respondent is the widow of Elmer Brant who died of cerebral hemorrhage on December 20, 1937. From 1922 to the date of his death Brant was employed as a fireman holding the rank of truck driver. The city charter (§ 169) provides that in the event any member of the fire department "shall die as a result of any injury received during the performance of his duty, or from sickness clearly, unmistakably and directly caused by and resulting from the discharge of such duty" his family shall be entitled to a pension. It is respondent's contention that her husband died as a result of complications which followed an illness contracted in the performance of his duties.

The evidence shows that Brant was forty-five years old at the time of his death, and that prior to January of 1937 he was a normal, healthy, athletic man. On January 11, 1937, on a cold day, in a driving rain, Brant, together with the other members of his firehouse, was called upon to fight a fire which lasted over five hours. All of the men received a severe drenching. Nearly every man in the firehouse, within a short time after the fire, contracted a severe cold, and was compelled to take time off. Brant contracted such a

cold, which, by January 15th, had developed into influenza and bronchial pneumonia. He was very ill for a period of twenty days with the pneumonia attack. Respondent's evidence was to the effect that the pneumonia attack left Brant with a hacking severe cough; that from February, 1937, to the time of his death in December of that year he had frequent and extended coughing spells. During this period Brant was under the care of a physician who prescribed for the cough but was unable to check it. Brant collapsed in the bathroom of his home on the morning of December 20, 1937, with a cerebral hemorrhage. He died from that cause in the afternoon of that day. Respondent's evidence was that prior to getting out of bed on that morning Brant had a severe coughing spell, and that he had another spell after he went to the bathroom to shave. It was her contention, sustained by the trial court, that the fire of January 11th caused the pneumonia, the pneumonia caused the cough, and the cough caused the strain that resulted in the bursting of the blood vessel in Brant's brain that resulted in his death.

[2, 3] The fact that eleven months expired between the exposure and the death in no way militates against petitioner's claim if the evidence produced, without substantial conflict, establishes the proper causal relationship. Pension laws are to be liberally construed and applied to the end that the beneficent policy thereby established may be accorded proper recognition. Dillard v. City of Los Angeles, 20 Cal.2d 599, 127 P.2d 917, 128 P.2d 537; Casserly v. City of Oakland, 215 Cal. 600, 12 P.2d 425.

The records of appellants show that on January 11, 1937, Brant was subjected to an unusual exposure in fighting a fire for five hours in a cold, driving rain. There is no dispute but that most of the men from Brant's firehouse shortly thereafter came down with severe colds. Brant developed a cold which developed into influenza and bronchial pneumonia within four days of the exposure. The evidence of his then attending physicians, of his fellow workers, and of his family, establishes without conflict, that the exposure was the cause of the pneumonia. When a healthy young man is subjected to five hours of exposure, and shortly thereafter develops pneumonia, and there is no evidence of any intervening cause that would produce pneumonia, it requires no expert knowledge to conclude that the exposure was at least a contributing cause of the pneumonia.

The second step in the chain of causation—that the cough was the result of the pneumonia and continued until the time of death—was proved by overwhelming testimony. Respondent testified that Brant was left with a severe cough after the pneumonia attack, and that such affliction, with increasing severity, continued until the time of death. Dr. John McKay, one of the doctors who attended Brant during the pneumonia attack and who also attended him between February and November, 1937, for the resulting cough, testified that Brant was left with a severe cough as the result of the bronchial pneumonia; that such is a common complication of that disease; that he had prescribed for Brant for the cough but had been unable to check it; that he had seen Brant seven or eight times during the year at his office; that Brant complained of the severe cough and asked for relief; that he had prescribed five different prescriptions for the cough; that the cough was very harsh, dry and hacking; that during an attack the cough was "so severe, in fact, that it lasted for a considerable length of time, and would cause his face, of course, to become red, and the veins of his neck and temporal region to become distended." The severity of the cough and its continuous nature were graphically described by many of the witnesses. Respondent testified that during the frequent coughing spells "the temples would throb, his eyes would bulge, and the muscles and cords in his neck would stand out like he was strangling"; that the cough increased in severity toward the end of the year; that frequently the spells were so severe "he would lose his dinner"; that frequently he would awaken at night "coughing so severe he would have to get up and walk the floor, he couldn't stand it"; that the various cough medicines gave but temporary relief. Brant's daughter, Imelda, described, in detail, the nature and extent of the coughing spells suffered by Brant during 1937. She testified that "it just seemed like he was choking and you would just be able to tell what was going on inside; the veins up here [forehead] would pop out, his eyes would bulge, his face would get liver red." Virginia, another daughter of Brant, also testified as to the continuous nature of the coughing spells. She testified that "when he used to cough his whole body used to tremble. He used to hold his head in his hands, his

eyes would bulge, his face would get real red, the temples up here would stand out. We often remarked it looked like a blood vessel was going to break, he coughed so hard; it seemed that his whole body was being torn apart." She also testified that as the months went on the cough became increasingly severe, and that on the night of December 19th, he had a very bad spell, coughing continuously for about fifteen minutes; that on the morning of December 20th she heard her father coughing in the bathroom; that shortly thereafter they heard him breathing heavily and opened the door and found him unconscious on the floor.

Grace Wiebusch had known the Brants for ten years. She testified that she and her husband normally saw the Brants about three times a week; that before January, 1937, Brant was a well man; that thereafter his cold grew increasingly worse; that "he used to cough until he was exhausted; his face would be red; and he would hold his head in his hands and sit; and he would sit there until he was through coughing—it looked as if he was worn out"; that she never saw him between January and December, 1937, when he didn't cough to some extent. It was stipulated that if Mr. Wiebusch were called he would testify as to the same facts testified to by Mrs. Wiebusch.

Luke Angelich had known and worked with Brant in the fire department for ten years prior to Brant's death. He had worked at the January fire and he, together with five other men from that firehouse, had caught a severe cold as a result of the exposure at that fire. He had taken nine days off as a result of his cold. He testified that Brant was coughing quite a bit when he returned to work after the pneumonia attack; that he noticed Brant taking cough medicine from that time until his death; that for the six months prior to Brant's death the cough continued; that it was "a severe cough"; that when he was working with Brant on the night shift his bed was next to Brant's and that "there was no sleeping next to him; that's how bad it [the cough] was"; that when he would cough, particularly at night, "he would remind you of a kid getting the whooping cough; he would gag, coughing; he would get a cough so bad he couldn't stop * * * he would be as red as a beet, like a child with whooping cough. He would strangle from coughing"; that he would sometimes get four or five spells a night; that the cough was more severe at night than during the day; that Brant always had a cough after the pneumonia attack.

Ralph W. Bradley was another fireman from the same firehouse who had worked with Brant for seven years and had known him for eleven years. He testified that for the last six or nine months of Brant's life he "seemed to have a continual cough * * * he would flush at the face, and it was a very deep cough. He would turn red and it was sort of a continual cough. He seemed to cough all the time."

Raymond W. Remy, a lieutenant in the fire department and Brant's superior officer for ten years, also was called as a witness. He described the January 11th fire, and testified to the severe drenching received by his men, including Brant. He also testified that it was cold enough that morning to turn the skin blue; that Brant, prior to that fire, was in good health; that after the pneumonia attack he had a slight cold; that "he was coughing around there right along, but how long it continued is too far back for me to remember"; that "he was always coughing more or less," but that the cough did not incapacitate him; that he had no recollection of seeing Brant in such terrific spells as described by his fellow workers; that he, as an officer, had a separate room, and did not sleep with the men; that if Brant coughed at night he would not know about it; that he can remember Brant had a cough and that it continued through 1937.

Harry Wrin, another fireman who had worked with Brant for many years, and who had contracted a cold at the 1937 fire, testified that after the pneumonia attack Brant had a cough, and that previous to his death he had a severe cough; that he used to "kid" Brant during 1937 for taking cough medicine; that Brant's cough was severe, "he would cough, and he got rather red in the face."

This is a fair summary of the evidence on the issues as to whether the fire caused the pneumonia and whether the pneumonia caused the cough. Appellants urge that there was a conflict in the evidence on these two issues. After reading the record we are of the opinion that the above summarized evidence stands uncontradicted and unimpeached. Appellants refer to one answer given by Mrs. Brant and from that one answer contend it may be inferred the

pneumonia was not caused by the fire. Mrs. Brant, after testifying several times that prior to the fire her husband had been healthy and athletic and had only occasional colds from which he quickly recovered, was asked if Brant had coughed prior to that fire. She answered, "Prior to the fire he had a cold." She was then asked, "I mean, did he do any coughing?" The transcript continues: "A. Not before that, because in winters, like when he was out, exposed in any way, he would develop some sort of a cold, and he would have a slight cough, but it never stayed with him. Q. Well, take a month or 60 days before the Clay Street fire, was he coughing? A. No, sir." It is obvious from a fair reading of the testimony that what Mrs. Brant testified to was that prior to 1937 Brant had had occasional colds, but that coughing caused thereby was slight, and that he recovered from the cough in a short time. Appellants' contention that she testified that Brant was sick at the time of the fire clearly is a distortion of the record. The other testimony relied upon as creating a conflict on this issue, other than that of Dr. Kilgore, which will later be discussed, is so clearly not susceptible of the interpretation given to it by appellants that it need not be discussed.

As creating a conflict on the issues as to whether the pneumonia caused the cough, and whether the cough continued from the pneumonia to the time of death, appellants rely on a couple of isolated sentences, separated from their context, from the testimony of Bradley, Angelich and Remy. These three men were testifying in 1940 as to facts that occurred three years before. They could not be absolutely positive as to dates. All three testified that after the pneumonia attack Brant had a cough. They all thought it got some better during the summer months but that for "six," or "eight" or "nine" months before Brant's death the cough became increasingly severe.

The main testimony relied upon by appellants as creating a conflict on this issue, other than that of Dr. Kilgore, to be later discussed, is that of Lieutenant Remy. The Lieutenant, after testifying as to the existence and continuous character of Brant's cough, was asked if he recalled Brant coughing so violently his face got red and the veins swollen as a result. He replied that he did not "recollect" having observed such an experience by Brant. He did testify as to Brant's coughing, and admitted that as an officer he was quartered in a different portion of the building from Brant and the other men. His testimony as to the severity of the cough was purely negative, and in no way conflicts with that of the other witnesses above summarized.

On the issue of whether the coughing caused the cerebral hemorrhage, Imelda testified that on the morning of December 20th, her father had a severe coughing spell in bed that lasted at least ten minutes. The existence of this spell was corroborated by the other members of the family, all of whom testified that Brant then got up and went into the bathroom. Virginia Brant testified that while he was in the bathroom she heard him coughing again, then she heard him breathing heavily, and, upon opening the door, found him collapsed on the floor. Appellants make much of the fact that Imelda and Mrs. Brant could not remember hearing Brant cough in the bathroom, but Mrs. Brant did testify that Virginia, while Brant was in the bathroom, told her, "Daddy is coughing." Obviously, this creates no conflict.

Dr. Thomas D'Arcy Quinn was called to assist in the care of Brant after he had been taken to the hospital on December 20th. He testified that from the physical examination then made that he ascertained that Brant was dying from a cerebral hemorrhage; that Brant was then unconscious; that he had a talk, before Brant died, with Mrs. Brant, and she told him about these coughing spells; that he told Mrs. Brant then that he believed that the strain caused by the coughing caused the hemorrhage; that from an examination of the transcript in this case, from facts gained from a physical examination made by him of Brant in the past, and from attending him on the day of his death, in his opinion "the cough, the chronic, extremely severe cough that he had, had a great deal to do with getting an attack of apoplexy"; that coughing causes a congestion in the brain and causes a dilation and engorgement of the blood vessels, and that "one of those delicate blood vessels [in the brain] is very liable to rupture under those circumstances; that although the autopsy showed "cerebral vessels: moderately sclerosed," such moderate sclerosis was not the whole cause of the hemorrhage; that the principal cause of the apoplexy was the coughing; that coughing will shoot the

blood pressure up twenty or thirty points very quickly; that apoplexy is caused by some strain or trauma; that he has treated "quite a few cases where I think the chronic cough that they had for years contributed a great deal to the cerebral hemorrhage"; that Brant was suffering from chronic bronchitis and that a chronic bronchitic never gets entirely over his cough. He was asked if he could account for the hemorrhage by any other reasonable hypothesis except from the coughing, to which he replied: "My opinion is that the coughing was a very great contributing cause of the hemorrhage, and I cannot account for it in any other way"; that the spell Brant had on December 20th could have caused the hemorrhage even without a prior history of coughing, but the prior history made it much more likely that it was caused by the coughing.

Dr. John McKay was the Brants' family doctor prior to 1937, was acquainted with Mr. Brant prior to 1937, and had examined Brant in 1935 as an applicant for lodge insurance. He attended Brant during the pneumonia attack, was his physician thereafter, and was called in immediately after the attack of December 20th, and attended him until his death. He testified that prior to January, 1937, he saw Brant frequently and that during that period Brant had no cough at any time he saw him; that on January 15, 1937, he was called in and found Brant was a very serious case of bronchial pneumonia; that for the first week he did not think Brant would live; that as a result of the bronchial pneumonia Brant was left with a "severe cough"; that such result was a common complication of bronchial pneumonia; that from February to November, 1937, he prescribed for Brant's cough; that the medicine prescribed was solely for the cough; that during the months mentioned Brant called at his office for medical advice concerning the cough seven or eight times; that he prescribed five different prescriptions for the cough, each of which was refilled many times; that he had observed Brant coughing during this period; that he had a harsh, dry hacking cough which was very severe, and caused congestion in the temporal regions; that when he was called to the Brant home the morning of December 20th, Mrs. Brant told him that Brant had had a severe coughing attack before going to the bathroom; that he diagnosed Brant's condition as cerebral hemorrhage. He was then asked to give his opinion as to the cause of death, and to base his opinion upon the autopsy report showing cerebral hemorrhage as the cause of death, and his observation as attending physician during 1937. He replied that "in my opinion, there is no doubt about it, that a severe cough would do that. It would raise the blood pressure to a certain point, and that would break that artery and cause the hemorrhage. Q. Was the cough, of the kind that you observed Mr. Brant had during 1937, and for which you treated him, of sufficient character to bring about the result that you have just described? A. I would say, yes, it was of a very severe character, and could cause it. Q. And is it your judgment that the cough which Mr. Brant had brought about the cerebral hemorrhage from which he died? A. I certainly believe that." He also testified that cerebral hemorrhage is frequently caused by excessive strain which raises the blood pressure, and that here the only evidence of strain was the coughing; that a severe cough raises blood pressure forty points; that a well known medical book, which he named, lists coughing as a common cause of cerebral hemorrhage; that the cough was caused by the bronchial pneumonia; that there is no doubt in his mind the pneumonic condition of January 15th was tied up with the fire and wetting of January 11th.

The appellants, while admitting that the above summarized evidence supports the conclusion that the fire of January 11th was a proximate cause of the cerebral hemorrhage, contend that the testimony of Dr. Eugene Kilgore, produced as an expert witness by the board, supports the board's finding to the contrary. Dr. Kilgore had never attended or seen Brant in his lifetime, his testimony being given as an expert, and his opinion was based on the record produced before the board which he had read. He was asked if he had formed an opinion as to whether the exposure at the fire caused the death. He replied that "I think there is a very remote possibility that that was so"; that he based his opinion on the fact that this man attended a fire on January 11th and became cold and wet and that "four days later he contracted pneumonia"; that it was the theory of respondent that the drenching at the fire caused the pneumonia, that the pneumonia caused the protracted severe cough, and that the cough caused the cerebral hemor-

rhage; that "I think all these suppositions are possible, but I think, in varying degrees, improbable."

He then took up each step separately. As to whether the drenching caused the pneumonia, he testified, "this is certainly possible," that severe exposure to cold is frequently followed by pneumonia; that in this case the pneumonia did not show up for four days; that such a time element "does not necessarily rule out a connection between the drenching and the pneumonia, but makes it a little less probable"; that respiratory diseases are common in January; that other men in the department had respiratory diseases at this time; that while "it is easily possible that Mr. Brant's presence at that fire caused the pneumonia, the odds are rather against that association."

Turning to the second link in the chain of causation—that the pneumonia caused the cough—he assumed "that that is the case"; that the autopsy found the lungs to be negative and that this ruled out "bronchiectasis, which is the common cause of protracted cough following pneumonia." He concluded: "While, therefore, I believe it possible that the pneumonia caused the long-lasting severe cough, I think the chances are rather against this supposition."

As to whether the cough caused the cerebral hemorrhage, he testified that "is a not unreasonable, a priori, assumption, for it is well known that arterial blood pressure momentarily rises very much at the time of severe cough. Textbooks of medicine also make reference to the possibility of the severe cough causing the cerebral hemorrhage," but that such association "is not a common experience"; that in his experience he cannot remember a single case of cerebral hemorrhage following immediately after a severe cough; that he had talked with three unidentified doctors concerning this case, and none of them remembers a cerebral hemorrhage that they thought resulted from a severe cough; that when the frequency of cerebral hemorrhage and frequency of coughing in cases of arterial disease are considered, the fact that death from coughing does not occur more often "makes me doubt very much that the coughing caused the cerebral hemorrhage in this case"; that coughing does cause a rapid rise in the blood pressure; that for all these reasons it was "very highly probable that the drenching had nothing to do" with Brant's death.

On this record the trial court found the facts concerning the fire and exposure, and then found that "all of the evidence * * * showed, without any conflict, that * * * Elmer J. Brant * * * died from a cerebral hemorrhage caused by a cough condition from which he was suffering as a result of the activities and work performed by said Brant at said fire of January 11, 1937"; that the evidence before the board "was susceptible of but one conclusion, namely, that petitioner was entitled to a pension, and said evidence fully and overwhelmingly sustained each and every allegation of said application * * * without any material evidence of any kind or character being offered in contradiction of or opposition to said evidence and there is no conflict in the evidence produced before the respondent Retirement Board"; that there "was no substantial or any evidence presented or introduced before said Retirement Board * * * to support a denial of petitioner's application for a pension"; that the testimony of Dr. Kilgore, called as an expert witness by the board "did not constitute substantial or any evidence in support of a denial by said Retirement Board of petitioner's application for a pension and did not, factually or legally, constitute or create a real or a substantial conflict in the evidence produced by the petitioner before the * * * Retirement Board. In this respect, this Court further finds (a) the testimony of said Dr. Eugene Kilgore constituted merely the opinion and conclusion of a physician who had not treated, examined or seen Elmer J. Brant; (b) the testimony * * * was based on matters not appearing in the record or evidence before the Retirement Board and his opinion and conclusions were based upon a state of facts not shown by the record to exist or upon a state of facts at variance with the uncontradicted facts shown by the record to exist and in some material respects his testimony and his opinion and conclusions were at variance with matters of common knowledge and at variance with the record and the uncontradicted evidence before the Retirement Board; (c) the testimony of Dr. Eugene Kilgore was purely speculative and conjectural and constituted merely a statement of conclusions and probabilities without evidence in support thereof; (d) at the very most, the testimony of said Dr.

Eugene Kilgore constituted a mere conflict in words and not a substantial and real conflict in the evidence and was wholly insufficient to support a decision denying the application * * * for a pension"; that all the other evidence produced before the board, including that of Brant's two attending physicians, "constituted positive, uncontradicted, competent, and credible evidence and fully and overwhelmingly supported petitioner's application for a pension," and that "the only conclusion that could reasonably be drawn" therefrom was that Brant died from a cerebral hemorrhage caused by a cough condition contracted at the January 11th fire.

We are of the opinion that these findings are amply supported by the record. It will be noted that Dr. Kilgore assumed that the pneumonia did not develop until four days after the fire. That is contrary to the uncontradicted facts, and at variance with matters of common knowledge. The evidence shows that shortly after the fire Brant developed a cold, which, by January 15th, had developed into pneumonia. The record also shows that because of his cold Brant did not work on January 14th, but secured another man to work for him. When Dr. McKay was called in on January 15th he found Brant in a very serious condition and feared for his life. Certainly, it is a matter of common knowledge that such a condition did not develop instantaneously but must have developed over several days. Thus, the basic premise upon which Dr. Kilgore based his opinion that the "probabilities" were that the exposure at the fire did not cause or contribute to the pneumonia, is contrary to the record.

Moreover, in giving his opinion concerning each of the three steps in the chain of causation, Dr. Kilgore did not testify that any one of the steps was impossible or did not occur. He admitted frankly and fairly that each step was "possible," but testified, hypothetically, that in any given case, the three steps together were "improbable." As opposed to that testimony, we have the positive, unequivocal testimony of the attending physician that in this particular case—not in a hypothetical case—the pneumonia caused the cough and the cough caused this particular cerebral hemorrhage. Under such circumstances, what might have occurred, what may occur in many or most cases, what the "probabilities" might be, creates no conflict with positive testimony as to what did occur in this particular case. It should also be noted that Dr. Kilgore admitted that the cerebral hemorrhage was caused by some sort of a strain. There was no evidence of any other strain than that caused by the coughing. No alternative theory or facts appear in the record. As was said in Reese v. Smith, 9 Cal.2d 324, 328, 70 P.2d 933, 935, "A majority of chances never can suffice alone to establish a proposition of fact, since the slightest real evidence would outweigh all contrary probabilities."

[4, 5] The rule is well settled in this state that, as against positive, uncontradicted factual evidence applicable to the particular case, particularly when given by attending physicians, opinions of experts as to probabilities or possibilities (particularly when partially based on erroneous assumptions) creates no conflict. Thoreau v. Industrial Acc. Comm., 120 Cal.App. 67, 7 P.2d 767; Singer v. Industrial Acc. Comm., 105 Cal.App. 374, 287 P. 567; Winthrop v. Industrial Acc. Comm., 213 Cal. 351, 2 P.2d 142; Gamberg v. Industrial Acc. Comm., 138 Cal.App. 424, 32 P.2d 413; Nielsen v. Industrial Acc. Comm., 125 Cal.App. 210, 13 P.2d 517; Mark v. Industrial Acc. Comm., 29 Cal.App.2d 495, 84 P.2d 1071; Blankenfeld v. Industrial Acc. Comm., 36 Cal.App.2d 690, 98 P.2d 584. While it is true that an appellate court has no power to set aside findings of a judicial body vested with fact finding power when such findings are based on conflicting evidence, it is equally well settled that for that rule to apply the conflict must be substantial and real and not fanciful or fictitious. Thoreau v. Industrial Acc. Comm., supra; Gamberg v. Industrial Acc. Comm., supra; Burns v. Faget Engineering Co., 53 Cal.App. 762, 200 P. 818; Houghton v. Loma Prieta Lumber Co., 152 Cal. 574, 93 P. 377, 14 L.R.A., N.S., 913, 14 Ann.Cas. 1159.

[6] For these reasons it must be held that the findings of the trial court to the effect that the findings of the board are totally unsupported, are themselves supported by uncontradicted evidence.

The judgment is affirmed.

KNIGHT and WARD, JJ., concurred.

57 Cal.App.2d 734

BEDELL ENGINEERING CO. v. ROUSE et al.

Civ. 13983.

District Court of Appeal, Second District, Division 1, California.

March 22, 1943.

Hearing Denied May 20, 1943.

1. Auctions and auctioneers ⇐11

Allegations that to enable defendants as auctioneers to sell plaintiff's personalty, written agreement of purchase was entered into which expressed price of $3,600, that defendants represented that personalty could not be sold at auction for more than $3,600, and that property was sold at auction by defendants for $10,553.04, which defendants kept, and that defendants made promise with no intention of performing it, sufficiently alleged cause of action for fraud, good against general demurrer.

2. Fraud ⇐31

Fraud vitiates every transaction, but when contract is completely executed, it is voidable, and injured party's remedy is action for damages.

3. Constitutional law ⇐321

Plaintiff was entitled to day in court including framing of issues as between it and defendants, and opportunity to prove allegations of complaint charging fraud.

4. Fraud ⇐11(2)

When statement of value is made as positive affirmation of fact and is intended as such by person making it, and statement is false and known to be false by party making it, and is relied on by person to whom it is made, it is actionable.

5. Fraud ⇐64(3)

Where there is reasonable doubt as to whether particular statement is expression of opinion or affirmation of fact, determination thereof rests with trier of facts in action for fraud.

6. Fraud ⇐12

A promise made without intention of performance constitutes "fraud".

See Words and Phrases, Permanent Edition, for all other definitions of "Fraud".

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by the Bedell Engineering Company against Max Rouse and others to recover damages for alleged fraud. From a judgment after demurrer to first amended complaint was sustained without leave to amend, and motion to file second amended complaint was denied, plaintiff appeals.

Judgment reversed.

C. Arden Gingery and E. W. Miller, both of Los Angeles, for appellant.

Samuel A. Miller and Bertram H. Ross, both of Los Angeles, for respondents.

DRAPEAU, Justice pro tem.

Appeal from judgment after demurrer to first amended complaint was sustained without leave to amend, and motion to file a second amended complaint was denied.

Allegations in the complaint essential to this opinion are: (a) That the plaintiff was the owner of certain personal property; that a verbal agreement was made with the defendants as auctioneers to sell the same, but that to enable the defendants as such auctioneers to sell the property a written agreement of purchase and sale was entered into between them, which expressed a purchase price of $3,600. (b) That the defendants represented that the goods could not in any event be sold at auction for more than $3,600. (c) That they made the following statements: "We want you to get every dollar out of this merchandise that you can; we don't want to make any money off of you; if your stock would bring more than $4,000, we would tell you so; we don't want to make in any event more than ten per cent (10%) of the amount of the sale * * *." (d) That the property was sold at auction by the defendants for $10,553.04, which the defendants kept, to the damage of plaintiff.

[1] The complaint alleges a contract of purchase and sale which would bar plaintiff's demand for damages, unless plaintiff's consent to the making of the contract was obtained by fraud. The alleged representation of value and the statements above quoted (together with other usual and essential elements of fraud to be found in the complaint) are sufficient to raise the issue of fraud.

[2, 3] It has been said that fraud vitiates every transaction. 12 Cal.Jur. 721. But when the contract is completely ex-

ecuted, as in the instant case, it is voidable, and the injured party's remedy is an action for damages. City of Oakland v. California Const. Co., 15 Cal.2d 573, at 577, 104 P.2d 30.

Therefore, the amended complaint and the proposed second amended complaint stated a cause of action good against general demurrer. The plaintiff is entitled to his day in court, which includes framing the issues as between it and the defendants, and an opportunity to prove the allegations of the complaint.

[4, 5] The rule to be applied to test the sufficiency of the allegations of misrepresentation in the amended complaint, and in the proposed second amended complaint, is to be found in Willson v. Municipal Bond Co., 7 Cal.2d 144, at page 150, 59 P. 2d 974, at page 976.

"The determination as to whether a particular statement is an expression of opinion or an affirmation of a fact is often difficult, and frequently is dependent upon the facts and circumstances existing at the time the statement is made. Under some circumstances, statements as to value of property are deemed to be mere expressions of opinion. (Gleason v. McPherson, 175 Cal. 594, 166 P. 332; Lee v. McClelland, 120 Cal. 147, 52 P. 300; Craig v. Wade, 159 Cal. 172, 112 P. 891; Barbour v. Flick, 126 Cal. 628, 59 P. 122; Coleman v. Dawson, 110 Cal.App. 201, 294 P. 13; Pease v. Thornburg, 118 Cal.App. 53, 4 P.2d 618; Lion v. McClory, 106 Cal. 623, 40 P. 12), while, under other circumstances, such statements are held to be affirmations of fact. Crandall v. Parks, 152 Cal. 772, 93 P. 1018; Herdan v. Hanson, 182 Cal. 538, 189 P. 440; Neff v. Engler, 205 Cal. 484, 271 P. 744; Williams v. Myers, 110 Cal.App. 265, 294 P. 61; Winkler v. Jerrue, 20 Cal.App. 555, 129 P. 804; Stumpf v. Lawrence, 4 Cal.App. 2d 373, 40 P.2d 920. These and many other cases that could be cited hold that when a statement as to value is made as a positive affirmation of a fact, and is intended as such by the party making it, and such statement is false and is known to be false by the person making it, and such statement is relied upon by the person to whom it is made, then such false statement is actionable. The cases also indicate that where there is a reasonable doubt as to whether a particular statement is an expression of opinion or the affirmation of a fact, the determination rests with the trier of the facts. Vah Dah Dunshee v. Boadway, 119 Cal.App. 678, 7 P.2d 325; McKeever v. Locke-Paddon Co., 58 Cal.App. 51, 207 P. 1040; McElligott v. Freeland, 139 Cal.App. 143, 33 P.2d 430; Hayward v. Widmann, 133 Cal.App. 184, 23 P.2d 762."

[6] In addition to the representation as to value, the declarations quoted from the complaint express a promise by the defendants to the plaintiff. The complaint alleges that the promise was made with no intention to perform the same; and the complaint alleges that the promise was not performed. A promise made without any intention of performing it constitutes fraud. Union F. M. v. Southern Cal. F. M., 10 Cal.2d 671 at 676, 76 P.2d 503.

The judgment is reversed.

YORK, P. J., and WHITE, J., concurred.



REED v. HAYWARD et al.

Civ. 13989.

District Court of Appeal, Second District, Division 2, California.

March 23, 1943.

Hearing Granted May 20, 1943.

1. Action ⇐50(4)

Causes of action to compel mother of allegedly illegitimate child to support child, to establish lost or destroyed will of mother's grandmother, and for declaration that third persons had no interest in property left by grandmother, were improperly united in same complaint. Code Civ.Proc. § 427.

2. Bastards ⇐16

In action by allegedly illegitimate child against his mother to compel mother to support him, court properly sustained demurrers of those who were made defendants under allegations that they claimed some right to mother's interest in her grandmother's estate.

3. Action ⇐45(2)

In action by allegedly illegitimate child against his mother to compel her to support him, child could not by cause of action to quiet title establish title in himself to mother's interest in her grandmother's estate.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Jack Edwin Reed, a minor, by his guardian ad litem, Evalyn M. Nichols, against Jean Louise Hayward (Black) and others and Monte Cly and P. E. Durkee for specific performance of obligation to support the plaintiff by Jean Louise Hayward (Black), to require Jean Louise Hayward (Black) to produce an alleged will, or in event that will's existence and validity could not be established to have a decree that property which descended to Jean Louise Hayward (Black) by reason of intestacy be adjudged to have been received in trust for benefit of her children, that one-half be seized by court for securing support of children, and that it be adjudged that other defendants had no right, title or interest in property. From a judgment of dismissal as to Monte Cly and P. E. Durkee, plaintiff appeals.

Judgment affirmed.

John A. Jorgenson, of Los Angeles, for appellant.

P. E. Durkee, in pro. per., and Paul Angelillo, both of Los Angeles, for respondents.

W. J. WOOD, Justice.

Plaintiff has appealed from judgments of dismissal of the action as to defendants Monte Cly and P. E. Durkee after their demurrers to the complaint had been sustained without leave to amend.

Plaintiff, a child seven years of age, commenced the action through his guardian ad litem, Evalyn M. Nichols, maternal aunt of plaintiff's mother. It is alleged in the complaint that the plaintiff is the illegitimate son of the defendant Jean Louise Hayward Black and of Jack Reed; that plaintiff's mother is also the mother of another illegitimate child, a girl five years of age, whose father is defendant Monte Cly; that Monte Cly has been appointed guardian of this child; that plaintiff's mother refuses to support plaintiff.

It is further alleged in the complaint that Laura L. Dickinson, who died on September 18, 1940, was the grandmother of plaintiff's mother; that Laura L. Dickinson left real estate in Los Angeles county of the approximate monthly rental value of $65 to $75; that Evalyn M. Nichols had been appointed administratrix of the estate of Laura L. Dickinson; that if Laura L. Dickinson left no will one-half of her estate would descend to plaintiff's mother. On information and belief it is alleged that Laura L. Dickinson executed a will prior to her death leaving $1 to plaintiff's mother, one-half of the residue of her estate to plaintiff and one-half to plaintiff's illegitimate half sister; that immediately after the death of Laura L. Dickinson, plaintiff's mother discovered this will, took possession of it and has either destroyed it or now has possession of it or knows of its whereabouts.

In a separate paragraph it is alleged that defendants Chloe Gordon, Monte Cly, P. E. Durkee, John Doe and Jane Doe claim some right and title to or lien upon the interest acquired by plaintiff's mother "through said descent but in truth and in fact they have none."

Plaintiff prays that plaintiff's mother "be required to specifically perform her obligation to support, maintain and educate the plaintiff; that she be required to produce said will and that if the same can be found and its existence and validity established that one-half of said property of decedent which may be decreed to have descended to said Jean Louise Hayward Black by reason of intestacy be adjudged to have been received in trust for the benefit of her said children; that said one-half be seized by this court for the purpose of securing the support, maintenance, and education of plaintiff or of plaintiff and such other child; that the same be held as security for the continued future performance of the obligation of said mother to plaintiff or said children; that it be adjudged that the other defendants have no right, title or interest in said premises. * * *"

[1] No brief has been filed in this court by respondents. The only pleadings before us are the complaint, the two demurrers of respondents and the judgments of dismissal as to them. It cannot be determined from the record whether any other defendants appeared in the trial court. The main purpose of the action is to compel support for plaintiff by his mother but in the action plaintiff asked the court to establish the

lost or destroyed will of plaintiff's great grandmother and at the same time to declare that certain named defendants have no interest in the property left by the great grandmother. Plaintiff has improperly united several causes of action in the same complaint. Sec. 427, Code Civ.Proc. Since the other parties defendant are not before us, it will be unnecessary to discuss the various legal points which could be presented.

[2, 3] The detailed statement of facts set forth in the complaint demonstrates that no cause of action has been alleged against either of the defendants as to whom the action has been dismissed. Defendant P. E. Durkee and defendant Monte Cly, who is sued in his individual capacity only, are brought into the action by the mere statement that they claim some right to the interest of plaintiff's mother in her grandmother's estate. If this meager statement be treated as an attempt to allege a cause of action to quiet title, it is apparent that the attempt must fail, for plaintiff cannot establish title in himself in a proceeding of this nature.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.



57 Cal.App.2d 772

MILLSAP v. NATIONAL FUNDING CORPORATION OF CALIFORNIA.

Civ. 12429.

District Court of Appeal, First District, Division 2, California.

March 25, 1943.

Hearing Denied May 24, 1943.

1. Master and servant ⇐6

In action for wrongful discharge from employment, evidence that defendant had promised plaintiff a permanent position if she would leave her other employment sustained finding that defendant had agreed to give plaintiff employment for a reasonable time under rule that the greater includes the less.

2. Master and servant ⇐21

A contract for permanent employment based upon sufficient consideration is enforceable according to its terms and may not be terminated at will of employer without good cause.

3. Contracts ⇐52

Any prejudice suffered or agreed to be suffered by promisee as an inducement to promisor, which promisee is not legally bound to suffer, is "good consideration" for a promise. Civ.Code, § 1605.

See Words and Phrases, Permanent Edition, for all other definitions of "Good Consideration".

4. Contracts ⇐52

The existence of a "good consideration" for a promise is not dependent upon conferment of a benefit upon promisor, but it is sufficient that a prejudice be suffered or agreed to be suffered by promisee. Civ.Code, § 1605.

5. Master and servant ⇐3(1)

Where prospective employee clearly stated to prospective employer that she would not give up present employment unless prospective employer would agree to give her permanent employment and prospective employer expressly agreed to such terms, prospective employee, in giving up present employment, suffered a prejudice as an inducement for prospective employer's promise which constituted "good consideration" for such promise. Civ. Code, § 1605.

6. Master and servant ⇐40(3)

In action for wrongful discharge from employment, evidence supported finding that discharge was arbitrary and not for good cause and sustained judgment for plaintiff.

7. Appeal and error ⇐1078(1)

Where plaintiff on appeal from judgment of nonsuit against her on three counts of her complaint presented no argument as to one of such counts, District Court of Appeal assumed that as to that count judgment of nonsuit was proper.

8. Appeal and error ⇐989

On appeal from a judgment of nonsuit, appellate court must determine whether there is any evidence which would support a judgment on merits for plaintiff, disregarding all conflicts and possible unfavorable inferences.

9. Trial ⇐165

On a motion for nonsuit, judge may not resolve conflicts or draw inferences unfavorable to plaintiff, but must accept as true all evidence, and indulge all reasonable inferences most favorable to plaintiff's case.

10. Master and servant ⇐81

In action by notary against employer, a personal property broker and small loan agency, to recover notary fees, evidence that notary, under threat of discharge from employment, endorsed check for fees to which she was entitled under Personal Property Brokers Act and Small Loan Act to employees association organized by employer authorized finding that notary acted under "duress" or "illegal business compulsion". Gen.Laws 1939 Supp.Acts 5825(2d), 7700.

See Words and Phrases, Permanent Edition, for all other definitions of "Duress" and "Illegal Business Compulsion".

11. Master and servant ⇐81

In action by notary against employer, a personal property broker and small loan agency, to recover notary fees to which she was entitled under Personal Property Brokers Act and Small Loan Act, checks for which fees notary had indorsed under duress to employer-created employees association for use in paying Christmas bonuses to all employees, evidence authorized recovery on ground that employer had exercised duress. Gen.Laws 1939 Supp. Acts 5825(2d), 7700.

12. Master and servant ⇐81

In action by notary against employer, a personal property broker and small loan agency to recover notary's fees to which she was entitled under Personal Property Brokers Act and Small Loan Act, checks for which fees were indorsed by notary under duress to employer for employees association, evidence authorized finding that employer received checks as "agent" of association and under rule imposing personal liability on agent for money obtained by agent's wrongful act and paid over to principal, required reversal of judgment of nonsuit. Gen.Laws 1939 Supp.Acts 5825(2d), 7700.

See Words and Phrases, Permanent Edition, for all other definitions of "Agent".

13. Principal and agent ⇐154(2)

Where money is paid to one whose agency is known, and by him paid over to principal, agent will be personally liable therefor where payment is induced by his fraud, mistake, or wrongful act.

14. Payment ⇐89(1, 2)

Action to recover money paid under duress is quasi contractual and does not require a prior rescission since there is no contract to rescind and no consideration to restore.

Appeals from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by Mellie Millsap against National Funding Corporation of California for wrongful discharge from employment, for damages for fraud, for money paid under duress and on the common count. From a judgment for plaintiff on one count and nonsuiting her on the others both plaintiff and defendant appeal.

Affirmed in part, reversed in part.

Ralph H. Lewis, of Sacramento, for plaintiff and appellant.

Elmer P. Bromley, H. E. Lindersmith, and Frank E. Carleton, all of Los Angeles, and Rowland & Craven, of Sacramento, for defendant and appellant.

DOOLING, Justice pro tem.

Plaintiff filed a complaint in four counts. On the first count plaintiff had judgment for $865, and from that portion of the judgment defendant appeals. Judgment of nonsuit was entered on the other three counts and from that portion of the judgment plaintiff appeals. The two appeals will be separately considered.

Defendant's Appeal.

The judgment for plaintiff was one for damages for wrongful discharge from employment. The complaint alleged that in consideration of plaintiff giving up an existing employment at $90 per month defendant agreed to employ her for a reasonable length of time at a beginning wage of $100 per month, to be increased at the end of two months to $110, and that she was discharged without cause in violation of this agreement. The trial court found in favor of plaintiff and found two years to be a reasonable period of employment. The damages were calculated on this basis.

While the complaint alleged and the trial court found a contract of employment for a reasonable period plaintiff's evidence showed a promise of permanent employment. Since the greater includes the less, we note this fact only to clarify the discussion of the evidence and the points of law presented on the appeal.

Defendant claims: 1. That the evidence does not support the finding that it agreed to give plaintiff employment for a reasonable length of time; 2. That an agreement for permanent employment is in law only an agreement for indefinite employment terminable at the will of either party; 3. That the surrender by plaintiff of her previous position was not a consideration sufficient to support a contract for permanent employment; and 4. That the finding that plaintiff was discharged without cause is not supported by the evidence.

[1] While the evidence on the first point is somewhat conflicting both plaintiff and the witness Chilcott, who employed plaintiff for the defendant, testified that plaintiff told Chilcott that she would not change her position unless she was given permanent employment, and plaintiff testified expressly: "Q. Was anything said at the time about the extent of your employment? A. It was to be a permanent job." This evidence supports the finding attacked.

[2] Questions 2 and 3 may well be considered together. While the Supreme Court in Lord v. Goldberg, 81 Cal. 596, 22 P. 1126, 15 Am.St.Rep. 82, used language indicating that a contract for permanent employment is in legal effect only a contract for indefinite employment terminable at the will of either party, the later cases of Seifert v. Arnold Bros., Inc., 138 Cal.App. 324, 31 P.2d 1059; Brown v. National Electric Works, 168 Cal. 336, 143 P. 606 and Davidson v. Laughlin, 138 Cal. 320, 71 P. 345, 5 L.R.A.,N.S., 579, make it clear that a contract for permanent employment based upon sufficient consideration is enforceable according to its terms and may not be terminated at the will of the employer without good cause.

The courts in other jurisdictions while generally recognizing the rule stated in these later California cases (135 A.L.R. 654) have arrived at divergent conclusions as to whether the giving up of other employment, business or profession is sufficient consideration to support a contract for permanent employment. Cases holding such consideration sufficient are collected in 135 A.L.R. 669 et seq., and cases contra in 135 A.L.R. 671 et seq. The precise question has not been squarely passed upon in California.

[3-5] In view of the recognized definition of consideration, codified in section 1605, Civil Code, which makes any prejudice suffered or agreed to be suffered by the promisee as an inducement to the promisor, which the promisee is not legally bound to suffer, good consideration for a promise, it is hard to follow the reasoning of those cases from other jurisdictions which hold that the giving up of other employment cannot afford sufficient consideration for a promise of permanent employment. Where the prospective employee clearly states to his prospective employer, as in the case before us, that he will not give up his present employment unless the prospective employer will agree to give him permanent employment and the prospective employer expressly agrees to those terms, it seems clear that the prospective employee (to paraphrase the language of section 1605, Civil Code) in giving up his present employment suffers a prejudice as an inducement to the promisor for his promise of permanent employment. "It is not necessary to the existence of a good consideration that a benefit should be conferred upon the promisor. It is enough that a 'prejudice be suffered or agreed to be suffered' by the promisee." 6 Cal.Jur. 171. We therefore hold that there was sufficient consideration for the promise of permanent employment (construed by the court in this case as employment for a reasonable period) in accord with the rule laid down in the following cases: Alabama Mills v. Smith, 237 Ala. 296, 186 So. 699; Carnig v. Carr, 167 Mass. 544, 46 N.E. 117, 35 L.R.A. 512, 57 Am.St.Rep. 488; Kirkley v. F. H. Roberts Co., 268 Mass. 246, 167 N.E. 289; Roxana Petroleum Co. v. Rice, 109 Okl. 161, 235 P. 502; Weber v. Perry, 201 S.C. 8, 21 S.E.2d 193; Riefkin v. E. I. DuPont, etc., Co., 53 App. D.C. 311, 290 F. 286; Littell v. Evening Star etc. Co., 73 App.D.C. 409, 120 F.2d 36; Fletcher v. Agar Mfg. Corp., D.C., 45 F.Supp. 650.

[6] The trial court found that defendant "without any cause whatsoever excepting its arbitrary will" discharged plaintiff. The witness Chilcott testified that plain-

tiff's work was not satisfactory and that she was discharged for that reason. On cross-examination, however, he testified that at the time plaintiff was discharged he told her that defendant had adopted a new policy and was replacing women cashiers (the position held by plaintiff) by men; and he further testified that except for this policy "she would possibly have been discharged, I don't know." Plaintiff testified that at the time of her discharge no complaint was made that her services had not been satisfactory. The evidence supports the finding that the discharge was arbitrary and not for good cause.

Plaintiff's Appeal.

[7] Count 2 of the complaint sounded in fraud. No argument as to count 2 is presented by plaintiff and we are entitled to assume that as to that count the judgment of nonsuit was proper.

By count 3 plaintiff seeks the recovery of notary fees received by plaintiff and allegedly paid by her to defendant under duress and coercion. Count 4 is a common count for money received and is only an alternative statement of the cause of action set out in count 3.

[8, 9] On these counts if the trial judge after weighing the evidence had given judgment for defendant on the merits such judgment would have found ample support in the evidence, but on an appeal from a judgment of nonsuit the question is not whether there is sufficient evidence to support a judgment on the merits for the defendant. The question is rather whether there is any evidence which would support a judgment on the merits for plaintiff. This is so because on a motion for nonsuit the judge may not resolve conflicts or draw inferences unfavorable to plaintiff, but must accept as true all evidence, and indulge all reasonable inferences most favorable to plaintiff's case. 9 Cal.Jur. 551. In stating the evidence therefore we will set out only that most favorable to plaintiff, disregarding all conflicts and possible unfavorable inferences.

It appears from the testimony that defendant is engaged in the business of lending money. In 1939 by the adoption of the Personal Property Brokers Act and the Small Loan Act the Legislature put a limitation upon the charges that could be made by lenders in making loans covered by those two acts. Defendant prior to the enactment of these two measures had been in the habit of giving a Christmas party in Los Angeles for its employees at defendant's expense and of giving its employees who had been with it for a certain period a bonus of one month's salary at that time. The witness Shoop, who is attorney for and secretary of defendant, testified that in 1940 defendant was unable to do this because it did not have the money, "the company had just changed over from the old brokerage set up into the new Personal Property Brokers Act—they were formerly under the old set up, whereas the situation on the bonus—as long as you have asked for it—the corporation, whenever they wrote a contract under the old brokerage set up made the base of the note the entire amount of the loan plus the estimated charges * * * when the new Personal Property Broker Act went into effect, the law was radically modified to the extent no brokerage charges would be imputed in effect, except for the purpose of making equal monthly payments."

The Small Loan Act and the Personal Property Brokers Act, while limiting the charges on loans with the effect on the earnings of defendant indicated by the quoted testimony of Mr. Shoop, did allow defendant to collect notary fees actually paid to the notary. Stats.1939, pp. 2886, 2893, Deering's Gen.Laws, 1939 Supp., Act 7700; Stats. 1939, pp. 2874, 2882, Deering's Gen.Laws, 1939 Supp., Act 5825(2d). Prior to the effective dates of these statutes plaintiff, who was a notary public, had done notarial work for defendant without extra compensation. When these statutes went into operation defendant began to collect notary fees from its borrowers pursuant to the authority of the statutes in question. By the terms of the statutes the collection of these notary fees was illegal unless the fees were paid to the notaries.

The witness Mitchell, who at that time was an assistant manager of one of defendant's offices in the Los Angeles area, proposed to the president of defendant that an employees organization might be formed into which the notaries employed by defendant would pay their notary fees collected for them by defendant, "a change in the law had just taken place, and I knew that we couldn't collect notary fees, but we were allowed under the law, or the notaries were allowed under the law to charge for their services as notary pub-

lics, and if he would allow the notaries to charge for their services * * * and in turn contribute those funds to the general benefit of all the employees * * *" that the employees association could assume the payment of bonuses and other services for the employees as a whole. The president assented to this proposal and Mr. Mitchell sent out notices calling meetings of the employees. The notices were sent from the general office of defendant and it furnished the stationery and stamps.

Pursuant to such notice a meeting of employees in the Northern California offices of defendant was held in Stockton about January 30, 1940. Mitchell presided and the manager of the office in which plaintiff was employed, Chilcott, was present. According to plaintiff's testimony: "Mr. Mitchell called this meeting to order stating they had these notary checks that had to be turned over to the notaries to endorse over to this association * * * that this association was to be for the benefit of the employees, for sick benefits and bonuses * * * and he give us these checks and said that the by-laws wasn't made up at that time. * * * He gave them out to us, he called out the different notaries' names and passed them out, and some one spoke up and says, 'Supposing they don't sign them?' He says, 'If they don't want to sign them, we will get someone else that will, that will sign it,'—I don't know the exact words, but he meant if we didn't sign it we would be out of a job * * * if we did not sign these checks and turn them over to this Employees Association, that we would be let out, and other notaries would be contacted, they would get other notaries to take their places. Then later on he said, 'Well just try to get out that door without signing them.'"

Two checks aggregating $797 were given plaintiff at the meeting and she endorsed them in blank and gave them to Mitchell "in order to have permanent employment with the company." After this meeting a check was given to plaintiff each day for her notary fees, endorsed by her to the employee's association and mailed to a Miss Cunningham, a bookeeper in defendant's Los Angeles office, in self-addressed envelopes furnished for that purpose. This was done at Mr. Chilcott's direction. All the checks were endorsed in the belief that if the plaintiff did not endorse them she would be discharged.

[10] Defendant apparently does not dispute the fact that the evidence is sufficient to support a finding of transfer of the checks by plaintiff under duress, or what is called in some of the cases "illegal business compulsion." 17 Am.Jur. 879; 2 Restatement Contracts § 492; Young v. Hoagland, 212 Cal. 426, 208 P. 996, 75 A.L.R. 654; Oswald v. City of El Centro, 211 Cal. 45, 292 P. 1073, 71 A.L.R. 899; Sciasscia v. Fredburn Const. Corp., 248 App.Div. 608, 287 N.Y.S. 513; McCarthy v. Steinkellner, 223 Wis. 605, 270 N.W. 551, 271 N.W. 374.

Defendant argues: 1. That the evidence is not sufficient to prove that the defendant exercise the duress; 2. That the money having been paid over to the employees association cannot be recovered from defendant; and 3. That in no event can there be a recovery without a prior rescission.

[11] Taking the evidence as a whole, and drawing all reasonable inferences therefrom in favor of plaintiff, the court could have found that Mitchell in making the threats testified to was acting for defendant. The formation of the employees association and its support in greater part by the contribution of notary fees would enable the defendant to keep its employees in general satisfied by the payment of bonuses and other benefits which the defendant could no longer afford to pay by reason of the changes in the law which resulted in a substantial decrease in defendant's earnings. When Mitchell pointed this out to the president of the defendant the president authorized Mitchell to proceed and notices of the organization meeting were sent out at defendant's expense. Fortuitously, although defendant had been collecting fees for notarial services for at least six or seven weeks before January 30, 1940, none of these fees were paid to the notaries. They were retained by defendant until the Stockton meeting and the checks for them appeared in the hands of Mitchell who presided over the meeting and made the threats. Contrastingly thereafter they were paid to the notaries daily. Chilcott, plaintiff's immediate manager, was present, heard the threats and remained silent; and thereafter directed plaintiff to endorse and mail her check for notary fees daily. The evidence is ample, if believed, to support a finding of duress by defendant.

[12, 13] It is also sufficient to support a finding that defendant received the checks from plaintiff as agent for the employees association. The first checks were delivered to Mitchell endorsed in blank. The employees association was not then completely organized. The later checks were mailed by Chilcott's direction to a bookkeeper of defendant at defendant's head office in Los Angeles. "Where money is paid to one whose agency is known, and by him paid over to his principal, the agent will be personally liable therefor where the payment is induced by his fraud, mistake, or wrongful act." 82 A.L.R. 312; 3 C.J.S., Agency, § 219, p. 129; 2 Am.Jur. 265; 2 Restatement Agency, § 339(f); Restatement Restitution, § 143(c); Hohn v. Peters, 216 Cal. 406, 14 P.2d 519; Stirnus v. Adams, 50 Cal.App. 730, 195 P. 955; Bocchino v. Cook, 67 N.J.L. 467, 151 A. 487.

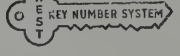
Defendant's claim that there could be no recovery without a prior rescission is based on the authority of Bancroft v. Bancroft, 110 Cal. 374, 42 P. 896 and McDougall v. Roberts, 43 Cal.App. 553, 185 P. 483. Those were cases in which it was held that damages by way of tort are not recoverable for contracts entered into by reason of duress or undue influence. It is unnecessary to inquire into the soundness of those decisions, although the view expressed by Mr. Justice Garoutte in his dissenting opinion in the Bancroft case, 110 Cal. 380, 42 P. 896, that damages suffered by reason of duress should be recoverable in a tort action, is supported by respectable authority. 4 Restatement Torts, § 871(f); 65 C. J. 32; Neibuhr v. Gage, 99 Minn. 149, 108 N.W. 884, 109 N.W. 1; Smith v. Blakesburg Savings Bank, 182 Iowa 1190, 164 N.W. 762.

[14] The action here is quasi-contractual, for the recovery of money paid under duress. The fourth count in assumpsit makes this clear. There was no contract to rescind, and no consideration to restore. In such circumstances the courts have allowed a recovery in an action for money received without previous formal rescission. Young v. Hoagland, 212 Cal. 426, 208 P. 996, 75 A.L.R. 654; Wake Development Co. v. O'Leary, 118 Cal.App. 131, 4 P.2d 802; Rowland v. Watson, 4 Cal.App. 476, 88 P. 495; McTigue v. Arctic Ice Cream S. Co., 20 Cal.App. 708, 130 P. 165.

The judgment in favor of plaintiff is affirmed. The judgment of nonsuit is reversed as to counts 3 and 4 of the complaint and affirmed as to count 2. Plaintiff will recover costs on both appeals.

NOURSE, P. J., and SPENCE, J., concurred.

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting.



58 Cal.App.2d 248

LANGENBEIN v. McCORMICK.

Civ. 13441.

District Court of Appeal, Second District, Division 3, California.

April 19, 1943.

1. Assault and battery ⇐14

Where landlord wrongfully entered rented house after having been refused admission by occupant and struck occupant's son on the head with a blackjack, occupant had the right to go to son's defense, regardless of son's size and age in comparison with landlord.

2. Assault and battery ⇐6

Where landlord, while attempting to force his way into rented house after being refused admission by occupant, struck occupant's son on the head with a blackjack, injuries suffered by occupant when she attempted to take blackjack from landlord resulted "proximately" from landlord's unlawful entry and asault so that it was not error to hold landlord liable therefor.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

3. Damages ⇐130(3)

Award of $357.62 for medical and hospital expenses and $1,500 general damages for a compression fracture of the body of fifth lumbar vertebra, resulting in considerable pain and confinement to bed three weeks at home and 45 days at the hospital, was not excessive.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by Christine Langenbein against Charles J. McCormick for injuries sustained by plaintiff when allegedly assaulted by defendant, wherein defendant filed a cross-complaint for damages. Trial by the court resulted in a judgment for plaintiff, and defendant appeals.

Judgment affirmed.

Morin, Newell, Brown & Hamill, of Pasadena, for appellant.

John C. Packard, of Los Angeles, for respondent.

SHINN, Acting Presiding Justice.

In an action tried by the court, plaintiff recovered damages sustained in a physical encounter with defendant, upon findings that defendant unlawfully assaulted plaintiff, struck and beat her, causing her to fall and to sustain serious injuries. Defendant also lost on his cross-complaint for damages and he appeals.

The only contention made is that the evidence, in the view most favorable to plaintiff, shows conclusively that defendant was not at fault in the brawl, which he started by striking plaintiff's son on the head with a blackjack. His argument goes entirely to the weight, and not to the legal sufficiency, of the evidence, but we shall nevertheless state our reasons for affirming the judgment.

Defendant owned a residence in the City of Pasadena which he had rented to plaintiff's daughter. Plaintiff was in charge of the place while the daughter was away and, with the assistance of her adult son Charles, was making preparations to move out. Defendant approached Charles with a request that he be allowed to go into the attic to repair a broken window. When Charles offered to speak to his mother about it, defendant went to his home and returned with a blackjack in his pocket. This, he said, was because he weighed only 139 pounds and he knew that in any encounter he might have with Charles he would have to concede the latter some 50 or 60 pounds. Charles, having consulted his mother, informed defendant that she refused to see him. Defendant shoved Charles aside as both entered the rear of the house; Charles refused defendant permission to mount the stairs leading from the back porch to the attic, and while he and defendant were shoving each other around, defendant suddenly took the blackjack out of his pocket and struck Charles two glancing blows on the head. Charles, who had received scientific training for such emergencies in his younger days, seized one of defendant's arms, pinioned the other one holding the blackjack, applied pressure with his knee in approved fashion, threw himself over backwards, and pulled defendant down on top of him with the blackjack held under his, Charles', body. Charles, fearing to release defendant, called to his mother for help and she came to his assistance. Defendant, although held down, was fighting vigorously with his left arm free. At one time he seized Charles' face with his free hand and plaintiff pulled his fingers away one by one. At Charles' request she endeavored to secure the blackjack, which, while immobile, was tightly clasped in defendant's right hand. While she was thus engaged defendant was striking her and pushing her with his free arm. Plaintiff tugged at the blackjack and when it appeared that she would be unable to wrest it from defendant's grasp Charles pulled down defendant's head and bit him four or five times on the ear. Coincidentally defendant released his hold on the blackjack, whereupon plaintiff, with the blackjack in her hand, was deposited heavily upon the floor in a sitting posture. The hostilities, which had lasted some fifteen minutes, ended at this point, and, except for the ensuing litigation, were not resumed. Plaintiff sustained a compression fracture of the body of the fifth lumbar vertebra, suffered considerable pain, was in bed three weeks at home and 45 days at the hospital. At the time of trial nearly two years after the injury, her ultimate recovery was considered probable. She was awarded $1,500 as general damages and $357.62 for her medical and hospital expenses.

[1-3] Upon these facts defendant does not appear to have been blameless as a matter of fact, certainly not as a matter of law. He entered the house wrongfully, after having been refused admission, endeavored to force his way upstairs with the use of the blackjack, and appears to have been the aggressor. In the ensuing fracas plaintiff had the right to go to her son's defense, regardless of the latter's size or age. Her efforts to gain possession of the weapon were essentially defensive. Charles insisted that in seizing and throwing defendant he acted in self-defense. In answer to the court's question concerning his tactics in meeting his an-

tagonist, he testified: "It was a mechanical operation rather than a mental operation, as your medulla oblongata operates there; it is mechanical, not mental." The trial judge was entitled to draw his own conclusions from this testimony. There was no error in fastening responsibility upon defendant for plaintiff's injuries, which resulted proximately from defendant's entry into the house and assault upon plaintiff's son. The award of damages was quite modest.

The judgment is affirmed.

PARKER WOOD, J., and SHAW, Justice pro tem., concurred.



58 Cal.App.2d 310

PEOPLE v. STANLEY.

Cr. 3686.

District Court of Appeal, Second District, Division 2, California.

April 21, 1943.

Rehearing Denied May 3, 1943.

Hearing Denied May 20, 1943.

1. Criminal law ⇐1144(13)

On defendant's appeal from conviction, evidence is viewed in light most favorable to people.

2. Larceny ⇐14(1)

In larceny by trick and device, owner of property does not part with title to appropriated property, since he has no intention of so doing, though he may intend to part with its possession.

3. Larceny ⇐62(2)

Where evidence discloses that grand theft has been committed upon theory of larceny by trick and device, no corroboration is required as a prerequisite for conviction. Pen.Code, § 1110.

4. Larceny ⇐65

Evidence sustained conviction of grand theft of an automobile by means of larceny by trick and device.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Fred Wallace Stanley was convicted of grand theft, and he appeals.

Affirmed.

John J. Craig, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., Bayard Rhone, Deputy Atty. Gen., Fred N. Howser, Dist. Atty., of Long Beach, and Jere J. Sullivan, and George W. Kemp, Deputy Dist. Attys., both of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment finding him guilty of grand theft after trial before the court without a jury, defendant appeals. There is also an appeal from the order denying his motion for a new trial.

[1] The evidence being viewed in the light most favorable to the People (respondent), and pursuant to the rules set forth in People v. Pianezzi, 42 Cal.App.2d 270, 277, 108 P.2d 685, the essential facts are:

The complaining witness, Mr. Jones, advertised in a newspaper that his automobile was for sale. In response to this advertisement defendant contacted Mr. Jones on several occasions. During these conversations Mr. Jones told defendant that he would not be interested in taking any property by way of trade for his car, but that in case he should be on the point of being inducted into the military service, he might accept a lower price for his car. These various telephone conversations culminated in Mr. Jones and defendant meeting at the intersection of Melrose and Fairfax avenues in Los Angeles. At this meeting defendant asked Mr. Jones his final price for his automobile, to which Mr. Jones replied, $1,600. Whereupon, defendant stated that he did business with a branch of the Security Bank located at Melrose and Fairfax avenues, that he would ascertain from the bank how much of the $1,600 it would lend him, and that he would pay the balance of the purchase price himself. Mr. Jones indicated that this arrangement would be satisfactory to him.

Subsequently defendant asked Mr. Jones if his finance company, the People's Finance Company in Beverly Hills, would finance his purchase of the automobile. Mr. Jones indicated that they might do so.

Discussions then ensued between defendant, Mr. Jones, and a Mr. Hill representing the People's Finance Company. These discussions ended with an agreement whereby defendant promised to pay Mr. Jones $1,600 for the automobile. The purchase price was to be paid by the cancellation of Mr. Jones' indebtedness of $500 to the finance company, by defendant turning over to Mr. Jones the $500 loaned by the finance company to defendant, and by the payment of $600 in cash by defendant to Mr. Jones. Pursuant to this arrangement a conditional sales contract was executed by Mr. Jones' wife, in whose name the title to the automobile was registered, and defendant. This contract provided that defendant was to purchase the automobile for the total sum of $1,790.48. $190.48 representing a financing charge, $600 in cash, and the balance in installments of $66.11 per month commencing September 29, 1941.

This contract Mrs. Jones assigned to the finance company. Whereupon, the finance company cancelled Mr. Jones' previous indebtedness to them in the sum of $500, credited defendant with having paid $190.48 financing charge, and gave Mr. Jones $500 in cash.

When they left the finance company's office defendant told Mr. Jones that he could not give him the $600 in cash still due, since he was in the midst of a real estate transaction and could not afford to turn the money over to him that afternoon. He stated, however, that he would leave with Mr. Jones, as security for the $600 he owed him, a note of a close friend in the sum of $750, upon which $100 had been paid and upon which the balance was due October 15, 1941.

Mr. Jones replied that he would not accept the note or anything like it, but would keep the car until he received the $600 from defendant. Defendant then stated that he would not sell the note; that he could not endanger his friendship with Mr. Clark, the payor, by disposing of or discounting the note to anyone. He said in addition:

"To prove to you that the note has a market value and that it is a legitimate piece of paper, I have a man by the name of G. W. Watson who is in the discount business, * * * and he also has known this man for approximately 20 years, and he knows the man is good, he has bought paper from him before, and he would be very glad to have this paper if I would consent to sell it, but I have this deal this afternoon, and I need this money, and I will leave this note with you and I will bring to you an agreement of Mr. Watson to purchase this note at any time for a certain amount of money" in excess of $600.

Mr. Jones replied that he would like to accommodate defendant and that he should bring him a card or a letter from someone in the discount business agreeing to purchase the note. He further stated that he was not accepting the note as payment and that he was merely holding it, and must have his money the following day. To this defendant agreed. Shortly thereafter defendant went to Mr. Jones' home in Beverly Hills and showed him a business card which read "G. W. Watson, Loans" and gave an address in a downtown office building of Los Angeles. It was stated on the back of the card in ink, that the signer, G. W. Watson, would accept the note above referred to for the sum of $600.

Again Mr. Jones told defendant he was not in favor of the transaction, but wanted defendant to bring him the money the following day. This defendant agreed to do. After handing the card back to defendant, Mr. Jones asked him for it, whereupon, defendant replied that Mr. Jones had the card. Mr. Jones stated that he did not, but that defendant had just put it in his right-hand pocket. Defendant insisted however, that he did not have the card and the matter was dropped. Whereupon, Mr. Jones permitted defendant to take the automobile.

The following day, after repeated attempts to reach defendant by telephone, Mr. Jones finally succeeded and was told by defendant that he was not able to bring him the money which he owed. When Mr. Jones asked why, defendant said that he could not bring the money because Mr. Jones had Mr. Clark's note which he would have to surrender in order to get the money. Mr. Jones agreed to meet defendant at his friend's office and surrender the note and get the money. Defendant replied that he had better see if his friend was in his office. Defendant telephoned Mr. Jones shortly thereafter making an appointment for 9:30 the following morning. At which time Mr. Jones met the defendant who stated that he was sorry but that Mr. Watson was out of town and would not be back until the following

week. Mr. Jones then said that he was leaving for the army and that he would leave the note with his wife, who would surrender it when defendant gave her the sum that was due.

Sometime later when Mr. Jones was at home on leave from the army, he contacted defendant who told him that he had collected $50 from Mr. Clark on the note and that he would be glad to give it to Mr. Jones. This offer was refused, and when Mr. Jones told defendant that he had checked up and found many things that he had told him were untrue, defendant merely said, "What are you going to do about it?"

Defendant has not paid any part of the $600 due, but on the contrary, on one occasion stated to the complaining witness that he had better settle for $100, because the note which he held wasn't any good.

On October 4, 1941, defendant sold the automobile, that he had obtained from Mr. Jones, to the Kelley Kar Company for $1,250.

This is the sole question necessary for us to determine:

Was there substantial evidence to sustain the trial court's implied finding that defendant was guilty of larceny by trick and device?

[2, 3] This question must be answered in the affirmative, and is governed by the following pertinent rules of law:

(1) In larceny by trick and device the owner of the property does not part with title to the appropriated property, since he has no intention of so doing, though he may intend to part with its possession. People v. Edwards, 133 Cal.App. 335, 340, 24 P.2d 183; People v. Santora, 51 Cal. App.2d 707, 711, 125 P.2d 606.

(2) When the evidence discloses that grand theft has been committed upon the theory of larceny by trick and device, such offense need not be corroborated in accordance with the provisions of section 1110 of the Penal Code. People v. Santora, 51 Cal.App.2d at page 711, 125 P.2d 606, supra.

[4] Applying the foregoing rules to the evidence in the present case, it appears that defendant obtained possession of Mr. Jones' automobile by larceny through trick and device. The facts as set forth above disclose that Mr. Jones intended to part with the possession of his automobile only, and did not intend to part with title to it until he was paid the full purchase price thereof.

Since the offense was larceny by trick and device, under rule 2 supra, it was unnecessary to corroborate the foregoing evidence in accordance with the provisions of section 1110 of the Penal Code.

In view of our conclusions it is unnecessary to consider defendant's argument relative to the offense of grand theft upon the theory of false pretenses.

For the foregoing reasons the judgment and order are and each is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.



58 Cal.App.2d 371

JORDAN v. JORDAN.

Civ. 3092.

District Court of Appeal, Fourth District, California.

April 26, 1943.

1. Trial ⇐404(2)

Where result can be reached from facts in evidence by process of natural reasoning adopted in investigation of truth, it becomes "ultimate fact" to be found as such by trial court, but, if resort must be had to artificial processes of law to reach final determination, result is "conclusion of law".

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion of Law" and "Ultimate Fact".

2. Divorce ⇐303(3)

In action against plaintiff's divorced husband for custody of their minor daughter, where plaintiff alleged, and defendant denied, that change of custody to plaintiff was for child's best interests, and defendant alleged in cross-complaint that court had determined defendant's fitness for child's custody as opposed to plaintiff's claim, court's finding, after hearing evidence, that there had been no material or substantial change of conditions authoriz-

ing interference with previous determination, was not mere "conclusion of law" but finding of "ultimate fact" sufficient to support judgment awarding custody to defendant.

3. Trial ⇐395(2)

A "negative pregnant", as in trial court's fact finding, is such form of negative expression as may imply or carry with it an affirmative.

See Words and Phrases, Permanent Edition, for all other definitions of "Negative Pregnant".

4. Divorce ⇐303(3)

In action against plaintiff's divorced husband for custody of parties' minor daughter, trial court's finding that allegation of complaint that award of custody to plaintiff was to child's best interests was not true did not constitute "negative pregnant" implying truth of such allegation and inconsistent with finding of truth of allegation in defendant's cross-complaint that child's return to cross-complainant's control was for child's best interest.

5. Divorce ⇐303(3), 312

An application for modification of award of custody of divorced parents' minor child is addressed to trial court's sound legal discretion, which will not be disturbed on appeal unless record clearly shows abuse of discretion.

6. Divorce ⇐303(3)

In action against plaintiff's divorced husband for custody of parties' minor daughter, evidence held sufficient to support trial court's finding that there had been no material or substantial change of circumstances relating to plaintiff's fitness for child's custody and best interests of child since date of decree modifying order granting custody to defendant to extent of granting custody to plaintiff for certain months, so that court did not abuse his discretion in ordering child's return to defendant's custody after such period.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action by Pat Oklah Jordan against Martin Jordan for the custody of Betty Ruth Jordan, the parties' minor child, in which defendant filed a cross-complaint, seeking dismissal of the action and an order awarding him the child's custody. Judgment for defendant, and plaintiff appeals.

Affirmed.

Dorris & Fleharty, of Bakersfield, for appellant.

Borton, Petrini, Conron & Borton and Dorsett Phillips, all of Bakersfield, for respondent.

GRIFFIN, Justice.

Appellant Pat Oklah Jordan and respondent Martin Jordan are the parents of Betty Ruth Jordan, a minor child. Prior to 1940, they resided in Oklahoma. Respondent, in Oklahoma during that year, filed an action for divorce. He was granted the decree and the custody of their two minor children. Appellant came to California. Respondent thereafter cared for and supported the children. In September, 1941, appellant returned to Oklahoma and instituted proceedings to modify the court's order respecting the custody of the children. After a full hearing was had, the decree was modified to the extent that appellant here was given the custody of Betty Ruth Jordan, for the months of June, July and August of the year 1942. The evidence shows that at the time the decree was thus modified appellant promised the trial judge that if he granted her permission to take the children to California she would return them to Oklahoma at the end of the period mentioned in the modified decree. Appellant returned to California and in June, 1942, went to Oklahoma to secure the children as permitted. She also promised respondent she would return them at the end of the three months period. Appellant left for California with Betty Ruth. She testified in her deposition that it was her intention to keep the child in California notwithstanding the Oklahoma decree. On August 22, appellant wrote respondent for permission to allow the child to remain in California, which permission was refused. She then refused to return the child to Oklahoma. Respondent came to California. Appellant filed the complaint in this action on October 5, 1942, seeking the custody of the child and obtained an ex parte order granting her the temporary custody of it. Orders to show cause why the custody should not be changed were obtained by each party. Respondent answered and by way of cross-complaint sought the dismissal of the action and an order of custody.

The trial court found (Finding No. VI) that "there has been no material change in circumstances with respect to the parties hereto, or with respect to the welfare of Betty Ruth Jordan, the minor child of the parties hereto, since the 2nd day of September, 1941, and that it is for the best interest of said minor child that she be returned forthwith to the care, custody and control of her father, Martin Jordan, defendant and cross-complainant herein."

[1, 2] It is argued that this finding is not a finding of ultimate fact but only a conclusion of law and therefore does not support the judgment which followed, citing such cases as Franklin v. Franklin, 140 Cal. 607, 74 P. 155; Smith v. Smith, 62 Cal. 466; and Perkins v. Perkins, 29 Cal. App. 68, 154 P. 483. We see no merit to this point. The line of demarcation between what are questions of fact and conclusions of law is not one easy to be drawn in all cases. It was said in Palmer v. Fix, 104 Cal.App. 562, at page 567, 286 P. 498, at page 499, quoting from Levins v. Rovegno, 71 Cal. 273, 275, 12 P. 161: "If, from the facts in evidence, the result can be reached by that process of natural reasoning adopted in the investigation of truth, it becomes an ultimate fact, to be found as such. If, on the other hand, resort must be had to the artificial processes of the law in order to reach final determination, the result is a conclusion of law", citing cases.

In the instant case appellant alleged that it was for the best interests of the minor child that the custody be changed to her and that respondent came to California to retake the child to Oklahoma in compliance with the decree of that court as set forth. Respondent not only denied appellant's allegation respecting the best interests of the child, but also alleged by way of cross-complaint that the court in Oklahoma had already determined that respondent was a fit and proper person to have the custody of the child as opposed to appellant's claim and that those issues were there fully presented.

Upon those issues thus framed the trial court here, after hearing evidence as to whether there had been a change of conditions since the modified Oklahoma decree was signed, made the finding above quoted, that there had been no material or substantial change authorizing it to interfere with the previous determination. Under these circumstances it becomes immediately apparent that the finding is one of fact and not merely a conclusion of law. Foster v. Foster, 8 Cal.2d 719, 68 P.2d 719.

[3, 4] The next objection was that the court's finding of fact No. I, wherein the court found that "the allegations contained in paragraphs * * * VII * * * of plaintiff's complaint are not true," is a negative pregnant and therefore implies the truth of the allegation and is inconsistent with finding No. IV, which is to the effect that "the allegations contained in paragraphs * * * VII of cross-complainant's cross-complaint are true." Allegation VII of the cross-complaint alleges "that it is for the best interest of the said minor child, Betty Ruth Jordan, that she be returned to the actual care, custody and control of cross-complainant herein." This contention is equally untenable. A negative pregnant is such a form of negative expression as may imply or carry with it an affirmative. Black's Law Dictionary; 21 Ruling Case Law, p. 560, Pleading, sec. 119; 41 Am.Jur. p. 429, Pleading sec. 196.

In Wiles v. Hammer, 66 Cal.App. 538, 226 P. 651, 652, relied on by appellant, the appellate court found the trial court's finding "that it is not true * * * that all casing furnished by plaintiff was furnished at his own cost and expense * * *" to be an implication that some of the casing was furnished.

In Auerbach v. Healy, 174 Cal. 60, 161 P. 1157, it was held that a finding that "all the allegations of the answer are not true" is not a finding that all of them are untrue.

The finding in the instant case is not such a finding as to constitute a negative pregnant. The allegation of the complaint was to the effect that it was to the best interests of the minor that her custody be awarded to the plaintiff. The finding clearly recites that the allegation is not true.

[5, 6] It is next argued that if we hold that there is no merit to the first two points raised, still the evidence is insufficient to support the finding that there has been no material or substantial change of circumstances as of November 23, 1942, relating to the condition of the fitness of appellant and best interests of the child as of September, 1941, the date of the Oklahoma decree. We have fully examined the evidence on this question. It does not reveal an abuse

of discretion on the part of the trial court but demonstrates clearly that there is at most only a conflict in the evidence. It is true that appellant did show that while in Oklahoma her health was not as good as it had been in California; that she was not able to work there, but that she was employed in California as a waitress in "Joe's Fountain and Lunch Cafe", and now is employed as a fountain girl at Minter Field, at $90 per month; and that she is now living with her brother and his wife and that she is buying a little house located on the back of their lot and that her brother's wife has been taking care of the child while she is working.

Respondent Martin Jordan testified that he works for the County Highway Department in Oklahoma; that on March 4, 1942, he remarried; that he supported the minor children even when they were in California with their mother on a previous occasion; that he had a five-room home in Oklahoma and the children were going to school there; and that the children were happy with his present wife.

There was received in evidence an affidavit of the trial judge in Oklahoma. It recites that at the hearing of the petition for modification of the decree before him, he inquired of appellant as to whether or not, if he modified the former decree allowing her the custody of the children for three months and she were permitted to take them to California, she would return them to Oklahoma at the expiration of that period; that in response thereto she "very definitely promised that she would observe the order of the court"; that this inquiry was made because of the fact "that upon a previous occasion the plaintiff, Martin Jordan, was required to go to the State of California for the purpose of obtaining the custody of the children in question and it was because of my fear that Mrs. Jordan would not observe the order of the court that the inquiry last above referred to was made"; that he had known Martin Jordan for a period of some years and knew him to be a Christian gentleman of good moral character and thoroughly capable and competent of having the custody of the children in question.

An application for modification of an award of custody is addressed to the sound legal discretion of the trial court and its discretion will not be disturbed on appeal unless the record presents a clear case of an abuse of that discretion. Foster v. Foster, supra; Bancroft v. Bancroft, 178 Cal. 352, 173 P. 582. In the instant case we are unable to interfere with the finding of the court or to hold that there has been any abuse of discretion. The evidence fully supports the judgment.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.



57 Cal.App.2d 922

In re SPENCE'S ESTATE.

SHUBURGH v. SPENCE.

Civ. 13986.

District Court of Appeal, Second District, Division 2, California.

March 31, 1943.

Hearing Denied May 27, 1943.

1. Appeal and error ⇐77(2)

An order and opinion rendered on petition to construe will and determining rights of parties thereunder was a "final order" and appealable. Probate Code, § 1240.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Order".

2. Wills ⇐470

A will must be read as a whole and all parts construed together and in relation to one another, so as to form, if possible, a consistent whole. Probate Code, § 103.

3. Wills ⇐439, 440

A will should be construed according to intention of testator as expressed therein.

4. Wills ⇐448

A will should be interpreted, if possible, in such manner as to prevent intestacy where the testamentary document evinces an intention to dispose of entire estate.

5. Wills ⇐450

The words of a will are to receive an interpretation which will give some effect to every expression therein rather than one

which will render any expression inoperative.

6. Wills ⇐525

Where testator left to brother $1 and no more, and provided that his estate should be divided into two equal portions and that "one equal portion thereof" should go one-half thereof to three named persons, two of whom were husband and wife, and that the "other equal portion or one-half of my estate" should be divided among certain named persons, one-half of the estate should be equally divided between the three persons mentioned, and testator did not die intestate as to any portion of his estate.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Proceeding in the matter of the estate of Newton E. Spence, deceased, on petition of George Shuburgh, executor, for instruction concerning construction of the will to which John F. Spence filed a pleading suggesting a construction of the will. From the judgment rendered, John F. Spence appeals.

Affirmed.

LeRoy N. French and Schell & Delamer, all of Los Angeles, for appellant.

Clyde Doyle and Preston W. Johnson, both of Long Beach, and Henry F. Walker, of Los Angeles, for petitioner and respondent.

McCOMB, Justice.

This is an appeal from an order of the Superior Court of Los Angeles County, sitting in probate, construing certain provisions of the last will and testament of Newton E. Spence, deceased.

The essential facts are:

Newton E. Spence died testate on September 11, 1941, leaving as an heir at law his brother John F. Spence, appellant herein.

So far as essential here, decedent's will read thus:

"First. I declare that I was never married and therefore I have no children, and that my mother and father are both dead. I have one brother, John F. Spence, at or near Elizabeth City, North Carolina."

"Fifth. I declare that I do not want anyone to take any of my estate except as in this last will and testament provided.

"Sixth. I give and bequeath unto my brother, John F. Spence, the sum of One Dollar ($1.00) and no more, and if he become deceased before receiving said sum of one dollar from my estate leaving child or children, then I do not desire that his children take anything from my estate.

"Seventh. After all my debts and costs of administration have been first paid, I direct that my estate be divided into two equal portions:

"One equal portion thereof, I give, devise and bequeath in manner following:

"One-half (½) thereof to George Shuburgh, a friend of mine, and a great friend of my beloved friend, Harree Sollenberger, and my friends, Mr. and Mrs. C. B. Rudge, who were great friends of my beloved friend, Harree Sollenberger. They are now assisting me at 326 East Tenth Street, Long Beach, California.

"The other equal portion or one-half of my estate shall be divided as follows: and which shall be divided in equal shares and distributed to the following:

"1. Mrs. McDonald, Bellflower, California. * * * (etc., listing a total of eight beneficiaries)."

After the will had been admitted to probate, the executor asked the probate court to instruct him whether he should construe the Seventh paragraph of the will, as, (a) distributing to George Shuburgh, one-half of one-half of the estate, and to Mr. and Mrs. C. B. Rudge, the other one-half of said one-half of the estate, or (b) should he distribute to George Shuburgh one-third of a half of the estate and to Mr. and Mrs. C. B. Rudge each one-third of a half of the estate.

Appellant filed a pleading suggesting that the word "thereof" appearing in the third sub-paragraph of paragraph Seventh of the will referred to "one equal portion" mentioned in the second sub-paragraph as the total amount distributable to Mr. and Mrs. C. B. Rudge and respondent, and therefore, that decedent died intestate as to one-fourth of his estate.

After a hearing the trial court filed a document denominated "Order and Opinion on Petition to Construe Will". This document contained the following statement and order:

"The court is of the opinion that the provisions in question dispose of all of the 'first half' of the estate, and that the second interpretation suggested by counsel for the

executor is the more tenable one; that is, that Mr. Shuburgh and Mr. and Mrs. Rudge each are given one-third of one-half of the entire estate."

"It is therefore ordered that the said will be construed accordingly."

Two questions are presented for our determination, which will be stated and discussed hereunder seriatim.

First: Was the "Order and Opinion on Petition to Construe Will" a final order and thus appealable under the provisions of section 1240 of the Probate Code?

[1] This question must be answered in the affirmative. It is evident from a reading of the order that the probate judge intended it to be a final order and not a preliminary order for a subsequent judgment. Therefore, the order is appealable.

Second: Was the construction placed upon paragraph Seventh of the will by the probate judge correct?

This question must likewise be answered in the affirmative. It is true that a strictly logical and grammatical construction of paragraph Seventh, without reference to any other provision in the will, would lead to the conclusion that decedent had disposed of only three-fourths of his estate and therefore died intestate as to the remaining fourth of it. However, we are led to a different conclusion by the following established rules of law:

[2] (1) A will must be read as a whole; all parts thereof are to be construed together and in relation to each other so as to form, if possible, a consistent whole. (Sec. 103, Probate Code, In re Estate of Northcutt, 16 Cal.2d 683, 689, 107 P.2d 607.)

[3] (2) A will is to be construed according to the intention of the testator as expressed therein. (In re Estate of Lawrence, 17 Cal.2d 1, 6, 108 P.2d 893.)

[4] (3) A will should be interpreted, if possible, in such manner as to prevent intestacy where the testamentary document evinces an intention on the part of the testator to dispose of his entire estate. (Estate of Lawrence, supra, 16 Cal.2d at page 7, 108 P.2d 893.)

[5] (4) The words of a will are to receive an interpretation which will give some effect to every expression therein, rather than one which will render any expression inoperative. (In re Estate of Tompkins, 132 Cal. 173, 177, 64 P. 268.)

From a reading of the will of the deceased with the foregoing rules in mind, it is evident that the testator intended to dispose of his entire estate. Paragraph Fifth thereof reads as follows: "I declare that I do not want anyone to take any of my estate except as in this last will and testament provided."

Also it is clear, in view of the Sixth paragraph of his will, that it was decedent's intention that his brother, appellant, should receive only one dollar from his estate.

[6] By placing the construction on the Seventh paragraph of the will that was given to it by the probate judge, we meet all the requirements of the above stated rules. The will is construed: (1) as a whole, (2) in accordance with the intention of the deceased, (3) so as to prevent intestacy, and (4) so as to give effect to each and every expression used therein.

On the other hand, the construction suggested by appellant violates each of the above rules.

For the foregoing reasons the order is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.



57 Cal.App.2d 717

LINDLEY v. HINCH.
Civ. 12353.

District Court of Appeal, First District, Division 2, California.
March 19, 1943.

1. Divorce ⇐322

The general rule that when divorce decree makes no disposition of community property, spouses become tenants in common thereof, applies only where existence or amount of such property is not put in issue by pleadings, so as to preclude divorced wife's subsequent recovery of half of such property in absence of allegation in her complaint that complaint in divorce suit made no reference to community property.

2. Divorce ⇐322

A divorce decree, granted by default on complaint expressly alleging that there is no community property, becomes "res judicata" that there is no such property, though decree is silent on that subject.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

3. Divorce ⇐322

In divorced wife's action against her deceased former husband's estate to establish trust in half of their community property, allegation that divorce decree made no disposition of community property was insufficient to support plaintiff's conclusion that each spouse became entitled to equal share of such property, in absence of allegation that complaint in divorce suit made no reference to community property.

4. Divorce ⇐322

In divorced wife's action against her deceased former husband's estate to establish trust in half of their community property, allegations of complaint that spouses orally agreed at various times that husband would continue to control and invest such property and account to plaintiff for profits therefrom whenever mutually agreed on were insufficient to overcome presumption of "laches" arising from plaintiff's failure to assert interest in property for over forty years.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Clara Hinch Lindley against Grace M. Hinch, as special administratrix of the estate of Edward M. Hinch, deceased, to establish a trust in half of the community property of plaintiff and decedent at the time of their divorce. From a judgment for defendant after sustaining a demurrer to plaintiff's second amended complaint, plaintiff appeals.

Affirmed.

M. F. Ryan, of Oakland, for appellant.

Redmond C. Staats and Redmond C. Staats, Jr., both of Berkeley, for respondent.

DOOLING, Justice pro tem.

Plaintiff appeals from a judgment for defendant entered after sustaining a demurrer to plaintiff's second amended complaint. The complaint alleges that Edward M. Hinch died in 1941 and respondent was appointed special administratrix of his estate; that plaintiff and decedent were married in 1893 and divorced in 1899; that at the time of their divorce they were possessed of community property consisting of $30,000 in gold coin and that at all times after their divorce decedent exercised dominion and control over all of said property, invested and reinvested it and died leaving an estate valued at $200,000 derived from the original $30,000. The complaint is framed on the theory that because the decree of divorce made no disposition of the community property the parties became tenants in common of the $30,000, and that thereafter decedent became a trustee of one-half of such property and its subsequent earnings by repeated oral promises to plaintiff that he would hold and manage it for her benefit.

As to the decree of divorce the complaint alleges in paragraph VII: "That said decree of divorce, a copy of which is hereto attached, marked Exhibit 'A' and made a part hereof, made no disposition of the community property of plaintiff and decedent, Edward M. Hinch, and that upon the granting of said divorce, plaintiff and the said decedent Edward M. Hinch, each became entitled to an equal share of said property."

The copy of the divorce decree shows that plaintiff secured the divorce after default by decedent and makes no mention of community property. The complaint here is silent concerning the allegations of the complaint in the divorce action.

[1] Appellant counts on the general rule that where a divorce decree makes no disposition of community property the spouses become tenants in common thereof. 3 Cal.Jur. 10-Yr.Supp. 673. Respondent points out that there is a well-established qualification to this rule by which it only applies where the existence or amount of community property are not put in issue by the pleadings (3 Cal.Jur. 10-Yr. Supp. 674), and that the complaint in this action contains no allegation that the complaint in the action for divorce made no reference to the community property of the parties. Respondent's point is well taken.

[2] It is settled, for example, that where a divorce is granted by default upon a complaint which expressly alleges that there is no community property, the decree although silent on the subject becomes res

judicata that there is no community property. Brown v. Brown, 170 Cal. 1, 147 P. 1168; Stone v. Stone, 58 Cal.App. 415, 208 P. 993; Champion v. Woods, 79 Cal. 17, 21 P. 534, 12 Am.St.Rep. 126. The reason for this rule is thus stated in Brown v. Brown, supra, 170 Cal. at pages 5 and 6, 147 P. at page 1170:

"Where a defendant is served with a summons and complaint stating the facts upon which he is required to act, and he makes default, he is presumed to admit all the facts which are well pleaded in the complaint. * * * The defendant here is presumed to have acceded to the proposition embraced in the complaint and to have consented that plaintiff should obtain the relief therein prayed for, upon the conditions and facts set forth in the complaint. The proceeding is equivalent to a statement by Brown to plaintiff that he did not object to a divorce for the cause alleged, based upon the theory that there was no community property existing at the time the action was begun. * * * Although the final decree is silent as to property, it nevertheless operates as an adjudication that at the time the action was begun there was no community property."

[3] The allegation concerning the divorce decree hereinabove quoted therefore omits a necessary fact to support the conclusion of the pleader, attempted to be drawn therefrom, that upon its granting plaintiff and decedent "became entitled to an equal share of said property."

[4] Respondent's assertion that the cause of action is barred by laches appearing on the face of the complaint is equally well founded. The complaint alleges in paragraph IX:

"That within two years after the granting of said decree of divorce, and at various and divers times there after, the exact dates of which plaintiff cannot now with certainty recall, and up to and including a short time prior to decedent's death, it was orally agreed by and between the plaintiff and decedent, that the said Edward M. Hinch would continue to exercise dominion and control over all of said property and invest the same for the mutual benefit of plaintiff and decedent, and would make an accounting to plaintiff for the profits derived therefrom at such time as should be mutually agreed between them. That during the lifetime of decedent Edward M. Hinch, he never accounted to the plaintiff for the money held by him as aforesaid, or for the profits derived therefrom and that no demand was made by the plaintiff for an accounting during decedent's lifetime."

The complaint is barren of any further explanation of plaintiff's delay of over forty years in asserting her rights to or attempting to derive any benefit from her claimed interest in, this valuable property. The quoted allegations standing alone are not sufficient to overcome the presumption of laches from such an unusual lapse of time. Kleinclaus v. Dutard, 147 Cal. 245, 81 P. 516; Garrity v. Miller, 204 Cal. 454, 268 P. 622. A plaintiff cannot wait over half a normal lifetime and, after an alleged trustee is dead, seek the aid of a court of equity with no further explanation of his delay than that the alleged trustee made repeated oral promises to hold the property in trust. The reasons for this rule are fully stated in the two cases cited above, are grounded in experience and common sense, and need no repetition here. It may be well to add that the very rareness with which such exceedingly stale claims are asserted is itself an indication that in the normal course of events people do not, without better reason than that shown by plaintiff here, refrain for such an inordinate length of time from seeking some benefit from property in which they have a present beneficial interest. In the rare instances in which they do so long delay, reason and good conscience demand that they should not have recourse to the courts of equity without fully stating in their complaints facts which will clearly justify the interposition of the courts in support of their otherwise stale and easily falsified demands.

The case of Miller v. Ash, 156 Cal. 544, 105 P. 600, most strongly relied on by appellant, is an example of such a case. There a guardian had fraudulently concealed his breach of trust, and the reasons for the failure of the wards to discover his perfidy over a period of more than forty years were fully alleged in the complaint. The allegations of the complaint in this action in explanation of the plaintiff's long delay fall far short of the facts alleged in the Miller case.

The judgment is affirmed.

NOURSE, P. J., and SPENCE, J., concurred.

57 Cal.App.2d 695

KRUPP v. LOS ANGELES RY. CORPORATION et al.

CORIENE et al. v. SAME.

Civ. 13855, 13856.

District Court of Appeal, Second District, Division 2, California.

March 18, 1943.

1. Appeal and error ⇐1067
Negligence ⇐141(11)

In action by automobile passengers against streetcar company to recover for injuries sustained by passengers in collision with streetcar, refusal to give requested instruction that negligence of automobile driver was not imputable to plaintiff passengers was error and prejudicial in view of mutual fault instruction and testimony from which jury could have found that motorman was negligent.

2. Appeal and error ⇐930(2)

The jury is presumed to have heard and heeded all the instructions given by the trial court.

3. Trial ⇐252(9)

In action by automobile passengers against streetcar company to recover for injuries sustained by passengers in collision with streetcar, where there was no evidence of contributory negligence the giving of instruction on mutual fault of defendants and plaintiffs was error.

4. Street railroads ⇐118(1)

In action by automobile passengers against streetcar company to recover for injuries to passengers in collision with streetcar, instruction concerning rights and obligations of automobile driver was proper but only for purpose of aiding jury in determining whether motorman was negligent. Vehicle Code, §§ 531, 544, St.1935, pp. 183, 185.

5. Street railroads ⇐113(1)

In action by automobile passengers against streetcar company to recover for injuries sustained by passengers in collision with streetcar, evidence as to conduct of automobile driver, not being in issue, was admissible only to extent that it might aid in determining ultimate question of defendants' negligence.

6. Street railroads ⇐118(16)

In action by automobile passengers against streetcar company to recover for injuries to passengers resulting from collision with streetcar, the giving of lengthy instructions concerning conduct of automobile driver and placing emphasis thereon as to defendant's nonliability if driver's negligence was sole proximate cause of injuries was misleading.

Appeals from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Esther F. Krupp against the Los Angeles Railway Corporation and others, and by Ruth Coriene and others against the same defendants to recover for injuries sustained by automobile passengers in collision between automobile and a streetcar. From judgment for defendants, plaintiffs appeal.

Reversed.

Max Fink and Ray Sandler, both of Los Angeles, for appellants.

Gibson, Dunn & Crutcher and Philip C. Sterry, all of Los Angeles, for respondents.

W. J. WOOD, Justice.

An action was commenced by Ruth Coriene and her husband to recover damages for injuries suffered by Mrs. Coriene when an automobile in which she was riding as a guest passenger was struck by a streetcar operated by defendant Crow and owned by defendant Los Angeles Railway Corporation. A separate action was commenced by Esther F. Krupp to recover for injuries suffered in the same accident, she also having been a guest passenger in the same automobile. The actions were consolidated for trial, resulting in a verdict for defendants. Plaintiffs have appealed from the ensuing judgments.

The accident occurred about noon on August 9, 1941, on Western Avenue near the intersection of Melrose Avenue in the city of Los Angeles. At that time plaintiffs were riding as guests of Mrs. Tillie Nahan in an automobile which was being driven by Mrs. Nahan in a southerly direction. In addition to the plaintiffs and the driver, Mrs. Barbara Davis, her minor daughter, and the minor daughter of Mrs. Nahan were riding in the car. They were on their way to have luncheon at the Farmer's Market.

Defendant railway corporation operates a streetcar line on Western Avenue. As Mrs. Nahan was driving her car along Western Avenue between a line of automobiles parked at the curb and the street-

car tracks, an automobile stopped directly in front of her car and blocked passage in the lane in which she was driving. Mrs. Nahan started to turn to the left to pass around this automobile but the motorman of defendants' streetcar, which was coming from her rear, rang the bell and Mrs. Nahan pulled back to the right to a point within a foot of the automobile which had stopped and she in turn stopped her car. Within two or three seconds thereafter defendants' streetcar struck the Nahan automobile and shoved it into the automobile which had stopped ahead of it, causing the injuries for which plaintiffs are seeking damages.

[1-3] The trial court erred to the prejudice of plaintiffs when it refused to give to the jury a requested instruction that the negligence of the driver of the car in which plaintiffs were guests was not imputable to plaintiffs. Renowden v. Pacific Elec. Ry. Co., 73 Cal.App. 383, 238 P. 785. The prejudice suffered by plaintiffs by the failure to give such an instruction was emphasized when the court in another instruction told the jury that plaintiffs could not recover if their injuries were a "result of the mutual fault and negligence of the defendant and of the plaintiffs." The fact that this instruction was given in a paragraph dealing with the measure of damages does not destroy its effect, for the jury is presumed to have heard and heeded all of the instructions given by the court. In their answer defendants pleaded contributory negligence but no evidence was presented at the trial which gave the slightest support to these allegations. The instruction concerning the "mutual fault" of the defendants and of the plaintiffs should not have been given. Chapman v. Pacific Elec. Ry. Co., 85 Cal.App. 69, 74, 258 P. 1006.

[4] The trial court gave to the jury several instructions on the subject of the legal obligations of the driver of the automobile in which plaintiffs were passengers. These instructions were given at considerable length and in one of them the court read section 544 of the Vehicle Code, St. 1935, p. 185, pertaining to the obligations of drivers of a vehicle upon turning an automobile or bringing it to a stop. In another instruction the court referred to section 531 of the Vehicle Code, St.1935, p. 183, pertaining to the distance at which the driver of an automobile should drive his vehicle behind another automobile. Each of these instructions was terminated with the admonition to the jury that if the driver of the automobile in which plaintiffs were riding violated her obligations as set forth in the instructions she would be guilty of negligence and that if such negligence was the sole proximate cause of plaintiffs' injuries the verdict should be for defendants. It was proper for the court to instruct the jury concerning the rights and obligations of the driver of the automobile but only for the purpose of aiding the jury in determining whether the defendant motorman was negligent. Crutchfield v. Davidson Brick Co., 55 Cal.App.2d 34, 130 P.2d 183.

[5, 6] But the ultimate question for the determination of the jury was whether defendants were guilty of negligence contributing to plaintiffs' injuries. The conduct of the driver of the automobile, not being in issue, was admissible in evidence only to the extent that it might aid in the determination of the question of the negligence of defendants. The procedure adopted by the court of giving lengthy instructions concerning the conduct of the driver of the automobile and of placing emphasis thereon by adding the statement at the end of each instruction that plaintiffs could not recover if the driver was guilty of negligence which was the sole proximate cause of plaintiffs' injuries, was such as to mislead the jury and cause them to believe that the conduct of the driver of the automobile was the ultimate issue for their determination instead of the conduct of the motorman. The laymen constituting the jury were not aided in their determination of the question of the negligence of defendants by an elaborate statement of the rights and duties of someone not a party to the litigation together with the admonition that if the conduct of such third party was the sole cause of plaintiffs' injuries the verdict should be for defendants. The danger of misleading the jury was unquestionably enhanced by the giving of the later instruction on the subject of the mutual fault of the parties. By adopting the course followed in giving these instructions the court unquestionably made it necessary to clearly inform the jury that the negligence of the driver of the automobile was not imputable to plaintiffs. A case bearing striking similarity to the present one is Renowden v. Pacific Elec. Ry. Co., supra [73 Cal.App. 383, 238 P. 786], where the court said that "there was a

series of instructions given at the request of the defendant, which, however correct they may be in themselves as statements of law (and as to this we express no opinion), might easily have been applied by the jury in such manner as to hold the plaintiff responsible for negligence of the driver of the automobile, in the absence of any instruction that negligence of the driver could not be imputed to the plaintiff." The series of instructions referred to were a number concerning the duties of the driver of the automobile in which the plaintiff was riding and ending with the admonition that if the negligence of the driver of the automobile was the sole proximate cause of the accident the plaintiff could not recover. The reviewing court reversed the judgment because of the failure of the trial court to instruct the jury that the negligence of the driver could not be imputed to the plaintiff.

Plaintiffs vigorously assert that on the uncontradicted evidence no verdict could be supported other than a verdict in favor of plaintiffs and defendants, with equal vigor, assert that no verdict could be supported other than one in their favor. Neither position is correct. The testimony of the motorman, together with that of other witnesses, could support a finding by the jury that he was free from negligence if such a verdict had been rendered by a jury which had been properly instructed. On the other hand, the record discloses ample evidence to support a verdict in favor of plaintiffs if such a verdict had been rendered by the jury. It is sufficient to refer to the testimony of Mrs. Davis, who was riding in the car with plaintiffs:

"Q. After Mrs. Nahan brought her car to a stop did you see the street car? A. Yes.

"Q. And where was it when you first saw it after Mrs. Nahan brought her car to a stop? A. I turned my head and I know it was a quarter of a block away when her car stopped.

"Mr. Fink: That is all.

"By Mr. Sterry: Q. And how long a time elapsed from the time you again turned your head and saw the street car one-quarter of a block away until the collision? A. I didn't turn my head. I watched that car bearing down on us. I was frightened and I couldn't turn my head.

"Q. From what point did you watch this car? A. Over my left shoulder. I wasn't talking to Mrs. Krupp then.

"Q. How far away was it when you became frightened, where was the street car? A. About one-quarter of a block away.

"Q. That is when Mrs. Nahan started to turn over from the tracks? A. No, Mrs. Nahan had started to turn and stopped the car.

"Q. What made you frightened? A. I heard continuous clanging of the bell without a let-up at no time.

"Q. Was the ringing of the street car bell the only cause for your fright? A. I wasn't frightened at the street car ringing. I heard it and was attracted to it. That made me turn my head, when Mrs. Nahan had stopped, I wondered what he was ringing about. I was frightened when I saw without decrease of speed that car coming right our way. I didn't know it would hit us but I could see the car bearing down on us and my first thought was of the children." From this testimony the jury could reasonably have found that the motorman without decreasing the speed of his car negligently crashed into the automobile which had been standing still for several seconds at a distance of a quarter of a block. Such a finding, if made by the jury would have supported a verdict in favor of plaintiffs.

The judgments are reversed.

MOORE, P. J., and McCOMB, J., concurred.

21 Cal.2d 773

FERRONI v. PACIFIC FINANCE CORPORATION OF CALIFORNIA et al.

FERRONI et al. v. SAME.

S. F. 16776.

Supreme Court of California.

April 1, 1943.

1. Automobiles ⇐192(8)

The conditional vendor of an automobile is liable, within the amounts stated in section 402 of the Vehicle Code, for the operation of automobile with his consent by conditional vendee in a negligent manner, where conditional vendor delivers possession of the automobile to the conditional vendee and fails to comply with section 177 of the Code with reference to giving notice of the transfer prior to the occurrence of the accident. Vehicle Code, § 177, St.1935, p. 115, and § 402, St.1937, p. 2353.

2. Automobiles ⇐192(8)

Where conditional vendor delivered possession of automobile to conditional vendee and motor vehicle department was not notified until six days thereafter of transfer and conditional vendee was in possession and control of automobile at time of an intervening accident, due to his negligence, the conditional vendor was an "owner" within meaning of section 402 of the Vehicle Code, making owner liable for negligence of person operating automobile with owner's consent. Vehicle Code, § 177, St.1935, p. 115, and § 402, St.1937, p. 2353.

See Words and Phrases, Permanent Edition, for all other definitions of "Owner".

3. Principal and agent ⇐149(2)

One who assumes to act as an agent is responsible to third persons as a "principal" for his acts in the course of the agency when he enters into a written contract in the name of his principal without believing in good faith that he has authority to do so. Civ.Code, § 2343.

See Words and Phrases, Permanent Edition, for all other definitions of "Principal".

4. Automobiles ⇐192(1)

An "owner", as contemplated by section 402 of the Vehicle Code imposing liability on owner of a motor vehicle for the negligence of a person operating it with his consent, may be an actual owner even though he has not complied with the formalities of section 177 relating to giving notice of transfer prior to occurrence of accident. Vehicle Code, § 177, St. 1935, p. 115, and § 402, St.1937, p. 2353.

5. Appeal and error ⇐1056(1) Automobiles ⇐243(2)

In action involving question whether automobile dealers or finance corporation was owner of automobile involved in accident, exclusion of evidence of course of business dealings between dealers and finance corporation tending to establish that finance corporation was authorized by dealers to execute conditional contracts of sale on behalf of such dealers was prejudicial error. Vehicle Code, § 177, St.1935, p. 115, and § 402, St.1937, p. 2353.

6. Principal and agent ⇐99

An "implied agency" may arise from words and conduct of the parties and the circumstances of the particular case.

See Words and Phrases, Permanent Edition, for all other definitions of "Implied Agency".

7. Automobiles ⇐192(8)

An assignee of a conditional vendor of a conditional sale contract of a motor vehicle is not answerable for the negligent operation of the motor vehicle by the conditional vendee under section 402 of the Vehicle Code imposing liability on owner of the motor vehicle for negligence of a person operating it with his consent. Vehicle Code, § 177, St.1935, p. 115, and § 402, St. 1937, p. 2353.

8. Appeal and error ⇐1173(1)

In action involving issue whether automobile dealers or finance corporation was owner of automobile involved in accident, where there was prejudicial error in excluding evidence as to finance corporation, judgment would also be reversed as to automobile dealers, although there was evidence sustaining judgment in their favor. Vehicle Code, § 177, St.1935, p. 115, and § 402, St. 1937, p. 2353.

9. Appeal and error ⇐1173(1)

Inconsistent judgments on same set of facts cannot stand.

In Bank.

Appeals from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Aurelia Ferroni against the Pacific Finance Corporation of California, John T. McConnville and Pacheco & Geis, a partnership doing business under the name of Pacific Motor Sales Company, and separate action by Serafino Ferroni and another against named defendants on account of injuries and death resulting from negligent operation of automobile by defendant McConnville, which actions were consolidated for trial. From a judgment for plaintiffs against defendants McConnville and Pacific Finance Corporation of California, but against plaintiffs as to defendant partnership, the Pacific Finance Corporation of California and the plaintiffs appeal.

Reversed and remanded for a new trial.

For prior opinion, see 124 P.2d 615.

Dinkelspiel & Dinkelspiel and Alfred Del Carlo, all of San Francisco, for plaintiffs and appellants.

O'Connor, Neubarth & Moran and Harold H. Cohn, all of San Francisco, for defendant and appellant.

Daniel J. O'Brien, Jr., and R. H. Cormany, both of San Francisco, for defendants and respondents.

CARTER, Justice.

The action of plaintiff Aurelia Ferroni against defendants, Pacific Finance Corporation of California, a corporation, Pacheco and Geis, a partnership, doing business under the name of Pacific Motor Sales Company, and McConnville, was consolidated for trial with an action by plaintiffs Serafino Ferroni and Julia Ferroni, against the same defendants. The action arose out of injuries and death resulting from the negligent operation of an automobile by McConnville on November 3, 1939. The trial court sitting without a jury gave judgment in favor of plaintiffs against defendants McConnville and Pacific Finance Corporation of California, but against plaintiffs as to the defendant partnership. McConnville has not appealed, but Pacific Finance Corporation of California has appealed and is referred to herein as appellant. Plaintiffs appeal from the judgment against them as to defendant partnership asserting that if their judgment against appellant is reversed they should have judgment against the partnership.

No issue of negligence, contributory negligence or damages is presented. The question involved is the liability of appellant or the partnership or both, such liability, if any, depending upon the ownership of the automobile at the time of the accident under section 402 of the Vehicle Code, St.1937, p. 2353, imposing liability on the owner of a motor vehicle for the negligence of a person operating it with his consent.

Apparently on May 9, 1939, the car in question was in the possession of a Mr. Brazil, who had purchased it from a Mr. Daniels, a dealer. According to the records of the Department of Motor Vehicles, Brazil was the registered owner and the Bank of America National Trust & Savings Association was the legal owner. On October 31, 1939, the partnership, a dealer in used cars, purchased the car from Daniels and received possession of it. Neither the certificates of legal or registered ownership were delivered to it at that time, but insofar as the records of the department show they were in the names abovementioned. The following events occurred on November 2, 1939, the day before the accident. An independent automobile salesman, Houser, advised the partnership that he had a purchaser for a car. He demonstrated the car in question and informed the partnership that he had sold it to defendant McConnville and that appellant was "handling the deal," that is, financing the purchase. McConnville and one of the partners signed a purchase order on the partnership's forms in which it was recited that of the purchase price of $310, $85 had been paid by McConnville to appellant; that the purchase price was to be financed by appellant; and that "It is understood and agreed that the Title of Ownership of car as above described does not pass to me until the final cash payment is made." McConnville was given possession of the car. On the same day, but prior to the foregoing, Houser and McConnville had called on appellant, and it had prepared a conditional sale contract of the car in which Geis, one of the partners was named seller and McConnville, buyer. It received the down payment on the car, and the contract was signed by McConnville. The employee of the appellant signed Geis' name to an assignment of the contract to it. The partnership then obtained from Daniels the certificates of legal and registered ownership endorsed by Brazil and the legal owner and delivered them to appellant, receiving a check for $319.30 for the car. The accident occurred the next day. The certificates of registered and legal ownership did not reach the Motor Vehicle Department until November 9, 1939, when the car was

placed in the name of McConnville as registered owner and appellant as legal owner.

[1, 2] In approaching the problem presented by this appeal it should first be observed that sections 402 and 177 of the Vehicle Code have been construed as providing that the conditional vendor of an automobile is liable within the amounts stated in the former section for the operation of such automobile with his consent by his conditional vendee in a negligent manner, where he delivers possession of the car to the vendee and fails to comply with section 177, St.1935, p. 115, with reference to giving notice of the transfer prior to the occurrence of the accident. Guillot v. Hagman, 30 Cal.App.2d 582, 86 P.2d 865; Bunch v. Kin, 2 Cal.App.2d 81, 37 P.2d 744; Helmuth v. Frame, 46 Cal.App.2d 372, 115 P.2d 846. Appellant questions the soundness of those cases, but a hearing by this court was denied in all of them and we are not inclined to disapprove them. In the instant action there is no question but that the car was sold on conditional sale contract and that McConnville was the conditional vendee, and as such he was in possession of the car and using it with the consent of the owner at the time of the accident. Nor can it be doubted that there was not an immediate notification to the Motor Vehicle Department by the conditional vendor of the transfer. See Guillot v. Hagman, supra. The accident occurred the day following the execution of the conditional sale contract; the circumstance with relation to the transfer had not changed since the transfer, and the department was not notified until six days thereafter. Therefore, the conditional vendor, whoever he was, would be liable to plaintiffs because he was the owner within the meaning of section 402 of the Vehicle Code, and was not exempted from its terms by subdivision (f) thereof. This brings us to the question of the identity of the conditional vendor, because under the circumstances he must be considered the owner of the car at the time of the accident.

[3] Appellant attacks the trial court's finding that it was the owner at the time of the accident as being unsupported by the evidence. The merit of that contention, as we have seen, in turn depends upon the identity of the conditional vendor of the car. Viewing that question without regard to the assignment on November 2, 1939, of the conditional sale contract by appellant to itself, but purporting to act for the partnership, there is sufficient evidence to support the finding that appellant was the conditional vendor and therefore, the owner at the time of the accident. The following factors justify such an inference. Houser, the independent salesman, took the car and McConnville, the purchaser, to the appellant without the knowledge of the partnership. There appellant examined and approved the credit of McConnville and had McConnville sign the conditional sale contract. It received the down payment of $85 required under the contract. McConnville and Houser left with the car and returned to the partnership's place of business and informed the partnership that the car had been sold. The partnership called appellant and asked if the contract had been signed. One of the partners then obtained the certificates of legal and registered ownership from Daniels, and delivered them to appellant "so he could get the check from" appellant. He received a check for $319.20. Appellant paid $5 to Houser for his services. (The partnership paid him $35.) It is true that the contract named Geis, one of the partners, as vendor, but the partners testified that that was done without their knowledge or consent. It may justifiably be inferred that the contract was in fact that of appellant although it used the name of Geis as vendor. One who assumes to act as an agent is responsible to third persons as a principal for his acts in the course of the agency when he enters into a written contract in the name of his principal without believing in good faith that he has authority to do so. Civ.Code, § 2343; Nichols G. & M. Co. v. Jersey Farm D. Co., 134 Cal.App. 126, 24 P.2d 925.

[4] Furthermore, it may be inferred from the above circumstances that the partnership sold the automobile to the appellant which in turn sold it to McConnville, thus making appellant in truth the owner of the vehicle. An owner as contemplated by section 402 may be an actual owner even though he has not complied with the formalities of the Vehicle Code with reference to transfer of title. Helmuth v. Frame, supra; Schmidt v. C. I. T. Corporation, 14 Cal.App.2d 92, 57 P.2d 1016.

[5] However, in the instant action, the appellant in the course of the examination of one of its employees, offered to prove that the course of business dealings between it and the partnership were the same as in the instant case, and establish that appellant was authorized by the partnership to execute conditional contracts of sale on

behalf of the partnership. That offer was refused. Aside from that offer there is evidence in the record that would have supported appellant's theory that the partnership was the conditional vendor or the owner of the car rather than appellant at the time of the accident. It will be recalled that the partnership and McConnville signed the partnership's sale order in which it was recited that $85 was to be paid down; that the purchase was to be "financed" by appellant, and that the title was to be retained by the vendor; that negotiations were had with the partnership, Houser and McConnville; that the partnership had possession of the car for sale in its place of business; that it was a dealer in used cars and appellant was a finance company; (customarily automobile finance companies deal only in financing rather than the purchase and sale of cars); that the partnership gave Houser a check for $35 on which was marked "Com.," meaning commission; that partner Pacheco testified that "Houser took him (McConnville) to a finance company, and had the deal financed"; and that appellant assigned the contract in Geis's name as assignee to itself. If appellant were the vendor the assignment would have been meaningless. There are also other factors. In the light of those circumstances it was prejudicial error to refuse to receive the offered proof. If that proof had disclosed, contrary to the partner's testimony, that appellant was authorized to make the conditional sale contract in the partnership's name as principal and the vendor, which was done by appellant, the contract would be between the partnership and McConnville, the partnership would be the owner as well as the vendor. Appellant would be neither. It would be merely the agent of the partnership, and such evidence might have resulted in a judgment against the partnership but in favor of appellant. The delivery of the possession of the car to McConnville by appellant would have been a delivery by the partnership, inasmuch as it was acting as the latter's agent.

[6] Unquestionably, under the circumstances here present, evidence of a prior course of dealing between appellant and the partnership in similar transactions would be relevant on the question of an agent-principal relationship between them, and that appellant was authorized as such to make the contract on behalf of the partnership. An implied agency relationship may arise from the words and conduct of the parties and the circumstances of the particular case. Smith v. Schuttpelz, 1 Cal. 2d 158, 33 P.2d 836; Bergtholdt v. Porter Bros. Co., 114 Cal. 681, 46 P. 738; Brown v. Spencer, 163 Cal. 589, 126 P. 493; MacDonnell v. California Lands, Inc., 15 Cal.2d 344, 101 P.2d 479; Burgess v. Security-First Nat. Bank, 44 Cal.App.2d 808, 113 P. 2d 298; 1 Cal.Jur. 646; 2 C.J.S., Agency, § 23.

[7] Finally, it is contended that in any event appellant was the owner of the automobile by reason of the assignment to it of the conditional sale contract on the same day that the other transactions took place; that therefore, no prejudice was suffered by the refusal of appellant's offered proof of agency. The assignment was made by appellant in Geis' name. If the evidence established to the satisfaction of the trial court that appellant was acting merely as the partnership's agent, the question is merely one of whether an assignee of the conditional vendor of a conditional sale contract is liable for the negligent operation of the car by the conditional vendee under section 402 of the Vehicle Code where proper notice is not given. That is true because under those circumstances the partnership would be the conditional vendor, McConnville the conditional vendee, and appellant merely the assignee of the vendor. Any delivery of the possession of the car to the vendee by appellant would be in fact a delivery by the partnership, appellant's principal. An assignee of a conditional vendor of a conditional sale contract of a vehicle, is not answerable under section 402 of the Vehicle Code for the negligent operation of the vehicle by the conditional vendee. That follows from the basis of the liability of the conditional vendor under that section. He is liable, and does not fall within the exclusion provision thereof when he fails to comply with section 177 of the Vehicle Code requiring notice of transfer of the car. That section states that when the owner of a vehicle sells title or interest in the vehicle and delivers possession thereof, the department must be notified immediately. Ordinarily the conditional vendor delivers possession of the car to the vendee, but the assignee does not. When the assignment is made, delivery of possession to the conditional vendee has already been completed.

[8, 9] It follows from the foregoing that the judgment must be reversed insofar as it determines that appellant is liable as the owner of the car. The court also found that the partnership was not the owner and

therefore not liable. As we have seen that determination is supported by sufficient evidence. Plaintiffs have appealed from that portion of the judgment. Inasmuch as a retrial of the issue of ownership as to appellant alone might result in a determination that appellant was not the owner, hence, leaving plaintiffs in the position where neither the partnership nor appellant was the owner, and hence not liable as such, the judgment in favor of the partnership is also reversed. Otherwise, there would be inconsistent judgments on the same facts, because if appellant was merely acting as the partnership's agent and thus not liable, then the partnership would necessarily be the owner, and therefore liable. Such inconsistent judgments will not be permitted to stand. See Southern Pacific Co. v. City of Los Angeles, 5 Cal.2d 545, 55 P.2d 847. From the circumstances presented, either the appellant or the partnership was the owner within the scope of section 402 of the Vehicle Code. On retrial that issue should be resolved upon the introduction of proper evidence.

For the foregoing reasons the judgment is reversed both as to appellant and the partnership, and the cause remanded for a new trial to determine the sole issue of ownership of the car at the time of the accident, and thereupon fix liability upon the owner pursuant to section 402 of the Vehicle Code for the damages suffered by plaintiffs.

GIBSON, C. J., SHENK, CURTIS, EDMONDS, and TRAYNOR, JJ., and GRIFFIN, Justice pro tem., concurred.



57 Cal.App.2d 742

BARKER et al. v. CITY OF LOS ANGELES et al.

Civ. 13862.

District Court of Appeal, Second District, Division 2, California.

March 23, 1943.

Hearing Denied May 20, 1943.

1. Appeal and error ⇐1010(1)

Whether condition in a public street is dangerous to those traveling upon it is usually one of "fact" for determination of trier of facts, whose conclusion, if supported by substantial evidence, will not be disturbed on appeal.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

2. Municipal corporations ⇐819(1)

Evidence that other accidents had occurred at same place in a street is some evidence that the condition there existing is dangerous.

3. Appeal and error ⇐989

Where it is urged that findings of fact are not supported by the evidence, power of appellate court begins and ends with its determination whether there is any substantial evidence contradicted or uncontradicted which will support the questioned findings of fact.

4. Automobiles ⇐306(4, 7)

Evidence that, at least six times prior to accident involved, other accidents had occurred at the same place and were caused by automobiles running into guard rail and service pole in street, was "substantial evidence" to support finding that a dangerous condition existed and that it was negligence on part of department of water and power to erect and maintain service pole at jog, and that condition of street at location of service pole was a "proximate cause" of collision with pole.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause" and "Substantial Evidence".

5. Automobiles ⇐308(4, 10)

Whether street and service pole were negligently maintained and were the proximate cause of collision of automobile with pole and resultant injury to passenger was for jury.

6. Automobiles ⇐275

Letter by city engineer to city council that jog in street was dangerous was sufficient to establish "knowledge" on part of defendant city of dangerous character of street.

See Words and Phrases, Permanent Edition, for all other definitions of "Knowledge".

7. Negligence ⇐138(4)

It is error for trial court to instruct on presumption of due care where the evi-

dence discloses acts and conduct of the injured person immediately prior to or at the time of the accident.

8. Appeal and error ⇐1064(1)

Whether an instruction on presumption of due care on part of the deceased, when the evidence discloses acts and conduct of the injured party at the time of the accident constitutes prejudicial error, depends on the circumstances of each case.

9. Appeal and error ⇐1170(9)
Automobiles ⇐309(1)

In action by automobile passenger for injuries resulting from collision with service pole in street where plaintiff's evidence disclosed various acts of deceased driver immediately prior to accident, it was error to charge on presumption of due care by driver but harmless where all facts surrounding the accident were fully and fairly related to jury and it was not probable that different verdict would have been rendered if instruction had not been given. Const. art. 6, § 4½.

10. Appeal and error ⇐1170(9)

In action for injury to passenger resulting from collision with service pole in street, where instruction was otherwise correct the use of the word "may" in place of "has" or "had" in sentence that "fact that a public utility whether privately or municipally owned or operated may have a legal right under its franchise to erect poles on a street does not affect its liability," etc., was not prejudicial. Const. art. 6, § 4½.

11. Trial ⇐295(1)

The instructions must be read in their entirety.

12. Trial ⇐296(3)

In action for injuries to automobile passenger resulting from collision with service pole where court had previously instructed jury that department of water and power was liable only in event that it was negligent, an instruction that before department could be held liable jury must find by preponderance of the evidence that the pole maintained constituted a danger was not error.

13. Trial ⇐260(1)

An instruction was properly refused where subject matter thereof had been covered in an instruction given.

14. Trial ⇐240, 252(8)

In action against city and department of water and power for injuries resulting to automobile passenger from collision with service pole, instruction that law did not require department to anticipate all circumstances under which some person might make contact with the wire or pole used in distribution of electricity even if such contact should result in injury to such person or even in his death, and that reasonable care and the taking of all reasonable precautions against accident constituted the measure of the department's liability, was properly refused as "argumentative", and as not based on evidence where there was no evidence that anyone had come in contact with the wire.

See Words and Phrases, Permanent Edition, for all other definitions of "Argumentative Instruction".

Appeals from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Earl A. Barker and Ernest Dukehart against the City of Los Angeles and another for damages for injuries sustained from collision with service pole maintained by Department of Water and Power. From a judgment for second named plaintiff, the defendants appeal.

Affirmed.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and Leonard Husar and Bourke Jones, Deputy City Attys., all of Los Angeles, for appellant City of Los Angeles.

S. B. Robinson, Chief Asst. City Atty., Mark A. Hall, Asst. City Atty., and Cecil A. Borden and Wendell Mackay, Deputy City Attys., all of Los Angeles, for appellant Department of Water and Power.

Marion P. Betty, Ben C. Cohen, and Kent Rogers, all of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before a jury in an action to recover damages received in an automobile accident alleged to have been caused by the, (a) defective condition of a street of defendant municipality, and (b) negligence of defendant Department of Water and Power in erecting and maintaining a service pole, defendants appeal.

The record discloses these facts:

The following is a photograph of the scene of the accident hereinafter described:



The above photograph depicts a portion of Exposition Boulevard in the city of Los Angeles looking westerly approximately a quarter of a mile west of Western Avenue. At this point the boulevard lies in an easterly and westerly direction and is a "two way" street 26 feet in width from curb to curb east of the jog and 22 feet in width west of the jog. It is divided by a white line down the center of the street which leaves a strip of 13 feet in the roadway east of Western Avenue. North of this white line, and paralleling it, is a breaker strip which runs straight ahead to the jog and terminates at the base of a service pole designated in the picture as pole "A".

The jog shown in the photograph has the effect of offsetting the street to the south about 20 to 23 feet so that the south curb of the street east of the jog, if extended west, would be about a foot or more south of the north curb of the street west of the jog. The northwest curb of the jog itself being at an angle of about 45 degrees. Back of the northerly curb along the jog is a fence or barrier about 20 feet long and 3½ to 4 feet high on both the upper and lower rails of which are painted danger warning signs of diagonal lines. The curb is painted in a similar manner.

Between 18 inches and 2 feet from the base of the curb on the jog back of the barrier just mentioned and approximately at the south end of it, defendant Department of Water and Power has erected and maintained a service pole "A" which is 17 inches in diameter. This pole as shown in the picture, for warning purposes, was equipped at its base with a number of visibility strips consisting of a substance similar to galvanized iron placed on the pole approximately 6 inches apart.

There was also installed on a mast arm attached to the pole a sodium vapor light which was 14 feet toward the center of Exposition Boulevard and 25 feet above the surface of the street.

Shortly after 6:30 p.m. October 26, 1940, plaintiff was a passenger in a 1935 model Ford or Chevrolet coupé which was being driven west on the north side of Exposition Boulevard, 4 or 5 feet south of the north curb, at a speed of about 25 miles per hour. This car was travelling about 50 feet behind another car which was going in the same direction. It was a rainy night. The windshield wiper located in front of the driver of the car in which plaintiff was riding was in operation, and the head lights on this car were also lighted, as was the sodium vapor light above mentioned.

The car immediately in front of the automobile in which plaintiff was a passenger turned to the left and safely negotiated the jog heretofore mentioned. The vehicle in which plaintiff was travelling failed to turn to the left, but went straight ahead, hitting the pole above referred to as pole "A".

As a result of the accident, plaintiff suffered serious personal injuries. The jury

returned a joint verdict against defendants in the sum of $10,000.

Defendants urge four propositions for reversal of the judgment. These will be stated and discussed hereunder seriatim:

First: The evidence fails to disclose that:

(a) A dangerous condition existed on the street on which plaintiff was travelling;

(b) There was negligence on the part of defendant Department of Water and Power in erecting and maintaining the service pole "A" at the jog on Exposition Boulevard;

(c) The condition of the street or the location of the service pole "A" was a proximate cause of the accident.

This proposition is untenable, and is governed by the facts hereinafter related together with these pertinent rules of law:

[1] (1) The question as to whether the condition in a public street is dangerous and a menace to those travelling upon it is usually one of fact for the determination of the trier of fact, whose conclusion, if supported by any substantial evidence, will not be disturbed on appeal. (Bigelow v. City of Ontario, 37 Cal.App.2d 198, 204, 99 P.2d 298.)

[2] (2) Evidence that other accidents have occurred at the same place in a street is some evidence that the condition there existing is dangerous. (George v. City of Los Angeles, 51 Cal.App.2d 311, 315, 124 P.2d 872; Bigelow v. City of Ontario, supra, 37 Cal.App.2d 205, 99 P.2d 298.)

[3] (3) When it is urged that findings of fact are not supported by the evidence, the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the questioned findings of fact. (In re Estate of Winzeler, 42 Cal.App.2d 246, 248, 108 P.2d 720.)

A witness who resided near the jog shown in the picture above (the place where the accident in the present case occurred) testified that at least six times prior to the present accident, accidents had occurred at the same place and were caused by automobiles running into the guard rail and service pole "A".

[4] Under rule 2 supra, this testimony was substantial evidence to support findings (a), (b), and (c) set forth above. Therefore under rules 1 and 3 supra, it is unnecessary, nor would any useful purpose be served thereby, for us to discuss other evidence in the record which would support the questioned findings.

In Norton v. City of Pomona, 5 Cal.2d 54, at pages 59 and 61, 53 P.2d 952, at page 954, our Supreme Court says: "At least two previous collisions of automobiles with this pole were shown by the evidence as tending to show the dangerous character of such pole. * * * In this case it became a question of fact for the court to determine whether under the circumstances shown the maintenance of the pole and the street, separately or together, constituted negligence on the part of either or both defendants * * * and whether such negligence, if any, proximately caused the injuries to plaintiffs, without contributory negligence on their part."

The cases of Waldorf v. City of Alhambra, 6 Cal.App.2d 522, 45 P.2d 207; and Robertson v. City of Long Beach, 19 Cal.App.2d 676, 66 P.2d 167, relied on by defendants are factually distinguishable from the present case. In each of these cases the dangerous condition was a jog or offset in the street occurring at an intersection with a cross street. While in the present case the jog and service pole were not at an intersection or cross street but came *between intersections* on an otherwise straight thoroughfare.

[5] Therefore it became a question of fact from all the circumstances in the case for the jury to determine whether the street and service pole were negligently maintained, and were the proximate cause of the present accident. This distinction is pointed out in the case of George v. City of Los Angeles, 11 Cal.2d 303, 309, 79 P.2d 723.

Second: That the evidence failed to disclose that defendant municipality had notice or knowledge of the dangerous character of the condition of Exposition Boulevard at the jog shown in the picture supra.

This proposition is likewise untenable. There was received in evidence a letter addressed to the city council of defendant municipality dated July 31, 1940, which had been written by the city engineer of the same defendant. In this letter, referring to the proposed acquisition of property so that the jog on Exposition Boulevard, now under discussion, could be eliminated, he said: "The only acquisition necessary to accomplish this improvement, including the crossing at Grammercy Place, will be three

pieces of railroad property and two pieces of vacant private property required to *eliminate a dangerous jog in the existing north roadway at Grammercy Place.*" (Italics added.)

[6] There can be no doubt that this evidence was sufficient to establish knowledge upon the part of defendant municipality of the dangerous character of the condition of Exposition Boulevard at the place where the present accident occurred. (See Arellano v. City of Burbank, 13 Cal.2d 248, 256, 89 P.2d 113.)

Third: The trial court committed prejudicial error in instructing the jury as follows:

(a) "It has been stipulated that Mr. Barker, who at the time of the accident was driving the automobile in which the plaintiff was riding, is now deceased and that his death was not caused by and had no relation to the accident here involved.

"There is a presumption of law that all persons exercise due care for their own safety and to avoid injury to others. This presumption applies to Mr. Barker's conduct at the time of and immediately preceding the accident in question. This presumption is in itself evidence, and in considering the issue as to whether or not Mr. Barker was guilty of negligence the jury may consider this presumption of care as evidence in itself and may weigh it with any evidence opposed to it, bearing in mind, however, that in this case negligence on the part of Barker—if the jury should believe, including the presumption I have referred to, that he was negligent—is material only if such negligence was the sole proximate cause of the accident."

From apparently conflicting opinions of appellate courts of California, the following rules may be adduced:

[7] (1) It is error for the trial court to give an instruction such as that set forth above where the evidence introduced by the plaintiff discloses the acts and conduct of the injured party immediately prior to or at the time of the accident. (Speck v. Sarver, 20 Cal.2d 585, 587, 588, 128 P.2d 16; Campbell v. City of Los Angeles, 28 Cal. App.2d 490, 491, 82 P.2d 720.)

[8] (2) Whether the giving of such an instruction when the evidence of the plaintiff discloses the acts and conduct of the injured party at the time of the accident constitutes prejudicial error depends on the circumstances of each case. (Speck v. Sarver, supra.)

[9] In view of rule 1, supra, since plaintiff introduced evidence which disclosed the various acts which occurred immediately prior to the time of the accident it was error for the trial court to give the foregoing instruction. However, pursuant to rule 2 we have examined the record and are of the opinion that the error was not prejudicial to defendant municipality, as all of the facts surrounding the accident were fully and fairly related to the jury, and it is not probable that had the instruction not been given a different verdict would have been reached.

Therefore we must consider the error as not prejudicial to defendant municipality, and disregard it, pursuant to the mandate of article VI, section 4½ of the Constitution of the State of California.

(b) "The fact that a public utility, whether privately or municipally owned or operated, MAY have a legal right under its franchise to erect its poles on a public street, does not affect its liability, if any, for damage to persons or property proximately caused by the manner in which a pole is erected or maintained, or the location thereof in a particular place, when any of these create a danger to persons lawfully using the street, or to property of such persons." (Emphasis added.)

[10] Defendant Department of Water and Power urges that the foregoing instruction was erroneous for the reason that the court used the word "may" in place of the words "has" or "had" in stating that said defendant had the right, under its franchise, to erect poles on a public street. This stricture upon the instruction we deem to be hypertechnical and not worthy of further comment since, under any view of the facts in this case the error could not have been prejudicial to the complaining defendant. In other particulars the instruction is an accurate statement of the law.

(c) "As to the defendant Department of Water and Power, the plaintiff must convince you by a preponderance of the evidence, first, that the maintenance of the power pole at the point in question CONSTITUTED A DANGER to persons lawfully using the street or to the property of such persons; second, that the maintenance of the pole at the place where it was located was the proximate cause, or one of the proximate causes, of the accident; and,

third, that he received injuries as the result of the accident." (Emphasis added.)

[11, 12] The foregoing instruction was not erroneous in advising the jury, among other elements, that before defendant Department of Water and Power could be held liable, it must find by a preponderance of evidence that the power pole which said defendant maintained "constituted a danger" to persons lawfully using the street, for the reason that instructions of the trial court must be read in their entirety. The trial judge had previously instructed the jury that this defendant was liable only in the event that it was negligent in its acts. The particular instruction read thus:

"The liability, if any, of the Department of Water and Power rests upon the theory that when a city engages in a business, such, for example, as the generation, distribution and sale of electric energy, its liability is governed by the same laws which govern the liability of private corporations or persons engaging in a similar business. A corporation, whether a private company or a municipal corporation engaged in conducting a business, is liable for injuries to persons or property proximately caused by negligence on the part of its agents or employees."

Reading the two instructions together, it is obvious that the jury must have believed that before they could render a verdict against defendant Department of Water and Power, they were required to find that the maintenance of the power pole was not only a danger to those using the street, but that it had been negligently erected and maintained. We do not pass upon the correctness of the questioned instruction standing alone. Were it the only instruction upon the subject, a different result might ensue.

Fourth: The trial court committed prejudicial error in refusing to give the following instructions requested by defendant Department of Water and Power:

(a) "You are instructed that the defendant Department of Water and Power was and is engaged in a lawful business; that under the law it was and is said Department's privilege and duty to supply electricity to The City of Los Angeles and its inhabitants; and that it had and now has a right to use the streets for the purpose of maintaining its poles and the necessary appliances used in connection with furnishing and distributing such electricity, so long as it exercised said right in a lawful and proper manner.

*"The Funk and Wagnalls New Standard Dictionary defines the term 'street' in part, as follows,—'A public way, with buildings on one or both sides, in a city, town, or village;—street is usually held to mean the entire surface including the sidewalk and buildings abutting thereon, and so much of the depth as is, or can fairly be, used for the ordinary purposes of a street. * * *'"*

[13] The court properly refused to give the foregoing instruction, the subject matter thereof having been covered in instruction No. 23 which appears in paragraph (a) of the third proposition supra.

(b) "You are instructed that the law does not require a public utility such as the Department of Water and Power, to anticipate, at its peril, all possible fortuitous circumstances under which some person might make contact with a wire or pole used in the distribution of electricity, even if such contact should result in injury to such person, or even in his death. Reasonable care, and the taking of all reasonable precautions against accident, constitute the measure of the Department's liability."

[14] The trial court properly refused to give this instruction. The instruction is argumentative. In addition, one of the facts which it presupposed was not supported by any evidence in the case. (Adams v. Warren, 11 Cal.App.2d 344, 348, 53 P.2d 780.) There was no evidence that the plaintiff, the car in which he was riding, or any other person came in "contact with a wire."

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.

Hearing denied; EDMONDS and TRAYNOR, JJ., dissenting.

57 Cal.App.2d 605

ROSENFIELD v. VOSPER et al.
Civ. 13613.

District Court of Appeal, Second District, Division 3, California.

April 9, 1943.

Hearing Denied May 7, 1943.

Costs ⇐264

An affidavit verifying memorandum of costs, stating that "the foregoing items of costs and disbursements in this action are correct, and that the said disbursements have been necessarily incurred", conformed to codal form which in effect is that "the disbursements have been necessarily incurred in this action", the difference merely being in location of the words "in this action". Code Civ.Proc. § 1033.

On petition for rehearing.

Rehearing denied.

For former opinion, see 57 Cal.App.2d 605, 134 P.2d 529.

Adolph B. Rosenfield, of Long Beach, Cal., in pro. per.

D. A. Boone, of Long Beach, Cal., for defendants-respondents.

PER CURIAM.

Rehearing denied. In his petition for rehearing appellant states that we have misconceived the nature of his objection to the affidavit verifying the memorandum of costs, and that his point in that respect is that the affidavit is not in the form authorized by the code and for that reason is, in legal effect, no verification at all. It is true, the affidavit departs slightly from the code in its arrangement of words. The code provision is for "a memorandum of the items of his costs and necessary disbursements in the action or proceeding, * * * verified by the oath of * * * stating that to the best of his knowledge and belief the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding." Code Civ.Proc. § 1033. The affidavit of respondents' attorney here was "that to the best of his knowledge and belief the foregoing items of costs and disbursements in this action are correct, and that the said disbursements have been necessarily incurred." In effect the code form is that "the disbursements have been necessarily incurred in this action" and the affidavit states that "the disbursements in this action have been necessarily incurred." The difference is merely in the location of the words "in this action." We cannot see that this difference causes any substantial difference in meaning, and for that reason stated in our former opinion, without discussion, the conclusion, to which we still adhere, that the affidavit conformed to the code.



58 Cal.App.2d 106

In re RABINOWITZ' ESTATE.
ROBBINS v. NEUMANN et al.
Civ. 13909.

District Court of Appeal, Second District, Division 1, California.

April 12, 1943.

Hearing Denied June 10, 1943.

1. Wills ⇐326

A motion for nonsuit in will contest was not subject to objection that it did not sufficiently point out grounds upon which it was based, where contestant did not make such complaint when motion was made, but motion was argued by his counsel in the trial court.

2. Trial ⇐163

The rule requiring specific statement of defects in proof set up as basis for motion for nonsuit is for protection of court and is applicable only to cases wherein motion is denied, and not to an order granting it.

3. Appeal and error ⇐854(5)

An order granting motion for nonsuit will be sustained when it has been granted upon any ground, whether made a ground of motion or not.

4. Appeal and error ⇐927(3), 989, 997(2)

A judgment granting nonsuit must be reversed unless reviewing court, disregarding conflict in evidence, and giving full credit only to that portion tending to sustain plaintiff's allegations and indulging

in every legitimate inference which may be drawn from evidence, can say that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff, if such verdict were given.

5. Trial ⇐142

Where different conclusions may be reasonably drawn by different minds from same evidence, decision must be left to triers of fact and motion for nonsuit should not be granted.

6. Appeal and error ⇐927(3)
Trial ⇐165

In determining motion for nonsuit, neither trial court nor reviewing court may weigh evidence or pass upon credibility of witnesses.

7. Wills ⇐82

A person of sound mind over 18 years of age may dispose of his separate property by will as he sees fit without regard to views of others as to naturalness or justice of his disposition. Probate Code, § 20.

8. Wills ⇐155(1)

A will may not be held invalid on ground of undue influence in absence of showing of pressure overpowering mind and mastering volition of testator at moment of execution, notwithstanding apparent injustice of will and variance from testator's expressions.

9. Wills ⇐163(2)

A person sustaining a confidential relation to testator and actually participating in procuring execution of will under which he unduly profits as a beneficiary has burden of showing that will was not induced by coercion, undue influence or fraud.

10. Wills ⇐153

The validity of will is not imperiled when executed so as to give all or a substantial part of estate to one beneficiary on beneficiary's promise, honestly made, to carry out testator's wishes concerning intended beneficiaries.

11. Wills ⇐384

In will contest, where beneficiary of will sought to avoid fact that a majority of testatrix' children were disinherited by claiming that testatrix intended that such beneficiary and her brother should take care of estate and that all children and grandchildren should benefit therefrom, rulings preventing examination of beneficiary as to what wishes were expressed by testatrix concerning intended beneficiaries and as to whether beneficiary and her brother intended to carry out such wishes were erroneous and prejudicial.

12. Wills ⇐386

In will contest, whether there was undue influence in execution of will devising property to four of testatrix' children, one of whom had been acting in connection with execution of will, and leaving nothing to five remaining children, was a question for triers of fact and granting of motion for nonsuit was improper.

13. Appeal and error ⇐927(3)

On appeal after granting of nonsuit in will contest, reviewing court took evidence most strongly in plaintiff's favor.

14. Wills ⇐358

An order granting a nonsuit in will contest was not appealable. Code Civ.Proc. § 963; Probate Code, § 1240.

Appeal from a judgment of the Superior Court of Los Angeles County, Ruben S. Schmidt, Judge, and from order granting non-suit.

Proceeding in the matter of the estate of Sarah Rabinowitz, deceased, wherein Sol Robbins filed a petition contesting the will of the deceased, opposed by Rose Sally Neumann and others. From an order granting a motion for nonsuit and from the judgment entered thereon, the contestant appeals.

Judgment reversed and cause remanded and attempted appeal from the order dismissed.

Monte C. Fiscus, of Los Angeles, and Eldred L. Eaton, of Whittier, for appellant.

Irwin R. Buchalter and Jerome Weber, both of Los Angeles, for respondents.

WHITE, Justice.

Sarah Rabinowitz died July 3, 1940, leaving as her survivors nine children. On May 26, 1938, some two years prior to her demise, she made and executed her last will and testament disposing of an estate valued at approximately $16,593.27, and by the terms of which will she devised certain of her property to one of her daughters, Betty Kuller, and the latter's husband, Ben Kuller; to another son, Dave Robbins,

and the rest and residue of the estate was devised to another son, Jake M. Rabinowitz and Rose Sally Neumann, a daughter, the executrix herein. The remaining five children were disinherited.

On March 18, 1941, Sol Robbins, a son of the decedent, not mentioned in the will, filed his petition of contest and for grounds thereof alleged (1) incompetency; (2) undue influence; and (3) fraud. After issue was joined the cause came on for trial May 22, 1942, before the court sitting with a jury. At the conclusion of plaintiff's case the court granted a motion for nonsuit. From the order granting such motion and from the judgment entered thereon, plaintiff prosecutes this appeal.

[1-3] As a first ground of appeal it is urged that the motion for nonsuit was fatally defective for the reason that the same failed to sufficiently point out the grounds upon which it was made or to state the particulars wherein the evidence was insufficient to establish contestant's case. This claim upon the part of appellant can not be sustained. From a reading of the record herein it is at once apparent that the proceedings had upon the hearing of the motion for a nonsuit were sufficient to inform the court and counsel of the specific ground of defendant's motion, viz., that "the evidence is totally lacking as to undue influence and as to unsound mind" and further that "there has been no evidence to substantiate fraud or any other element claimed by contestant to the will". Appellant's failure, when the motion was made, to complain that it was too general and not specific, coupled with the fact that the motion was argued by his counsel in the trial court, adds further weight to the assumption that the questions presented by the motion for a nonsuit were known to and understood by counsel for appellant. Curry v. Williams, 109 Cal.App. 649, 293 P. 623; Souza v. Underwriters' Fire Patrol, 116 Cal.App. 13, 2 P.2d 200; Appell v. Webster, 27 Cal.App.2d 551, 81 P.2d 467. The rule which requires a specific statement of the defects in the proof that plaintiff has made, when a motion for a nonsuit is presented, is for the protection of the court and is applicable only to cases wherein the motion is denied, and not to an order granting it. In the instance last mentioned, an order granting the motion will be sustained when it has been granted upon any ground, whether made a ground of the motion or not. Anchester v. Keck, 214 Cal. 207, 212, 213, 4 P.2d 934; Opinion of the Supreme Court denying a hearing in Inderbitzen v. Lane Hospital, 124 Cal.App. 462, 469, 12 P.2d 744, 13 P.2d 905.

[4-6] Under firmly established and oft-repeated rules, we must reverse the judgment herein, based as it is upon the granting of a nonsuit unless we can say from a review of the evidence, disregarding the fact that there may be a conflict therein, and giving full credit only to that portion of the evidence which tends to support the allegations contained in plaintiff's petition for contest of will, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff, if such verdict were given. In re Estate of Flood, 217 Cal. 763, 768, 21 P.2d 579; In re Estate of Lances, 216 Cal. 397, 14 P.2d 768. In other words, where different conclusions may be reasonably drawn by different minds from the same evidence, the decision must be left to the triers of fact. In determining the motion for a nonsuit the trial court was not authorized to, nor can this court on appeal, either weigh the evidence or pass upon the credibility of witnesses.

Viewing the testimony in a light most favorable to appellant, the record discloses that the testatrix could neither read nor write the English language and could "speak English very little"; she "was a very sick woman most of her life. She had doctors and medicines and went to Rochester many times before"; that her memory was poor. That at the time the will was executed decedent's husband was living, but for several years prior thereto had been very ill, required constant care and attention from his wife and was confined to a wheel chair. That respondent executrix, one of the residuary legatees, was very friendly with her mother, visited her frequently—once every week or oftener. That respondent executrix consulted with her mother from time to time regarding the latter's business affairs. That after consulting with her father and mother on numerous occasions concerning the execution of a will by her mother, respondent executrix communicated with the attorney who prepared the will and made an appointment for him to come to the home of her parents; that she discussed with such attorney the matter of preparing the will. That in the conversations between re-

spondent executrix and her mother the latter expressed herself as desiring "all her children and the grandchildren to benefit from her estate". That while respondent executrix was present in the room at all times when the attorney was at her parents' home, she at no time gave any instructions to the attorney concerning the contents of the will and never made any suggestions as to the manner in which the mother's property should be disposed of. That the facts as to the property and disposition thereof in the will were "primarily" given by her father to the lawyer. That the conversations between the father, mother and the attorney were partially in English and partly in Jewish. The respondent executrix also testified "my mother wanted Jay (meaning her brother Jake M. Rabinowitz) and I to look after things. She wanted all her children and grandchildren to get something". When asked what her mother said to the attorney with reference to excluding any of the children from the will, respondent executrix replied at the trial, "I did not hear mother tell the attorney to exclude my brother Sol and my brother Dave from receiving any of the proceeds of her estate. She didn't tell him to exclude anyone". Then, in reply to the question "What did she tell him?" the witness replied, "The will speaks for itself. The provisions that she made with me verbally, she wanted things arranged so my brother Jay and myself could take care of the estate for her". Asked whether she was "quite positive your mother never gave him (the attorney) any instructions to cut your brother Dave and your brother Sol out of the will" the witness replied, "To my knowledge she didn't give any instructions to cut them out". It is also in evidence that at the time the will was read to the decedent "there was further discussion of the fact that the will was not meant to be a specific distribution of mother's estate, but that my brother Jay and myself would take care of that". When the court inquired as to "what was said as to the way you two would take care of it", the witness replied, "and according to various discussions mother and I had had pertaining to her estate. As I said before, she wanted each of her children and each of her grandchildren to benefit from the residue of her estate, which they will do if we finish this". The evidence clearly indicates that the testatrix was on friendly terms with all of her children.

It is conceded by appellant that the evidence is sufficient to establish the mental and physical competency of the testatrix to execute the will in question, and upon this appeal he relies solely upon the claim that the evidence was sufficient to establish a prima facie case of undue influence and fraud that should have been presented to the jury for determination.

[7, 8] Appellant urges that the will in question is upon its face an unnatural and unjust one. In so far as this claim is concerned, we are first of all confronted with the fact that every person of sound mind, over the age of eighteen years, may dispose of his or her separate property by will (Sec. 20, Probate Code). In other words, the property belongs to the maker of the will and he or she may dispose of it as they think fit without regard to the views of juries or courts. In the minds of others than the testator, the naturalness or justice of the document is a matter of opinion and where the testator is competent, and undue influence or fraud is absent, it is the desires of the maker of the will that must prevail and not the opinions of a court or jury. In the Matter of the Estate of Nolan, 25 Cal.App.2d 738, 78 P.2d 456. By an unbroken line of authorities in this state, it is firmly established that however unnatural or unjust a will may appear to be, and however much at variance with expressions by the testator concerning relatives or the natural objects of his bounty, the testamentary document may not be held invalid on the ground of undue influence unless there be a showing of some sort of pressure which overpowered the mind and mastered the volition of the testator at the very moment of execution. In re Estate of Clark, 170 Cal. 418, 424, 149 P. 828; In re Estate of Carithers, 156 Cal. 422, 428, 105 P. 127; In re Estate of Gleason, 164 Cal. 756, 765, 130 P. 872; In re Estate of Lavinburg, 161 Cal. 536, 543, 119 P. 915.

[9] Appellant herein, however, relies upon an equally well-established exception to this general rule and which is to the effect that where one who unduly profits by the will as a beneficiary thereunder sustains a confidential relation to the testator, and has actually participated in procuring the execution of the will, the burden is on such person to show that the will was not induced by coercion, undue influence or fraud. As pointed out in Re Estate of

Higgins, 156 Cal. 257, 261, 104 P. 6, 8, a "presumption of undue influence" arises from proof of the existence of a confidential relation between the testator and such a beneficiary, "coupled with activity on the part of the latter in the preparation of the will." As we view the record in the instant case, it shows very considerable activity upon the part of respondent executrix who is one of the residuary legatees. The latter counselled with and advised her mother in business matters; on several occasions she discussed with her mother the making of a will and the provisions thereof; she procured the attorney who drew the will and was present at all times when the contents of the testamentary document were discussed as well as when it was executed. The contents of the will were "primarily" dictated by the husband of the testatrix but in the presence of respondent executrix. Furthermore, notwithstanding constant declarations on the part of the decedent that she desired all of her children and grandchildren to share in her estate, the will as executed disinherited a majority of her children and bequeathed nothing to her grandchildren.

[10-12] In an effort to overcome any inferences of undue influence upon her part, respondent executrix asserts that while the record points unerringly to the fact that the testatrix desired all of her children and grandchildren to benefit from her estate, that the respondent executrix and her brother Jay, the other residuary legatee, "were to take care of this". We are not unmindful of the rule which holds that the validity of a will is not imperiled when the same is executed so as to give all or a substantial part of the estate to one beneficiary on the latter's promise, honestly made, to carry out the wishes of the testator concerning the intended beneficiaries of the estate. It has been held that it can not be said that a will is procured by fraud or undue influence when executed upon the faith of such a promise made in good faith and with an honest intention to carry out such promise. In re Estate of Everts, 163 Cal. 449, 454, 125 P. 1058, 1060. As was said in the case just cited, "If, after the death of the testatrix, the donee fails or refuses to perform the promise, a different question arises and, although the will stands unaffected, the donee and the property may be charged with a trust in favor of the intended beneficiaries [citing cases]". However, in the instant case, persistent efforts on the part of appellant's counsel to elicit from respondent executrix what wishes were expressed by the testatrix concerning the intended beneficiaries of the estate were effectually blocked by objections which were sustained by the court, who finally said, "I have ruled three times now that you can not go into that. I insist that you do not ask any further questions on that subject-matter". These rulings by the court were erroneous and prejudicial. The contestant was entitled, under the facts here present, to inquire of the witness as to what desires were expressed by her mother and whether the witness and her brother, Jay, intended to carry out such expressed wishes of the testatrix regarding the intended beneficiaries of the estate. In re Estate of Everts, supra. As the record now stands we are unable to determine the validity of the will upon the theory relied upon by respondent and passed upon in Re Estate of Everts, supra. It is impossible to determine what wishes were expressed by the testatrix and whether the beneficiary under the will, to whom such expressions were made, promised to carry out the same and intended to keep that promise. So far as the record herein shows, we do not hesitate to say that the question of whether the execution of the will was procured by fraud or undue influence was one upon which different conclusions may be reasonably drawn by different minds from all the available evidence, and, therefore, the decision thereon should have been left to the triers of fact under proper instructions by the court.

[13] It should be understood that throughout this opinion we have taken the evidence most strongly in appellant's favor, as we are bound to do where an appeal is taken after the granting of a nonsuit. We wish it understood that we are expressing no opinion as to the weight of the evidence or its truth or falsity.

[14] The attempted appeal from the order granting a nonsuit is dismissed for the reason that an appeal from such order is not authorized by law. Sec. 963, Code of Civil Procedure; Sec. 1240, Probate Code; National Auto Ins. Co. v. Cunningham, 41 Cal.App.2d 828, 833, 107 P.2d 643; Parigian v. Citizens Nat. T. & S. Bank, 42 Cal.App. 2d 773, 782, 110 P.2d 117.

For the reasons herein stated, the judgment appealed from is reversed and the cause remanded for a new trial in conformity with the views herein expressed.

YORK, P. J., and DORAN, J., concur.

57 Cal.App.2d 892

WEISS v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.

Civ. 12186.

District Court of Appeal, First District, Division 2, California.

March 30, 1943.

1. Appeal and error ⇐989

In considering sufficiency of evidence to support findings, appellate court must disregard conflicts and consider only evidence tending to support findings.

2. Finding lost goods ⇐2

In action to quiet title to money found in bank's safe deposit vault where plaintiff contended that money was lost by plaintiff and found by decedent on day on which both plaintiff and decedent visited vault, evidence supported finding against plaintiff that decedent discovered money on day approximately two months later.

3. Appeal and error ⇐989

In determining whether findings are supported by evidence, appellate court will not consider whether supporting evidence admitted at trial without objection is either incompetent or hearsay.

4. Trial ⇐105(2)

Hearsay evidence, admitted without objection, is sufficient to support a finding.

5. Finding lost goods ⇐3

In action to quiet title to money found in bank's safe deposit vault, evidence sustained finding against plaintiff that money found was not the same which plaintiff had lost.

6. Finding lost goods ⇐6

In action to quiet title to money found in bank's safe deposit vault which money was deposited with bank as bailee for true owner, finding that money found was not the same as the money which plaintiff had lost supported judgment that plaintiff was not entitled to such money.

7. Appeal and error ⇐1042

In action to quiet title to money found where trial court denied relief to cross-complainant who had found the money for failure to bring timely statutory proceedings to quiet title thereto, any error in failing to rule upon plaintiff's motion to dismiss cross-complaint was not prejudicial to plaintiff. Civ.Code, §§ 1864–1871.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by William M. Weiss against Bank of America National Trust & Savings Association and Mary Gilmore to quiet title to money found, wherein defendant Gilmore cross-complained. Prior to the trial defendant Gilmore died and defendant Berringer was substituted as administratrix. From a judgment declaring defendant bank bailee for lawful owner, plaintiff appeals.

Affirmed.

Phil F. Garvey and Julia M. Easley, both of San Francisco, for appellant.

Louis Ferrari and G. D. Schilling, both of San Francisco, H. H. Bechtel, of Oakland, and D. Bianco, of San Francisco, for respondent.

SPENCE, Justice.

Plaintiff sought to quiet title to $1,150 in currency. The defendant bank filed an answer denying the material allegations of the complaint but admitting that it held the sum of $1,150 as bailee for the lawful owner thereof and that it claimed no other interest therein. Defendant Mary Gilmore filed an answer and cross-complaint denying the material allegations of the complaint and alleging that she was the owner of the sum of $1,150 held by the defendant bank by virtue of finding said sum and taking proceedings under sections 1864 to 1871 of the Civil Code. The trial court found against plaintiff and against defendant Gilmore on their respective claims of ownership of the sum of $1,150 held by the defendant bank. Judgment was therefore entered to the effect that neither plaintiff nor defendant Gilmore was the owner thereof and that the defendant should retain possession thereof as bailee for the lawful owner. Plaintiff alone appeals from said judgment. Defendant Gilmore died prior to the trial and defendant Berringer was substituted as administratrix.

Plaintiff states his contentions in various ways but said contentions may be summarized as follows: (1) that the evidence was insufficient to support the findings; (2) that the findings were insufficient to support the judgment; and (3) that the

trial court committed reversible error in failing to rule upon plaintiff's motion to dismiss the cross-complaint of defendant Gilmore.

[1] In considering the sufficiency of the evidence to support the findings, it is elementary that we must disregard conflicts and consider only the evidence tending to support said findings. Said evidence shows that defendant Gilmore, an elderly woman, was the mother of defendant Berringer, who was subsequently substituted as administratrix in this action; that each of said parties had a safe deposit box in the defendant bank; that on April 17, 1935, they visited the safe deposit vault and entered a booth located therein; that they found some currency at that time in an envelope; that on the outside of said envelope was the figure "$1,150"; that the currency was contained in two currency wrappers, one wrapper containing $700 and the other wrapper containing $450; that they became excited and did not know what they should do; that defendant Berringer finally suggested that they place the money in her safe deposit box and seek the advice of her husband; that they did so and thereafter returned with the husband two days later on April 19, 1935, and delivered the money to an employee of the bank, explaining the circumstances under which it was found and taking a receipt for the money; that nothing further was done with respect to the money, except to make inquiry of the bank concerning it, until almost five years later when defendant Gilmore purported to institute proceedings under sections 1864–1871 of the Civil Code.

Plaintiff testified that he had a safe deposit box in said bank; that in 1934 he sold a piece of real property for approximately $1,150; that thereafter he put $1150 in a single currency wrapper, placed it in a white envelope, wrote on the envelope "Alice give to Aunt Bert. Brother Bill," and placed said envelope in his safe deposit box; that sometime in 1935 he visited the bank and placed said envelope in another envelope; that about five years later and on March 3, 1940, he read an article in the Oakland Tribune concerning the finding by the defendant Gilmore of $1,150 and went to his safe deposit box and found the envelope was not there; that he made claim to the money and thereafter commenced this action.

It was plaintiff's theory that the time he lost his currency was the time he placed it in the second envelope. He testified, "I put it in another envelope and that is the day I think I lost the money. * * * It must have been the time I lost the money." It was also plaintiff's theory that this time must have been February 23, 1935, as that was the only day on which both plaintiff and defendant Gilmore had visited their safe deposit boxes according to the bank records. Plaintiff called an employee of the bank to testify concerning these records. While there is some conflict and confusion in the testimony of this witness, it appears that on February 23, 1935, defendant Gilmore gained access to her safe deposit box at 10:10 a. m. while plaintiff did not gain access to his safe deposit box until 11:40 a. m., being one and one-half hours later. Plaintiff adheres to the above-mentioned theories despite this discrepancy in time and despite the evidence showing that defendant Gilmore found the money now held by the bank on April 17, 1935, and not on February 23, 1935. Plaintiff's main attack is based on the claimed insufficiency of the evidence to support the finding that defendant Gilmore found the money on April 17, 1935.

[2-4] Our review of the evidence shows that it was ample to support said finding. It is true that defendant Gilmore had died and was not available as a witness at the time of the trial. It is also true that defendant Berringer, who was with defendant Gilmore on April 17, 1935, admitted that she did not actually see defendant Gilmore pick up the money. Counsel for plaintiff was at pains to develop this point on cross-examination. But the circumstances related by defendant Berringer as occurring on April 17, 1935, give rise to a reasonable inference that defendant Gilmore found the money now held by the bank on that date and not at any earlier date. Furthermore both on direct examination and on cross-examination, defendant Berringer gave testimony which included the conversation between herself and defendant Gilmore on their visit to the bank on April 17, 1935. This testimony clearly shows that defendant Gilmore found the envelope containing the money in the wastebasket at the bank on that day and just prior to the time that defendant Berringer saw the money in the lap of defendant Gilmore. Plaintiff objects to this evidence as being hearsay and incompetent, Code of Civil Procedure, section 1845. We need not consider whether such statements

of defendant Gilmore constituted competent evidence as statements against interest for even if it were incompetent, no objection or motion to strike was made with respect thereto. It is settled that hearsay evidence, admitted without objection is sufficient to support a finding. Powers v. Board of Public Works, 216 Cal. 546, 15 P.2d 156; Parsons v. Easton, 184 Cal. 764, 195 P. 419; Mercantile Trust Co. v. Sunset Road Oil Co., 176 Cal. 461, 168 P. 1037; Lucy v. Davis, 163 Cal. 611, 126 P. 490; Yule v. Miller, 80 Cal.App. 609, 252 P. 733.

[5] Thus far the discussion has been directed at the sufficiency of the evidence to support the finding that the sum now held by the bank was found by defendant Gilmore on April 17, 1935. This was not the only consideration, however, which justified the conclusion that the currency found by defendant Gilmore was not the currency lost by plaintiff. The currency which plaintiff claimed to have lost consisted of $1,150 contained in one wrapper. The currency found was contained in two wrappers. The currency which plaintiff claimed to have lost was contained in an envelope bearing the writing "Alice give to Aunt Bert, Brother Bill." The currency found was contained in an envelope bearing only the writing "$1,150." Plaintiff could not testify definitely as to the time of his alleged loss of his currency but he surmised that it was on February 23, 1935, as that was the only time that he and defendant Gilmore visited the safe deposit vault on the same day. It appears, however, that defendant Gilmore gained access to her safe deposit box an hour and a half before plaintiff gained access to his safe deposit box on that day and, in any event, as above indicated, the testimony showed that the money found by defendant Gilmore was found on April 17, 1935, and not prior thereto. Resolving the conflicts in the evidence in favor of the findings of the trial court, we conclude that there was ample evidence to sustain all the material findings against plaintiff.

[6, 7] The other contentions of plaintiff appear to be likewise without merit. The findings amply sustain the judgment entered. With respect to the failure of the trial court to rule upon plaintiff's motion to dismiss the cross-complaint of defendant Gilmore, the alleged error could not have been prejudicial to plaintiff as the trial court found against said defendant on said cross-complaint by reason of the admitted failure of defendant Gilmore to commence proceedings under sections 1864 to 1871 of the Civil Code within the time prescribed by said sections.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J. pro tem., concurred.



57 Cal.App.2d 795

MORRISON v. JOSE et al.

Civ. 3046.

District Court of Appeal, Fourth District, California.

March 26, 1943.

Hearing Denied May 24, 1943.

1. Negligence ⇐93(1)

Negligence of automobile driver could not be imputed to occupant on theory of a "joint venture" merely because collision occurred on returning from trip to town to purchase groceries for occupant.

See Words and Phrases, Permanent Edition, for all other definitions of "Joint Venture".

2. Negligence ⇐93(1)

Negligence of automobile driver is not imputed to passenger who has no control over automobile and bears no such relation to its use as to warrant assumption that passenger is jointly engaged with driver in operation thereof, notwithstanding common purpose in making the trip.

3. Appeal and error ⇐978(1)

Conclusion of the trial judge on a motion for new trial on ground of erroneous instruction, should receive consideration by appellate court.

4. Appeal and error ⇐1066

In action to recover for injuries sustained by automobile passenger in head-on collision with defendants' automobile, error, if any, in giving instruction respecting statutory duty to drive on right half of roadway, which instruction was applicable to both drivers, without instructing in re-

gard to driver's duty when passing another vehicle proceeding in opposite direction, was not prejudicial, where there was no evidence of contributory negligence. Vehicle Code, § 525, St.1939, p. 2197, § 527, St.1935, p. 182; Const. art. 6, § 4½.

5. Appeal and error ⇐236(2)

Where no objection was made at time witness answered as to result of blood alcohol test of automobile driver and no motion was subsequently made to strike the answer, admissibility of such evidence could not be questioned on appeal.

6. Appeal and error ⇐181

Parties cannot urge for the first time on appeal objections which could have been obviated if properly made in the court below.

7. Appeal and error ⇐992
Evidence ⇐546

The question of the qualification of a witness to express an opinion as an expert is one directed first to the sound discretion and judgment of the trier of facts, and its determination will not be disturbed on appeal in the absence of a proper showing of an abuse of discretion.

8. Stipulations ⇐14(1)

Where counsel stipulated as to qualifications of physician, objection could not be made on appeal that proper foundation was not laid for physician's testimony that automobile driver's blood alcohol test indicated lower limits of intoxication in which it was dangerous for a person to drive an automobile.

Appeal from Superior Court, Kern County; William L. Bradshaw, Judge.

Action by William M. Morrison against Corine Jose and others to recover for personal injuries sustained in an automobile accident. From a judgment for plaintiff, entered upon a verdict of the jury, the defendants appeal.

Affirmed.

Brittan & Mack and Harvey, Johnston & Baker, all of Bakersfield, for appellants.

Borton, Petrini, Conron & Borton, of Bakersfield, for respondent.

GRIFFIN, Justice.

Plaintiff and respondent Morrison prosecuted this action against defendants and appellants Corine Jose and A. D. Jose, for damages resulting from injuries received in an automobile accident. The respondent was an employee of Winnie Whitmore, upon whose dairy ranch he resided. Fred Lanagan was a truck driver for Mrs. Whitmore, and on the night in question he had possession of her pick-up truck. He invited Morrison to accompany him to Ford City, which is a few miles distant from her ranch. Corine Jose was the driver of a Plymouth automobile which collided with the pick-up truck which was being driven by Lanagan. It was stipulated that Corine and A. D. Jose were the joint owners of the automobile driven by Mrs. Jose and that she was driving the automobile with the consent and permission of Mr. Jose. The Plymouth car was proceeding in a general southerly direction. The truck in which respondent was riding was being operated in a general northerly direction. The highway on which the accident happened runs north and south and is a two-lane highway, 18 feet in width. Each lane is 9 feet wide. The collision occurred at about midnight on April 21, 1940. The highway was level at the place of the collision, which occurred at the crest of a small hill. There was a down grade in both directions from the crest of the hill and also there were some curves in the highway. Morrison contends he was riding as a guest in the automobile being driven by Lanagan.

Respondent testified that on April 21, 1940, he had to get some groceries so Lanagan said: "Come along, go with me"; that he went with Lanagan to town; that they first went to Lanagan's home in Ford City, where he changed his clothes; that they then obtained a few groceries and then stopped in a pool hall or two; that he had "part of a drink" of whiskey at one place and one drink at another; that he thought Lanagan had one in each place; that they then started home; that Lanagan was driving and that he (Morrison) did not have anything to do with the control and operation of the "pick-up"; that when the driver Lanagan made the last turn just before the accident he (Morrison) reached down to straighten up the groceries he had purchased which were "setting on the floor board"; that as they came close to the crest of the hill he saw two lights approaching; that the pick-up on which he was riding was on its right or easterly side of the road; that when he looked up the lights on the approaching car were "straight ahead or towards us"; that a

collision occurred and he did not remember anything thereafter until he awakened in the hospital; that he received a fractured jaw and the doctors "wired my mouth shut"; that infection set in; that the wires were not removed until about September 1st; that it was about two months before he could open his mouth to eat; that he was in the county hospital about 22 days; that in addition to permanent scars on his face he had other quite serious injuries to his back and knee and a cut on his ear; that several teeth were broken and that he was out of work for about one year.

Lanagan testified that after he finished work at the ranch he picked up Morrison; that he was going to town and Morrison went with him to "get some groceries"; that he was going to town to bathe and change his clothes, which he did; that they picked up the groceries and then visited various pool halls and drinking establishments; that he had two drinks of whiskey over a period of some hours and then started back to the ranch; that he was driving and Morrison was riding with him "sitting there as a passenger and * * * a guest in the car"; that Morrison had nothing to do with the "control, operation or direction" of the pick-up; that about one-fourth of a mile before he approached the crest of the hill Morrison started to roll the window of the car up on his side; that he reached over to show him how to operate the handle; that as he arrived at the crest of the hill he was driving on his right-hand or easterly lane of the highway; that at that moment he observed a car coming toward him "in the east lane," i. e., in his lane about 15 to 20 feet away; that he was going about 35 miles per hour; that he "gave it the blinkers and then saw I was just about to get hit, couldn't get out of the way—I thought I would cut to the left, I didn't think I would get hit"; that a collision occurred and after he regained consciousness he observed the position of the cars; that they looked to him to be "both in the center in the lane going north, with a slight variation of the rear end" of the pick-up being thrown around; that he didn't have permission of Mrs. Whitmore to use the pick-up for his personal business but only for business purposes. On cross-examination the witness was shown several statements he made in a deposition which were conflicting with the testimony above related.

Corine Jose testified that she went driving with a Mrs. Maguire about 7 o'clock that evening; that before 9:30 p. m. she had had two and a half glasses of "fortified" wine to drink; that they then went home and saw her husband and later went to Taft; that she had another glass of wine there and did not feel the effects of any of it; that Mrs. Maguire had three or four bottles of beer. She then testified that as she approached the crest of the hill she saw a car just a few car lengths from her, approaching from the opposite direction; that she was on her right-hand side of the white line and in her proper driving lane; that at the brow of the hill Lanagan swerved clear over into her lane, to his left, "like he was going catercornered across the road"; that she turned to her left into his lane to try to get out of his way and then the cars collided and she was knocked unconscious and her passenger, Mrs. Maguire, was killed.

A highway patrol officer testified that he investigated the accident. A diagram was drawn by him showing the relative positions of the cars on the highway after the accident. It indicates that the right rear wheel of the Plymouth automobile was sitting directly on the white line and the entire balance of the car was in the east lane; that the rear three-fourths of the pick-up was in the west lane over the white line and at right angles to it. There was a skid mark which began about 18 inches or 2 feet east of the white line and extended, so far as the witness could see, to the right rear wheel of the pick-up. He testified that there was a considerable amount of broken glass and two large oil spots where oil had run out of both vehicles; that the glass was right in the center where the two vehicles had come together and that the oil was underneath the motor of each vehicle; that the glass and debris was about in the center of the easterly or northbound lane. He then testified that he went to the hospital and talked to Mrs. Jose and that she said "she didn't know, didn't remember" how the accident happened; that he smelled alcohol on her breath and that in his opinion "she was under the influence of liquor to the point that I ordered a blood test to be taken of her."

Other witnesses corroborated the officer's testimony as to the location of the cars after the accident. One witness described the pick-up truck as being entirely in the

west lane after the accident. Another witness testified that he was hitchhiking on the road and noticed the pick-up truck as it passed him and at that time it was on the left side of the road and west of the center line; that when he observed it it was a few miles from the scene of the accident.

Several witnesses testified in reference to the condition of the respondent's, as well as Lanagan's and the appellant Corine Jose's sobriety at the time. Evidence was then admitted which showed, in connection with the blood test of Mrs. Jose, 1.5 milligrams of absolute alcohol per cubic centimeter of blood, and it was testified by a physician that "That is the lower elements of intoxication in which we feel that it is dangerous for a person to drive a car to use to get about"

Upon this evidence the jury returned a verdict for the respondent and against appellants in the sum of $3,300. Appellants appealed.

[1, 2] The first question presented involves the propriety of an instruction given by the court at the request of respondent. The jury was instructed that under the evidence presented the negligence of Lanagan, if any, could not be imputed to Morrison, the respondent. It is appellants' contention that the defense of joint enterprise was pleaded and that there was sufficient evidence upon which the jury could have found that Morrison and Lanagan were, at the time, engaged in a joint enterprise and that therefore the trial court erred in instructing the jury accordingly. Giving the evidence the benefit of every reasonable inference, we are convinced that the trial court was correct in its interpretation of the evidence in this respect. The respondent did not drive the truck at any time, nor did he exercise any control or management over it whatsoever. It cannot be said that the mere fact that the respondent was going to town to obtain some groceries, and that as an accommodation to him Lanagan agreed to drive the truck to his home for the purpose of changing his clothes and subsequently purchasing the groceries for respondent, that a joint venture resulted. Morrissey v. Kirkelie, 5 Cal.App.2d 183, 42 P.2d 361, to us, seems to dispose of appellants' contention in this respect. The plaintiff in that action rode from Los Angeles to Ventura in an automobile belonging to and driven by her fiancé. While in Ventura they filed a notice of intention to marry, having made the trip for that purpose. On the way home their car collided with another car. The court declined to instruct the jury on the doctrine of joint enterprise and imputable negligence upon the ground that under the undisputed facts the negligence of the driver could not be imputed to the plaintiff. The court said at page 184 of 5 Cal.App.2d, at page 361 of 42 P.2d:

"The negligence of an automobile driver is not to be imputed to a passenger who has no control over the car in fact, and who does not bear such a relation to the use of the vehicle as to warrant the assumption that he is jointly engaged with the driver in the operation thereof. The fact that they have a common purpose in making the trip is not, alone, sufficient. It is unnecessary to discuss the authorities further than to say that they uniformly adhere to this rule. [Citing cases.]" See, also, O'Brien v. Edens, 125 Cal.App. 100, 104, 13 P.2d 754; 2 Cal.Jur.Supp., p. 612, sec. 399; Day v. Pickwick Stages System, 134 Cal.App. 92, 25 P.2d 16.

The next question presented demands more consideration. The trial court gave an instruction, at the request of respondent, in the exact language of section 525 California Vehicle Code, St.1939, p. 2197, respecting a driver's duty to drive on the right half and as close as practicable to the right hand curb or edge of the roadway. No instruction was offered by either party nor was any given in the language of section 527 California Vehicle Code, St.1935, p. 182, in regard to a driver's duty when passing another vehicle proceeding in an opposite direction. In several reported cases it has been stated that section 525 California Vehicle Code was not applicable where the cars were passing each other in opposite directions. Arundel v. Turk, 6 Cal.App.2d 162, 44 P.2d 383; Polk v. Weinstein, 12 Cal.App.2d 360, 55 P.2d 588; Lewis v. Western Truck Line, 44 Cal.App.2d 455, 112 P.2d 747; Bennett v. Chandler, 52 Cal.App.2d 255, 126 P.2d 173; Finney v. Wierman, 52 Cal.App.2d 282, 126 P.2d 143. The rule that a motorist should drive as close as practicable to the right hand edge of the highway has been applied in a number of situations other than when motorists were traveling in the same direction. McLellan v. Cocola, 133 Cal.App. 9, 24 P.2d 200; Kellner v. Witte, 133 Cal.App. 231, 23 P.2d 1045. See, also, Mathers v. County of Riverside, — Cal.App.2d —,

132 P.2d 38, [Hearing granted in Supreme Court]. In the instant case, after reading section 525, supra, the jury was instructed:

"Conduct which is in violation of the provisions of the Motor Vehicle Act, which the court has read to you * * * constitutes negligence per se. By this statement is meant: that evidence of such conduct, standing alone, and in the absence of other evidence excusing or justifying it, gives rise to a presumption of negligence. Such presumption, however, is not conclusive; that is, it may be overcome by other evidence showing that under all the circumstances surrounding the event the conduct in question was such as might reasonably have been expected from a person of ordinary prudence."

The latter instruction, therefore, qualified the effect of the first one, in that the presumption of negligence is not stated to be absolute, but it is stated that the violation of the code section may be explained by circumstances surrounding the event. This instruction was followed by a general instruction on the sudden peril rule. Another instruction was then given, at the request of appellant, defining negligence in general. It is argued that the proximate cause of the accident was the negligence of Lanagan and that the question of appellants' liability was a close one; that, therefore, the giving of the instruction based on section 525 California Vehicle Code without giving one based on section 527 California Vehicle Code was prejudicial. The jury found, under proper instructions, that the respondent was not guilty of contributory negligence in riding with the driver of the truck under the circumstances related. The trial court properly instructed the jury that there was not sufficient evidence to constitute a joint enterprise as above mentioned. There is substantial evidence that the appellant Corine Jose was negligent in many respects in the operation of her car. Any negligence on the part of Lanagan could not be imputed to the respondent guest. The instruction, as given, was general in its terms and applied to the conduct of both drivers. No instruction was offered by appellant under section 527 California Vehicle Code correctly defining the duties of the respective drivers.

[3, 4] Without deciding whether the instruction, as given, was or was not erroneous, even if we assume it to be so, there still remains the question whether the giving of such an instruction was prejudicial under the facts of this case. Blanton v. Curry, 20 Cal.2d 793, 129 P.2d 1; Gackstetter v. Market Street Ry. Co., 130 Cal.App. 316, 324, 20 P.2d 93; Nance v. Fresno City Lines, Inc., 44 Cal.App.2d 868, 113 P.2d 244. In Paulsen v. McDuffie, 4 Cal.2d 111, at page 119, 47 P.2d 709, at page 714, it is said:

"Had this been a case where the contributory negligence of the plaintiff would have defeated his claim for damages, the consequences following the giving of that instruction might have been most serious, and possibly might have required a reversal of the judgment."

Article VI, section 4½ of the Constitution provides that no judgment shall be set aside in any case on the ground of misdirection of the jury unless, after an examination of the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. In the instant case a motion for new trial on this same ground was fully heard and argued before the trial court and was denied. The conclusion of the trial judge on a motion for new trial on the ground here presented should have some consideration. Lasch v. Edgar, 46 Cal.App.2d 726, 116 P.2d 949. We are convinced, even though it be assumed, under the circumstances of this case, the instruction given under section 525 California Vehicle Code was erroneous, no prejudicial error resulted. Ohlson v. Frazier, 2 Cal. App.2d 708, 39 P.2d 429; Dewhirst v. Leopold, 194 Cal. 424, 229 P. 30; Bennett v. Chandler, supra.

[5, 6] The next question presented involves the admissibility of the results of the blood test of Mrs. Jose, as to alcoholic content. It is argued that there was not sufficient showing of the "tracing of the sample of blood" from the body of Corine Jose to the time of its analysis and interpretation of its alcoholic content. The state highway patrol officer testified, without objection, that he ordered a blood test taken of Mrs. Jose and that it was "taken there at the Taft County Hospital." On cross-examination no questions were asked of the officer in respect to this testimony and no motion was made to strike it. It then appears from the undisputed evidence that the patrolman transported the sample of blood, so taken, to the Kern County General Hospital, and it was left with a Mrs. Saunders for analysis and report. Evelyn Graham, laboratory technician at

the county hospital, testified as follows: Question by Mr. Borton: "Calling your attention to the 22nd of April, 1940, did you perform a blood test on a sample of blood of Mrs. Corine Jose? A. Yes.

"Q. What was the result of that test?

"Mr. Mack: Just a minute I object—no proper foundation laid. May I ask a question on voir dire? * * *

"Mr. Mack: Someone told you that was her blood? A. The sample was labeled with her name.

"Q. How long after did you test it? A. I don't know when it was taken. I procured it from a lock box at 8 o'clock in the morning * * *.

"Q. You identified it by the label? A. Yes.

"Mr. Mack: I think that is hearsay, Your Honor * * *.

"By the Court: I am going to let her testify on that.

"Mr. Borton:—What was the result of the test? A. I found 1.5 milligrams of absolute alcohol per cubic centimeter of blood.

"Mr. Borton: That is all."

Mrs. Saunders was then called and as counsel for respondent offered to mark certain X-rays and records from the Kern County hospital for identification, Mr. Mack interrupted and said: "If Mrs. Saunders says these are his, it is Okay * * * I won't raise the objection. They are directly from the Kern General, but reserve any other objection I may have * * *.

"Mr. Borton: Are you going to question them?

"Mr. Mack: No." The witness was then excused. It appears that no objection to any question was made until the witness Graham had answered the question showing she made the test of a blood sample of Mrs. Jose. No mention was made to strike the answer "Yes." It was not until the question was propounded seeking the result of the test that an objection was made for the purpose of "voir dire." Counsel then, without making any other formal objection or motion to strike, remarked: "I think that is hearsay, Your Honor." It will be noted that Mr. Borton again asked the question. No objection was then made and the witness answered without further objection. No motion was subsequently made to strike the answer. It is apparent that appellant submitted to the suggestion of the court and failed to make a timely and proper objection if he intended to preserve his point. It is a well-settled rule that parties cannot urge, for the first time on appeal, objections which could have been obviated if properly made in the court below. 2 Cal.Jur., p. 248, sec. 74.

[7, 8] The testimony of Dr. Joe Smith was to the effect that, in his opinion as a medical man, a blood alcohol test of 1.5 milligrams per cubic centimeter of absolute alcohol indicated the lower limits of intoxication, in which it is dangerous for a person to drive a car. He was the attending physician of respondent and was called as a witness on his behalf. Counsel for respondent inquired if he was a duly licensed practicing physician and surgeon in Kern County. Counsel for appellants then said: "We will stipulate to Dr. Smith's qualifications." The doctor then testified as to the medical treatments given respondent and the extent of his injuries. Later, he was asked if he was familiar with blood alcohol tests and he replied: "A little, yes." He was then asked for the opinion above related and the question was objected to on the ground that no proper foundation had been laid. The court remarked: "Technically, I think you are right. I am going to let him answer the question." No further objection was made nor was any motion made to strike the answer as given. The question of the qualification of a witness to express an opinion as an expert is one directed first to the sound discretion and judgment of the trier of facts and its determination will not be disturbed on appeal in the absence of a proper showing of an abuse of discretion. 10 Cal.Jur., p. 963, § 220, and cases cited. In view of this determination and the stipulation of counsel, we do not see how appellants can now be heard to complain as to whether the proper foundation had been laid.

The other points raised are not meritorious nor deserving of further consideration.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concurred.

57 Cal.App.2d 908

GENERAL DISTILLERS, Ltd., v. WHOLESALE LIQUOR DRIVERS-SALESMEN UNION, LOCAL 109 et al.

Civ. 12147.

District Court of Appeal, First District, Division 1, California.

March 31, 1943.

1. Injunction ⇐101(1)

Where picketing is peaceful, injunction may not be granted on the ground that such picketing is being conducted to secure a union or closed shop contract.

2. Appeal and error ⇐954(1)
Injunction ⇐135

The granting or denial of a temporary restraining order is left to discretion of trial court, and its order should not be set aside except upon a clear showing of an abuse of that discretion.

3. Injunction ⇐135

In action to enjoin picketing, wherein it appeared that picketing was peaceful and was being conducted because of employer's refusal to sign closed shop contract, denial of temporary restraining order was discretionary.

4. Appeal and error ⇐102, 870(5)

An appeal does not lie from an order sustaining a demurrer without leave to amend, and an attempted appeal from such an order will be dismissed, the only method of reviewing such an order being by way of an appeal from the final judgment entered thereon.

Appeal from Superior Court, City and County of San Francisco; George W. Schonfeld, Judge.

Action by General Distillers, Ltd., against Wholesale Liquor Drivers-Salesmen Union, Local 109, and others to enjoin picketing. From an order denying a preliminary restraining order, and from an order sustaining a demurrer to the complaint without leave to amend, plaintiff appeals.

First order affirmed and appeal from second order dismissed.

Jos. I. McMullen and Bruce McMullen, both of San Francisco, for appellant.

Mathew O. Tobriner and Rinaldo Sciaroni, Jr., both of San Francisco, for respondents.

KNIGHT, Justice.

Plaintiff brought this action to enjoin defendants from maintaining pickets in front of plaintiff's place of business. After a hearing at which oral testimony and documentary proof was received, the trial court denied plaintiff a temporary restraining order, and thereafter entered an order sustaining defendants' demurrer to the complaint without leave to amend. Plaintiff took an appeal from each order.

[1-3] The controversy arose over the failure of the parties to enter into a contract relating to the employment of salesmen in the operation of plaintiff's business. The contract was prepared and submitted to plaintiff by a representative of the defendant union. It was dated July 1, 1941, and delivered to plaintiff about September 1, 1941, but up to November 26, 1941, plaintiff had not signed it. Thereupon the defendant union placed two pickets in front of plaintiff's place of business. It is conceded that the picketing was peaceful. The contract called for a closed shop, and the position taken by plaintiff at the hearing was that it was willing to enter into a union contract with the defendants but that it objected to certain provisions in the contract relating to a closed shop, claiming that it would have been "ruinous" to its business to try to operate under the objectionable provisions. In opposition to the granting of the preliminary restraining order the defendant union contended that the situation fell within and was controlled by recent decisions of the Supreme Court, notably McKay v. Retail Auto. S. L. Union No. 1067, 16 Cal.2d 311, 106 P.2d 373, and Shafer v. Registered Pharmacists Union, 16 Cal.2d 379, 106 P.2d 403. The trial court so ruled, and those cases doubtless sustain its ruling, for it is held therein in effect that where the picketing is peaceful an injunction may not be granted upon the ground that it is being conducted to secure a union or closed shop contract. Moreover and in any event, it is well settled that the granting or denial of a temporary restraining order is left to the discretion of the trial court, and that its order should not be set aside except upon a clear showing of an abuse of that discretion. Palm Springs, etc., Co. v. Kieberk Corp., 37 Cal.App.2d 642, 100 P.2d 346. We find no such abuse of discretion herein.

[4] As to the second appeal, it was taken from the minute order which recited merely that the demurrer was sustained

without leave to amend. No final judgment was ever entered thereon. It has long since been held, uniformly, that no appeal lies from an order sustaining a demurrer without leave to amend; that if such appeal is attempted it will be dismissed; that the only method of reviewing such an order is by way of an appeal from the final judgment entered thereon, if and when such judgment is entered. Braren v. Reliable Carpet Works, Inc., 125 Cal.App. 489, 13 P.2d 972; Doran v. Sherman, 18 Cal.App.2d 479, 64 P.2d 442; Beckjord v. Slusher, 22 Cal.App.2d 559, 71 P.2d 820; Scott v. Security Title Ins. & Guar. Co., 9 Cal.2d 606, 72 P.2d 143, 117 A.L.R. 1049.

For the reasons stated, the order denying the preliminary restraining order is affirmed, and the appeal from the order sustaining the demurrer without leave to amend is dismissed.

PETERS, P. J., and WARD, J., concurred.



GRAY v. SOUTHERN PAC. CO.

Civ. 6558.

District Court of Appeal, Third District, California.

March 25, 1943.

Hearing Granted May 20, 1943.

1. Appeal and error ⇐934(1)

A conflict in evidence should be resolved in favor of plaintiff on issue whether judgment for defendant notwithstanding verdict for plaintiff should have been rendered. Code Civ.Proc. § 629.

2. Appeal and error ⇐989

On appeal from judgment for defendant notwithstanding verdict for plaintiff, appellate court must consider testimony of all witnesses remaining in record regardless of whether testimony was properly received. Code Civ.Proc. § 629.

3. Judgment ⇐199(3)

The judgment notwithstanding verdict should not have been granted unless there was no substantial evidence to uphold one or more of material issues necessary to support the verdict. Code Civ.Proc. § 629.

4. Appeal and error ⇐989

If fair consideration of entire evidence, considered in light most favorable to plaintiff, precluded possibility that freight train brakeman died as result of alleged sudden application of air brakes, as alleged by plaintiff, appellate court could not speculate on some other cause of death not alleged in complaint, nor relied upon at trial.

5. Evidence ⇐597
Judgment ⇐251(1)

A judgment may not be based on speculation as to cause of death, or upon some ground neither alleged nor proved at trial.

6. Master and servant ⇐285(11)

Evidence that freight train ran no further than 250 to 267 feet after air brakes were applied before it came to full stop, that fresh blood was found on wheels of second car from front engine, and that train ran a distance of 1,958 feet from point where brakeman fell as indicated by fact that his body was found beneath 44th car from head engine, was insufficient for jury on issue whether death was caused by sudden application of air brakes without warning. Federal Employers' Liability Act, 45 U.S.C.A. §§ 51–59.

Appeal from Superior Court, Placer County; Raymond McIntosh, Judge assigned.

Action under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., by Mary Ellen Gray, as administratrix, etc., against the Southern Pacific Company to recover for the death of plaintiff's husband, allegedly caused by defendant's negligence. From a judgment for defendant notwithstanding a verdict for plaintiff, the plaintiff appeals.

Affirmed.

M. Mitchell Bourquin and Patrick J. Murphy, both of San Francisco, and K. D. Robinson, of Auburn, for appellant.

T. L. Chamberlain, of Auburn, and Jones & Quinn, of Stockton, for respondent.

THOMPSON, Justice.

Mary Ellen Gray, the widow of Pierce L. Gray, deceased, as administratrix of his estate, brought suit under the provisions

of the Federal Employers' Liability Act, 45 U.S.C.A. §§ 51–59, for damages against the Southern Pacific Company for the death of her husband, alleged to have been caused by negligently stopping a train without warning, by the sudden application of air brakes, from the violent jarring of which train he was thrown from the top of a box car where he was engaged in the performance of his duties as a brakeman, run over by the train and killed. A verdict of $15,000 was returned by a jury in favor of the plaintiff. On motion of the defendant, under section 629 of the Code of Civil Procedure, a judgment notwithstanding the verdict was rendered in favor of the railroad company. From that judgment this appeal was perfected.

The plaintiff alleged and relied upon one negligent act only as the cause of the accident which resulted in the death of her husband. That charge is contained in the third paragraph of the amended complaint. It reads in part: "While said Pierce L. Gray, deceased, was on the top of one of the freight cars in said freight train, in the course of his employment, the said defendant, its agents, officers, servants and employees so negligently operated said freight train as to cause it to and it did, without warning to said Pierce L. Gray, deceased, come to a sudden, violent, unusual, unnecessary and unexpected stop, and which said stop caused such a sudden, violent, and unexpected jolt or jar as to throw said Pierce L. Gray, deceased, from the top of said freight car to the tracks and ground below, thereby causing said Pierce L. Gray to be and he was run over by said freight train, decapitating said Pierce L. Gray, resulting in his death."

The defendant owns tracks, engines, rolling stock and equipment with which its interstate railroad business is conducted. The main track extends from Oakland by way of Sacramento, Roseville and Colfax over the Sierra Nevada to Sparks, Nevada, and thence East. On the night of April 10, 1934, the defendant was conveying a train, consisting of sixty-two freight cars, two engines and a caboose, easterly over the last-mentioned track. Attached to the head of the train was a large Mallet locomotive. A special helping engine was also cut into the train at a point four cars ahead of the caboose, which occupied the rear end. This special engine was supplied to assist in shoving the train over the steep mountain grades. Each car was 44½ feet in length. The entire train, including the two engines and the caboose, was 3,032 feet in length. The train crew consisted of the two engineers and their firemen, together with the conductor and four brakemen.

Colfax is a station situated in the foothills northeasterly from Auburn. The train reached Colfax about ten o'clock at night. It was then dark. The head engine stopped a few feet beyond the depot and other station buildings. Pierce L. Gray, who was employed as the front brakeman on that train, was an able bodied, experienced and efficient brakeman forty-one years of age. He had worked for the company many years. He was familiar with the tracks and yard at Colfax, having formerly made numerous runs through that station over the mountains, and having previously lived in that city for several years. As soon as the train stopped at Colfax, Mr. Gray alighted from the tender and uncoupled the engine, which ran forward about a hundred feet to a water tank where its boiler was filled. After that task was completed the engine returned and was again coupled to the front car. Mr. Gray then went to the telegraph office in the depot near by, to get the clearance order for the engineer. After receiving that order, Gray asked the operator to lend him a lantern. He said he had lost his lantern somewhere between Roseville and Colfax. The operator furnished him with a lantern, which a watchman by the name of Ragsdale testified he saw him light "right on the counter." He said he "took it out with him, as he left." Mr. Gray then went to the Mervin Inn, which was about a hundred feet distant, to get a cup of coffee or a luncheon.

When the train stopped at Colfax, George A. Lytle, the conductor, came forward from the caboose where he had been riding, and entered the depot to obtain his clearance order and to make his report and attend to other official duties. He did not remember whether he received his clearance order or not. Suddenly the train started to proceed from the station, without the usual signal from the conductor. Mr. Lytle ran out and prepared to board the train. He said that he did not then see Mr. Gray. He claimed, however, to have seen Fred Hatch, a special brakeman on that run, standing near the track at a distance of about two carlengths to his right, toward the front engine, inspecting the cars. The engine was then about six carlengths beyond the point where Mr. Lytle stood. The train

was slowly moving forward. Mr. Hatch testified that he inspected the entire train as it rolled out of Colfax that night. When the caboose reached the point where he stood east of the depot, he boarded that car. He said the train never ran at a speed faster than eight miles per hour as it left Colfax, and that it gradually slowed down before the caboose reached him. After he boarded the caboose, the train continued to move forward only three or four carlengths when it came to a full stop. It follows that the train traveled only its entire length of about 3,000 feet, from the time it started to leave Colfax until it came to a full stop. That fact is corroborated by other witnesses, and is not contradicted. The track runs in a northeasterly direction from Colfax on a slightly ascending grade.

Both Mr. Charles Smethurst, the engineer, and Mr. Fred Wolf, the fireman on the foremost locomotive, testified that they saw Mr. Gray run from the Mervin Inn after the train started to leave the station. Neither of them testified that he was carrying the borrowed lantern. Possibly he left in such haste that he forgot to carry it with him. It was not thereafter found. The engineer testified that he watched Gray board the first or the second car from the engine, saw him climb the ladder and appear on top of the car. He said that he did not observe that he carried a lantern. The engineer said that he expected Mr. Gray to come forward immediately to ride in the cab, as was his usual custom, but that he failed to appear. After the train had run a distance of about its full length from the station, and Gray failed to appear, the engineer became anxious about him, and after talking with the fireman about his absence, the air brakes were applied to stop the train. The engineer and fireman testified positively that the train did not run more than five or six carlengths, which would be from 250 to 267 feet, after the air brakes were applied, before it came to a full stop. There is evidence that it was an "unusual stop." It was admitted no whistle was sounded before the air brakes were applied. Rule 14a of the company's regulations, which was received in evidence, provides that one blast of the whistle shall be given before an unusual stopping of the train.

There may be said to be a conflict of evidence as to whether the application of the air brakes caused the train to stop with a violent jolt or jar of the cars. Mr. Purl Wait testified that would be the inevitable result of a sudden application of the air brakes under such circumstances. On the contrary, each member of the crew testified that the train came to a gradual and easy stop, and that there was no perceptible or unusual jolt or jar of the cars.

There is also a sharp conflict as to whether it was the duty of Mr. Gray as head brakeman to inspect the cars for flat wheels, hot boxes, set brakes or mechanical defects as the train left Colfax or any other station where it had stopped. Mr. Purl Wait, who worked for the defendant company for many years until 1930, testified, over objection, that it was the uniform rule and custom of the company as a train left a station to require the head brakeman on a long train of fifty or sixty cars, to inspect at least the foremost half of the train, and to then mount the cars and hold himself in readiness to transmit to the engineer any signals which were given or required. The defendant moved to strike that evidence from the record on the ground that it was incompetent since the witness had not worked for the company since 1930, and could not possibly know what its rules were in 1934, when the accident occurred. That motion was denied. Each member of the crew testified that it was not the rule or custom for a head brakeman, under such circumstances, to inspect the cars or any of them and upon the contrary that it became the duty of the special brakeman to perform that service. No witness testified that he saw Mr. Gray inspecting the cars. The conductor said that as he came from the depot to board the train he observed Mr. Fred Hatch, the special brakeman, inspecting the forward cars. Mr. Hatch also testified that he personally inspected the entire train, and boarded the caboose when it arrived. He said that Mr. Gray did not inspect any of the cars on that occasion.

[1] Much space is devoted in the briefs to the discussion of the two questions as to whether the application of the air brakes did, or naturally would, under such circumstances, cause a violent jolting or jarring of the cars before the train came to a full stop, and whether it was the rule or custom of the company to require the head brakeman to inspect any portion of the wheels and apparatus as a train left a station where it had stopped. Assuming, without so deciding, that the testimony of Mr. Wait created a conflict of evidence, that conflict should be resolved in favor of the appellant

on the issue as to whether a judgment notwithstanding the verdict should have been rendered.

In considering the entire evidence included in the record on appeal, it is our duty to weigh the testimony of Purl Wait upon the subject of the rule and custom of brakemen with respect to inspecting freight cars as a train leaves a station.

[2] We are required to consider on this appeal the testimony of all witnesses which remains in the record, regardless of whether it was properly or improperly received in evidence. In the case of Rapp v. Southern Service Co., 116 Cal.App. 699, at page 710, 4 P.2d 195, at page 199, it is said in that regard: "This case upon appeal must be considered in the light of all the evidence embraced in the record before us, including evidence that may have been improperly admitted over respondent's objections."

Numerous cases support that doctrine.

In corroboration of the testimony of Mr. Wait, regarding the custom of inspecting cars, the appellant relies on Rule 828 of the Transportation Department of the defendant company, which was received in evidence, and reads as follows: "Speed of a freight train must not exceed eight miles per hour for a distance sufficient to permit running inspection when starting. Trainmen must closely watch to see that brakes are released, and if necessary must signal enginemen to stop if wheels are found sliding. Each trainman will be held responsible for wheels slid under that part of the train in his charge. Conductor in reporting flat wheels must give the name of trainman in charge. They must mail promptly to the superintendent a report of flat wheels discovered under the cars in their train."

The appellant also relies on the admission contained in paragraph V of the defendant's answer, as follows: "That a part of the regular duties of a brakeman, and a part of the regular duties of the decedent at and immediately prior to the accident herein complained of, was the duty to go upon, walk along and over moving freight cars at night as well as in the daytime."

We do not assume that the foregoing rule or admission of the answer means that it was necessarily the duty of the deceased to inspect the cars of that freight train, from his position on the ground, as the train left the station at Colfax. But conceding that it was his duty to so inspect the cars of the forward one-half of the train, that obligation does not determine the vital issue as to whether he was knocked from the top of a car by the sudden application of the air brakes. The most important questions to be decided are from which car did the deceased fall, and what caused his fall?

[3] It is true that the judgment notwithstanding the verdict which was rendered in this case should not have been granted unless there was no substantial evidence to uphold one or more of the material issues necessary to support the verdict. The established rule in this state regarding the right of a trial court to grant a motion for judgment notwithstanding the verdict is exactly the same as that which applies to a motion for nonsuit. Neel v. Mannings, Inc., 19 Cal.2d 647, 122 P.2d 576. The rule which is applicable to a motion for judgment notwithstanding the verdict is stated in the case of Myers v. Southern Pacific Co., 14 Cal.App.2d 287, at page 292, 58 P.2d 387, at page 389, as follows: "A motion for judgment in favor of a defendant notwithstanding a verdict previously rendered by a jury should be granted under the provisions of section 629 of the Code of Civil Procedure, only when it appears from a full and fair consideration of the whole evidence, viewed in a light most favorable to the plaintiff according to the same rule which applies to the granting of motions for nonsuit or for a directed verdict, that there is no substantial evidence to support one or more material issues necessary to uphold the verdict."

[4] On this appeal we are required to confine our attention to the issue as to whether the deceased was killed as the result of being thrown from the freight train by the jolt or jar caused by the sudden application of the air brakes. No other acts of negligence are alleged or relied upon. If a fair and full consideration of the entire evidence, considered in the light most favorable to the plaintiff, precludes the possibility that the deceased met his death as a result of the alleged sudden application of the air brakes, we may not speculate on some other possible or even probable cause of his death not alleged in the complaint. We may not be permitted to reverse the judgment on some ground of negligence which was neither alleged nor relied upon at the trial.

We are unable to escape from the inevitable conclusion that Mr. Gray fell from the second car of the train, for the reason that the conductor and several other witnesses testified that they found fresh blood upon the wheels of that car immediately after the accident. There is absolutely no conflict with respect to the presence of blood on the wheels of the second car. It would have been impossible for Gray to have fallen from that second car as a result of the sudden application of the air brakes, because the train traveled only 250 or 267 feet after the application of the air brakes when it came to a full stop, and the body of the deceased was found under the 44th car from the front, which was a distance of about 1,958 feet from that second car. Immediately after the train stopped, the entire crew searched with lanterns along both sides of the cars for the missing brakeman. The conductor, Lytle, and the fireman, Wolf, first discovered the severed forearm of the deceased beneath the thirty-ninth car, numbered PFE-50598, from the foremost engine. The arm lay on the edge of the graveled crossing of the Standard Oil Company, adjacent to the right-hand or southern rail. The torso and severed head of Mr. Gray were later found about 220 feet further back toward the rear end of the train, under the 44th car from the forward engine. That car was numbered PFE-71921. There is no dispute over the approximate positions where the torso and the arm of the deceased were found. Since the evidence is undisputed that the train ran only 250 to 267 feet after the air brakes were applied, it follows that if the deceased was thrown from the moving cars by the sudden force of the air brakes, he must have been located on a car standing within 250 to 267 feet from the place where his body was found after the train stopped. Both Mr. Smethurst, the engineer, and Mr. Wolf, the fireman, testified positively that the train did not run more than 250 to 267 feet, or the length of five or six cars after the air brakes were applied before it came to a full stop. That does not seem improbable, for it was a very long train which was slowly proceeding up a slight grade at a speed not to exceed eight miles per hour. Since the body of the deceased was found under the 44th car from the front, a distance of some 1,958 feet from the foremost engine, it would have been impossible for him to have been standing on a box car forward of the 38th car from the head engine, if he was thrown to his death by the sudden application of the air brakes, for the train traveled only five or six carlengths after that occurred.

We are unable to escape from the uncontradicted and convincing evidence that the deceased was killed by falling beneath the second car from the front engine. In the first place, the engineer testified that he saw Mr. Gray run from the Mervin Inn after the train started to leave the station, and that he saw him board a car which he designated as the second, third or fourth car from his engine. The engineer saw him climb to the top of the car. Immediately after the train stopped, a critical examination of the wheels of each car was made, from the 44th car to the head engine, for evidence of blood stains. Conductor Lytle and brakeman Bertram L. Larr testified to that fact. They found fresh blood on the inside flanges of the right-hand wheels of the second and fifth cars from the front engine. Upon inquiry, Mr. Larr testified that it was fresh blood. When the train arrived at Sparks the following morning two inspectors, C. H. Russell and W. G. Knight, again examined the wheels of the car of that entire train in the daylight. Both of these men testified that they found blood spots on both rear right wheels on the south side of the second car from the front engine. They said there was a spot on the inside rim of each wheel. Reports of those examinations were subsequently made by the car inspectors. These reports were received in evidence. One of them, which was signed by both inspectors, reads in part as follows:

"This car was second car in train from Eng. blood stains found on east trucks on the wheels on south side of car. There was no signs of brakeman slipping or falling from this car."

[5, 6] From this undisputed evidence of fresh blood on the wheels of the second car from the front engine, the only reasonable conclusion we can reach is that the deceased fell from that second car and was run over and killed. Since there is no conflict regarding the testimony of several witnesses that the train ran no further than five or six carlengths, or from 250 to 267 feet, after the air brakes were applied before it came to a full stop, we must assume that the force of applying the air brakes could not have knocked him from that second car because the train actually ran a distance of 1,958 feet from the point where he fell. This is conclusively proved

by the fact that his body was found beneath the 44th car from the head engine. These physical facts impel us to conclude that the deceased must have fallen from that second car long before the air brakes were applied. It follows that he must have fallen from the car from some cause other than the sudden application of the air brakes. Since that is the only assignment of negligence, and a judgment may not be based on speculation as to the cause of death, or upon some ground neither alleged nor proved at the trial, we are bound to conclude that the trial court properly granted the motion for judgment notwithstanding the verdict.

The judgment is affirmed.

ADAMS, P. J., and SCHOTTKY, Justice pro tem., concurred.



57 Cal.App.2d 656

TAYLOR v. OSBORNE-FITZPATRICK FINANCE CO. et al.

Civ. 13914.

District Court of Appeal, Second District, Division 2, California.

March 17, 1943.

1. Fraudulent conveyances ⇐299(1)

Evidence sustained finding that when stockholder in three corporations filed three actions against individual to whom certificate for stock had been issued, and who allegedly transferred certificate with intent to defraud stockholder, for money judgment and injunctive relief, individual was shown by records of corporation issuing certificate as owner of the stock.

2. Fraudulent conveyances ⇐295(2)

Since direct proof of fraudulent intent in fraudulent conveyances is often impossible, proof indicative of fraud may come by inference from circumstances surrounding transaction, relationship, and interest of parties.

3. Fraudulent conveyances ⇐299(1)

Evidence sustained finding that, when stockholder in three corporations filed three actions against individual to whom certificate for stock had been issued, for money judgment and injunctive relief, individual claimed during pendency and trial of the actions to be owner of certificate, and subsequently assigned certificate to defraud stockholder and prevent collection of any judgments which might be entered against individual in the actions.

4. Fraudulent conveyances ⇐299(1)

Evidence established that individual, to whom certificate of stock in corporation was issued, attempted to transfer the certificate with full knowledge of injunction issued against transfer of certificate in actions by stockholder in the corporation, in order to defraud stockholder.

5. Fraudulent conveyances ⇐301(1)

Evidence sustained finding that certificate of stock in corporation was received by transferee of individual to whom certificate was issued, with knowledge of individual's fraudulent intent to prevent collection of judgments against individual, and that therefore transferee acquired no right, title, or interest to certificate.

6. Fraudulent conveyances ⇐297

Return of execution unsatisfied establishes "prima facie case" of insolvency of execution debtor.

See Words and Phrases, Permanent Edition, for all other definitions of "Prima Facie Case".

7. Fraudulent conveyances ⇐297

Return of sheriff to writ of execution issued pursuant to judgment for $35,000, showing judgment unsatisfied except for sum of $5,000, authorized finding that judgment debtor was, to her transferee's knowledge, insolvent when she assigned certificate of stock in corporation to transferee.

8. Fraudulent conveyances ⇐298(1)

Evidence sustained finding that judgment debtor was owner of certificate of stock in corporation notwithstanding attempted transfer of certificate for purpose of defrauding judgment creditor.

9. Fraudulent conveyances ⇐298(1)

Evidence sustained finding that corporation, for benefit of which certificate of stock in another corporation was purchased at sheriff's sale, owned certificate after sale notwithstanding that original owner previously transferred certificate to prevent collection of judgments against her.

10. Fraudulent conveyances ⇐300(7)

In action to quiet title to certificate of stock in corporation which plaintiff purchased for $500 from transferee of original owner who transferred certificate to prevent collection of judgments against her, evidence sustained finding that stock represented by certificate was worth much more than $500.

11. Fraudulent conveyances ⇐301(1)

Evidence sustained finding that one who purchased stock certificate from transferee of original owner, who had transferred certificate to prevent collection of judgments against her, knew that stock certificates had been sold at sheriff's sale by judgment creditor of original owner.

12. Fraudulent conveyances ⇐295(4)

Evidence sustained judgment quieting title to certificate of stock allegedly transferred by judgment debtor for purpose of defrauding judgment creditor, on ground that certificate should not be left outstanding because certificate might come into hands of bona fide purchaser for value without notice and litigation might ensue to detriment of real owner of stock.

13. Evidence ⇐230(5)

Affidavit of original owner of certificate of stock, who transferred certificate to prevent collection of judgments against her, was properly received in evidence in action to quiet title to the certificate by one who purchased certificate from original owner's transferee.

14. Evidence ⇐230(5)

Where there is an issue as to whether a transfer is in fraud of creditors and there is independent evidence of common design between grantor and grantee to defraud creditors, grantor's declarations subsequent to date of transfer are admissible as exception to general rule that actions and declarations of a grantor after he has parted with title to property do not constitute competent evidence.

15. Evidence ⇐230(5)

Where wife's attorney prepared affidavit in which husband stated that wife owned 50 per cent. of stock in corporation, affidavit was competent as to attorney's knowledge that wife claimed to be owner of certificate of stock in corporation many months after she had purportedly transferred it to him to prevent wife's judgment creditors from collecting judgments.

16. Fraudulent conveyances ⇐287

In action to quiet title to stock in corporation, wherein it was contended that original owner of certificate of stock, under whom plaintiff claimed, transferred stock to defraud judgment creditors, judgments in actions wherein judgments were obtained against original owner of certificate were admissible.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Suit by Roy H. Taylor against the Osborne-Fitzpatrick Finance Company, the Valhalla Memorial Park, and others, to quiet title to 5,000 shares of stock of the Osborne-Fitzpatrick Finance Company. From a judgment in favor of the Valhalla Memorial Park, the plaintiff appeals.

Judgment affirmed.

Ernest A. Clausen, of Los Angeles, for appellant.

Howard & Littlefield, of Hollywood, and George A. Judson, of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of defendant Valhalla Memorial Park, quieting title in said defendant to 5,000 shares of the capital stock of Osborne-Fitzpatrick Finance Company, plaintiff appeals.

The case was tried as an equity suit before the court without a jury.

The evidence being viewed in the light most favorable to defendant Valhalla Memorial Park (Respondent), hereinafter referred to as defendant, the essential facts are:

September 18, 1930, Osborne-Fitzpatrick Finance Co. issued its certificate No. 6 for 5,000 shares of its capital stock to Edith May Boice, sometimes known as Edith May Osborne.

March 30, 1935, Ada H. Fitzpatrick, as a stockholder in Osborne-Fitzpatrick Finance Co., Valhalla Memorial Park, and Valhalla Mausoleum Park, filed three actions in the Superior Court of Los Angeles County against Edith May Boice and others. The actions were predicated upon fraud and conspiracy of the officers of the corporations, which were interrelated, to defraud their respective stockholders, and sought a money judgment together with injunctive relief.

April 16, 1935, the superior court issued an order pendente lite restraining and enjoining Edith May Boice and her co-defendants in the aforementioned actions, their officers, agents, servants, attorneys, and employees from transferring upon the stock transfer books of Osborne-Fitzpatrick Finance Co. certificate No. 6 representing 5,000 shares of the capital stock of said corporation, which had been issued as above mentioned to Mrs. Boice. This order remained in full force and effect throughout the pendency of the above mentioned actions, and was made permanent in a judgment of the superior court entered April 6, 1939, in favor of Ada H. Fitzpatrick. Judgments were also entered in her favor, for the benefit of the corporations in whose behalf she had sued, for large sums of money. After these judgments became final, Ada H. Fitzpatrick, for the use and benefit of Valhalla Memorial Park caused a writ of execution to be issued in one of the actions and levied upon certificate No. 6 mentioned above.

February 6, 1940, at the sheriff's sale, Ada Fitzpatrick for the benefit of the Valhalla Memorial Park purchased Mrs. Boice's interest in the stock represented by certificate No. 6 of the Osborne-Fitzpatrick Finance Company.

Mrs. Boice testified that in April of 1935 she endorsed stock certificate No. 6 and delivered the same to Richard Kittrelle, an attorney who was representing her in the actions mentioned above. This she said was done in payment of a retainer fee for legal services theretofore rendered by him, and to be thereafter rendered in connection with the aforementioned actions.

April 16, 1941, Mr. Roy H. Taylor, having notice of the judgments in the above mentioned actions, purchased certificate No. 6 from Mr. Kittrelle for the sum of $500, whereupon Mr. Kittrelle duly assigned the certificate to him. Thereafter Mr. Taylor presented it for transfer upon the books of the Osborne-Fitzpatrick Co., which transfer was denied. He subsequently instituted the present action to have title quieted in himself to stock certificate No. 6.

Pleadings in response to his complaint were duly filed whereby defendant Valhalla Memorial Park sought to have title to the stock certificate quieted in it. At the conclusion of the trial in the instant case, the trial court made appropriate findings quieting title to the stock in said defendant.

Plaintiff urges reversal of the judgment on the ground *that there is no substantial evidence to sustain findings of the trial court which findings will be stated and considered hereunder seriatim:*

[1] *First: At the time Ada H. Fitzpatrick filed the three actions described above, the records of the Osborne-Fitzpatrick Finance Co. showed that Edith M. Boice was the owner of 5,000 shares of the capital stock of said company.*

This finding is sustained by the evidence. Stock certificate No. 6 for 5,000 shares of the capital stock of the Osborne-Fitzpatrick Finance Co. was received in evidence and shows on its face that it was issued to Mrs. Boice September 18, 1930. It also shows on its face that it was never cancelled or surrendered to the corporation. In addition, plaintiff testified that he did not request the transfer of the stock on the books of the corporation until the year 1941. The three suits in question were commenced March 30, 1935. It is therefore obvious that at the time the suits in question were instituted, Mrs. Boice was the owner of 5,000 shares of the capital stock of Osborne-Fitzpatrick Finance Co. according to the records of the company.

Second: (a) Mrs. Boice, during the entire time of the pendency and trial of the three actions mentioned above, claimed to be the owner of stock certificate No. 6 and the shares of stock represented thereby. (b) Subsequent to the 20th day of September, 1935, the exact date being unknown, Mrs. Boice for the purpose of defrauding Ada Fitzpatrick, the Osborne-Fitzpatrick Finance Co., Valhalla Memorial Park, and Valhalla Mausoleum Park, and preventing them from collecting the judgments in the actions which had been instituted against her, purported to assign and deliver certificate No. 6 to her attorney Richard Kittrelle.

[2] The law is established in California that, since direct proof of fraudulent intent is often an impossibility, because the real intent of the parties and the facts of a fraudulent transaction are peculiarly in the knowledge of those sought to be charged with fraud, proof indicative of fraud may come by inference from circumstances surrounding the transaction, the relationship, and interest of the parties

(Fross v. Wotton, 3 Cal.2d 384, 393, 44 P. 2d 350.)

The evidence in the instant case disclosed that Mrs. Boice claimed that she transferred stock certificate No. 6 to Mr. Kittrelle about the first of April, 1935. September 26, 1935, she filed an affidavit prepared by Mr. Kittrelle in which she claimed to own 5,000 shares of the stock of the Osborne-Fitzpatrick Finance Co. September 29, 1935, Mr. Kittrelle prepared an affidavit for Mrs. Boice's then husband in which he stated that his wife, Mrs. Boice owned 5,000 shares of the stock of the Osborne-Fitzpatrick Finance Co. It is conceded that Mr. Kittrelle received the stock certificate undated and never at any time sought to have the same transferred upon the books of the corporation.

When under examination in the present suit, Mrs. Boice gave testimony which contained many contradictions, evasions, and inconsistencies.

It is clear that Mr. Kittrelle at the time he prepared the affidavits mentioned above, that is, in September of 1935, was aware of the order pendente lite restraining the transfer of certificate No. 6 issued by the superior court September 16, 1935.

[3] The inference may be clearly drawn from the foregoing evidence that Mrs. Boice claimed to be the owner of certificate No. 6 during the pendency of the three actions described above, and attempted to assign certificate No. 6 to Mr. Kittrelle for the purpose of defrauding the corporations on whose behalf Mrs. Fitzpatrick had filed suit and also for the purpose of preventing the collection of any judgments which might be entered against her in such actions. The evidence supports the above findings.

[4] *Third: The attempt to transfer certificate No. 6 of the Osborne-Fitzpatrick Finance Co. to Mr. Kittrelle was made by Mrs. Boice with full knowledge of the injunction the superior court had issued against the transfer of such stock certificate.*

Mr. Kittrelle was present at the hearing at which the injunction pendente lite was granted, and Mrs. Boice testified at the trial of the present case that she was aware of the order. Such evidence clearly sustains the above finding.

[5] *Fourth: (a) Certificate No. 6 was received by Mr. Kittrelle with knowledge of the fraudulent intent of Mrs. Boice, and for the purpose of preventing the collection of any judgments which might be entered in the three suits which were then pending. (b) Richard Kittrelle acquired no right, title or interest in or to certificate No. 6 or the stock it represented by reason of the purported transfer of it to him by Mrs. Boice.*

The evidence we have set forth in support of findings second and third, *supra*, coupled with the fact that Mr. Kittrelle failed to have the stock certificate transferred to him upon the books of the company, and subsequently sold the stock, of a value of many thousands of dollars for $500, justifies inferences which support the findings just quoted.

[6, 7] *Fifth: Mrs. Boice was insolvent at all times subsequent to March 30, 1935, and Mr. Kittrelle knew of this fact. The assignment and delivery of certificate No. 6 by Mrs. Boice to Mr. Kittrelle was without consideration, and was made for the purpose of preventing the collection of any judgment which might be entered on the three suits which had been instituted against Mrs. Boice.*

In the present case there was received in evidence the return of the sheriff to a writ of execution which had been issued pursuant to a judgment for $35,000 against Mrs. Boice in one of the three suits mentioned above. This return showed the judgment unsatisfied except for the sum of $5,000. Since the law is established in California that the return of an execution unsatisfied establishes a prima facie case of insolvency (see Adams v. Bell, 5 Cal.2d 697, 702, 56 P. 2d 208; Ohio Electric Car Co. v. Duffet, 48 Cal.App. 674, 675, 192 P. 298), the sheriff's return in the present case, in the absence of any evidence to the contrary, gave rise to a substantial inference to support the above finding.

[8] *Sixth: Mrs. Boice was the owner of certificate No. 6 representing 5,000 shares of the capital stock of the Osborne-Fitzpatrick Finance Co. on December 28, 1939.*

Since we are of the opinion that the evidence supports each of the findings set forth heretofore, it follows that the attempt to transfer the questioned stock certificate by Mrs. Boice to Mr. Kittrelle was void, and therefore the title to certificate No. 6 and the stock represented thereby remained in Mrs. Boice.

[9] *Seventh: Valhalla Memorial Park has been the owner of certificate No. 6 and the stock represented thereby ever since it was purchased on behalf of said defendant at the sheriff's sale on February 6, 1940.*

Since we have found that finding number sixth *supra*, was amply supported by the evidence, it follows that the present finding is likewise supported by the evidence, as it is clear that when Ada H. Fitzpatrick purchased certificate No. 6 at the sheriff's sale February 6, 1940, for Valhalla Memorial Park, said corporation acquired Mrs. Boice's interest in the stock certificate.

[10] *Eighth: The 5,000 shares of stock of the Osborne-Fitzpatrick Finance Co. represented by certificate No. 6 was on February 6, 1940, reasonably worth a sum greatly in excess of $500.*

This finding finds substantial support in the evidence. Certificate No. 6 represented fifty percent of the outstanding capital stock of the Osborne-Fitzpatrick Finance Co., and according to the financial statement of the receivers of the corporation received in evidence, the corporation averaged a profit of $17,346 per year.

[11] *Ninth: Plaintiff had actual knowledge February 6, 1940, that stock certificate No. 6 had been purchased by Ada H. Fitzpatrick at a sheriff's sale on behalf of Valhalla Memorial Park.*

Plaintiff testified during the instant trial that prior to the time he purchased stock certificate No. 6 from Mr. Kittrelle he examined the sheriff's return to the writ of execution which had been issued upon one of the judgments obtained in the actions instituted by Ada H. Fitzpatrick, and he also testified that he was aware of the fact that stock certificate No. 6 had been sold at the sheriff's sale.

[12] *Tenth: That certificate No. 6, if left outstanding, might cause serious injury to defendant Valhalla Memorial Park.*

It needs no argument to support the foregoing finding. It is clear that if the certificate were left outstanding it might come into the hands of a bona fide purchaser for value without notice, and much litigation might ensue, all to the detriment of defendant Valhalla Memorial Park.

There are three questions as to the admissibility of evidence which will be stated and considered hereunder:

First: Was the affidavit of Mrs. Boice dated September 27, 1935, properly received in evidence?

[13, 14] This question must be answered in the affirmative. The law is established in California that where there is an issue as to whether a transfer is in fraud of creditors, and where there is independent evidence of a common design between the grantor and grantee that they intended to defraud creditors, declarations of the grantor subsequent to the date of the transfer are admissible. (McGee v. Allen, 7 Cal. 2d 468, 476, 60 P.2d 1026.)

The foregoing rule is an exception to the general rule that actions and declarations of a grantor after he has parted with title to property do not constitute competent evidence. (City of Manhattan Beach v. Cortelyou, 10 Cal.2d 653, 670, 76 P.2d 483; see, also, Byerley v. Conlin, 174 Cal. 40, 42, 161 P. 1150.) In this case at the time the affidavit was received in evidence, there was other evidence that Mrs. Boice and her attorney, Mr. Kittrelle, had entered into a scheme to defraud her creditors. Therefore the affidavit in which Mrs. Boice claimed to be the owner of stock certificate No. 6 was competent and material evidence.

[15] *Second: Was the affidavit of Mr. Boice dated October 29, 1935, admissible in evidence?*

This question must likewise be answered in the affirmative. Over objection, the affidavit was received for the sole purpose of showing that Mr. Kittrelle had notice that Mrs. Boice claimed to be the owner of stock certificate No. 6 subsequent to the date it was alleged to have been transferred by her to him.

Mr. Kittrelle prepared the affidavit in which Mr. Boice stated that his wife, Mrs. Boice, owned fifty percent of the stock of the Osborne-Fitzpatrick Finance Co. It is clear that the affidavit was competent and material evidence as to Mr. Kittrelle's knowledge that Mrs. Boice claimed to be the owner of stock certificate No. 6 at a period many months after she had purportedly transferred it to him.

[16] *Third: Were the judgments in the three actions referred to above, which had been instituted by Ada H. Fitzpatrick, properly received in evidence?*

This question must also be answered in the affirmative. These judgments were clearly admissible for the purpose of es-

tablishing the fact that the parties, in whose favor the judgments had been rendered, were creditors of Mrs. Boice at the time she claimed to have transferred stock certificate No. 6 to Mr. Kittrelle.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.



58 Cal.App.2d 100

In re TRIBBEY'S ESTATE.

THAGARD v. TRIBBEY.

Civ. 13793.

District Court of Appeal, Second District, Division 1, California.

April 12, 1943.

1. Wills ⇐82

Whether will is unnatural in its provisions is of no great importance, in absence of sufficient evidence that it was not spontaneous act of a competent testator.

2. Wills ⇐163(2)

There is no legal presumption against validity of any testamentary provision made by husband in his wife's favor, as she may justly influence making of husband's will for benefit of herself or others so long as she does not act fraudulently or extort benefits from husband when he is not in condition to exercise his faculties as free agent.

3. Wills ⇐157

The circumstance that testator's wife urged on him propriety of leaving his property to her did not constitute "undue influence" vitiating will to such effect.

See Words and Phrases, Permanent Edition, for all other definitions of "Undue Influence".

4. Wills ⇐163(2)

The mere fact that husband's will is changed to gratify his wife's wishes raises no presumption of "undue influence" on her part.

5. Wills ⇐155(3)

The mere fact that testator was influenced by another's arguments or entreaties is insufficient to constitute "undue influence".

6. Wills ⇐166(12)

To invalidate will on ground of "undue influence", evidence must be produced that pressure was brought to bear directly on testamentary act, but it must amount to proof, not merely raise suspicion, and such evidence has force of proof only when circumstances inconsistent with claim that will was testator's spontaneous act are proven.

7. Wills ⇐166(1)

Evidence *held* insufficient to support jury's verdict that will, leaving all of testator's property to his widow, was procured by her undue influence.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Proceeding by Lillian May Tribbey for probate of the will of Joseph Tribbey, deceased, contested by Esther Tribbey Thagard. From an order granting proponent's motion to set aside a jury's verdict for contestant and grant a new trial, contestant appeals.

Affirmed.

Hiram T. Kellogg, of Los Angeles, for appellant.

Geo. W. Perkins, of Los Angeles, for respondent.

DORAN, Justice.

This appeal is taken from an order granting a motion to set aside the verdict of the jury and for a new trial in the contest of a will. The motion in question was granted upon the ground of insufficiency of the evidence to justify the verdict. Following are the facts as stated by appellant.

Joseph Tribbey died on or about the 15th day of September, 1940, at Los Angeles, California. He left surviving him as heirs at law a widow, Lillian May Tribbey, respondent herein, and an adult daughter, Esther Tribbey Thagard, the contestant. At the time of his death he was 60 years of age, or thereabouts. On the 23rd of September, his widow petitioned for probate of a purported holographic will of the decedent. Said will was dated Sep-

tember 9, 1940, which was six days before the death of the testator. By this will the testator left his daughter, the contestant, the sum of $1. Testator then stated in the will that, "I leave all of my earthly belongings, including everything I own, both personal and property I own, to my wife, Lillian May Tribbey." On the 21st day of October, 1940, the will was admitted to probate and letters of administration with the will annexed were issued to the widow, Lillian May Tribbey, who qualified the 21st day of October, 1940. Thereafter and within six months a petition for revocation of probate of the will was filed, on April 18, 1941, by the contestant, Esther Tribbey Thagard.

The first trial of the action resulted in disagreement of the jury, which was thereupon discharged, and the case was again set for trial. The second trial commenced March 18, 1942, was concluded March 23, 1942, and a verdict was returned by the jury on that date wherein the jury made its finding that the will in question was procured by the undue influence of the proponent, Lillian May Tribbey, widow of deceased. Thereafter and within the time allowed by law proponent moved for a new trial and the court made its order herein appealed from, granting proponent's motion.

According to the evidence, as stated by appellant, the testator, Joseph Tribbey, was at the Hollywood Race Track in the middle of July, 1940, which was less than two months before his death, with John R. Land. He met Kermit Crownover there and Mr. Crownover rode home, in the back seat of Mr. Tribbey's automobile, driven by Mr. Land. Mr. Tribbey told Mr. Land that Mrs. Tribbey, the proponent and respondent herein, had been after him to make his will, and that he "wasn't feeling good and didn't expect to live long". He said he didn't want to do that (presumably, make a will). Mr. Tribbey further stated on that occasion that his wife wanted him to make a will leaving everything to her and he didn't want to cut his daughter off. Mr. Tribbey told Mr. Land in the presence of Mr. Crownover that his wife had been trying for quite some time to get him to make a will and cut his daughter off, and he didn't want to do it.

On the 24th day of August, 1940, about three weeks before Joseph Tribbey died, he went with John R. Land to the Del Mar Race Track to see the handicap race in which Big Flash was the winner. This was less than two weeks before he made out the purported holographic will. On the way home from the race track Mr. Tribbey told Mr. Land about his physical condition and stated that the doctor wanted him to keep away from race tracks. At that time Mr. Tribbey also told Mr. Land: "I know I cannot last long and I am certainly going to enjoy the things I like as long as I am here." He also told Mr. Land upon that occasion that his wife was trying to get him to cut off his daughter in a will and that he did not want to do it. In the car with Mr. Land and Mr. Tribbey on the return trip from Del Mar was George Land, son of John Land. George Land heard Mr. Tribbey tell his father that he, Tribbey, was not feeling good and that his wife had been asking him to make his will out and that he didn't want to do it.

On the 9th day of September, Mrs. Tribbey stated that Mr. Tribbey had handed her an envelope and said, "If anything happens you may need this." She did not look at the will at that time. She said he had never had any conversation with her about making a will and that she had never asked him to make a will and that she had never opened the envelope until after his death, when she took it to an attorney.

Lillian May Tribbey married Joseph Tribbey on November 12, 1936. They had no children. At the time of her marriage to him he owned a house and had other property, some of which is the property involved in this estate, but no effort was made at the trial to prove the character of all the property with reference to its being separate and community property. After testator's death, Lillian May Tribbey called Mr. Land, who went over to her house shortly after the funeral, and at that time Mrs. Tribbey said to Mr. Land: "Dick, I finally persuaded Joe to make a will and cut Esther off with $1.00 and I feel now that I have her property, I can put an addition on my bedroom." She also said at the same time that she "feared the daughter might contest the will," and she further said to Mr. Land, "I can depend upon you and Beulah being on my side if she does." Mr. Land further testified on cross-examination that Mrs. Tribbey told him at that time that she had finally persuaded Joseph Tribbey to make a will in her favor and cut out Esther Tribbey.

Esther Tribbey Thagard, contestant and appellant, lived with her father for one year after she grew up. She was married while living in his house. Esther Thagard was the daughter of the deceased. Her mother was Anna Raggio, who stated that Esther Tribbey was born June 6, 1907 and that Esther's mother and the decedent separated in 1917, being divorced in 1925. She also stated that the testator was a good father while the child was growing up and prior to the separation. According to appellant, there was considerable evidence to show that the father and daughter continued to be friendly.

Appellant also states that the evidence discloses that Joseph Tribbey was a sick man for several years prior to his death and had been wholly unable to work for more than a year prior to his death because of a bad heart ailment. He had been confined to his bed around Christmas, 1939, and had been in bed for some time prior thereto. He had a "bad spell" with his heart on the night of August 2, 1940, just about 38 days prior to the date of the will here in question. At that time it was necessary to get a pulmotor to revive him. The testator had been getting weaker for some time prior to his death.

In proof that the will was actuated solely by the volition of the decedent, his widow introduced the testimony of a number of friends that the decedent had said his daughter never seemed like a daughter to him, and that the testator complained that his daughter never came to see him unless she wanted money. On the other hand, the contestant showed that only on one occasion had she received any money from her father. That was in San Diego and the amount was trifling. Contestant produced evidence that she was on friendly terms with her father until he died. Proponent, Lillian Tribbey, stated she was a widow and owned her own home when she married testator. The evidence showed that Esther Tribbey Thagard was estranged from her husband, and was forced to work when her father died, and that for four or five months preceding she had been living in San Francisco where her mother lived. There was no evidence of any quarrel between father and daughter; and the daughter had called to see her father at the Christmas season of 1940, when he was sick in bed.

Appellant contends that the foregoing constitutes sufficient evidence to support the verdict of the jury that the will was procured by the undue influence of the testator's widow. In support of this contention appellant argues that the purported will was unnatural; that the dispositions of the will are at variance with the decedent's testamentary intentions; that the relations between the alleged wrongdoer and the decedent afforded to the former an opportunity to control the testamentary act; that the decedent's condition was such as to permit of a subversion of his freedom of will; and that the alleged wrongdoer was active in procuring the instrument to be executed.

[1] Whether or not the will was unnatural in its provisions is of no great importance in the absence of sufficient evidence that the will was not the spontaneous act of a competent testator. It has been said that one has a right to make an unjust will, an unreasonable will, or even a cruel will. In re McDevitt's Estate, 95 Cal. 17, 33, 30 P. 101.

[2-6] Appellant has stated the evidence in the light most favorable to her case, and it is apparent from appellant's own statement of the evidence that there was practically no evidence that the mind of the testator was subjected to the will of his wife. The wife's statements that she had "induced" the testator to make a will cutting off his daughter are alone insufficient to prove undue influence. " 'There is no legal presumption against the validity of any provision which a husband may make in a wife's favor, for she may justly influence the making of her husband's will, for her own benefit or that of others, so long as she does not act fraudulently, or extort benefits from her husband when he is not in condition to exercise his faculties as a free agent. Latham v. Udell, 38 Mich. 238. Accordingly, the circumstance that the testator's wife urged upon him the propriety of leaving his property to her does not constitute undue influence, to vitiate the will. Hughes v. Murtha, 33 N.J.Eq. 288. And the mere fact that the will of the husband is changed to gratify the wishes of the wife does not raise a presumption of undue influence on her part. Rankin v. Rankin, 61 Mo. 295.' " In re Langford's Estate, 108 Cal. 608, 622, 41 P. 701, 705, quoting from notes to Richmond's Appeal, 59 Conn. 226, 22 A. 82, 21 Am.St.Rep. 98. "The mere fact that one person has been influenced by the arguments or entreaties of another is not

enough to make the influence an undue one." Estate of Anderson, 185 Cal. 700, 707, 198 P. 407, 410. "Evidence must be produced that pressure was brought to bear directly upon the testamentary act. * * * It must, however, do more than raise a suspicion. It must amount to proof, and such evidence has the force of proof only when circumstances are proven which are inconsistent with the claim that the will was the spontaneous act of the alleged testator." Estate of McDevitt, supra, 95 Cal. at pages 33 and 34, 30 P. at page 106.

[7] It does not appear from the evidence that the wife participated in the making of the will and, furthermore, there was nothing to show that the testator's mental or physical condition was one which would be likely to render his mind subject to the will of others. From all that appears in the evidence, the testator had a mind of his own. It is shown that he suffered from heart trouble, but it is not shown that his heart trouble had any effect upon his mental condition. On the contrary, the statement of the evidence above given indicates, if anything, that the testator was possessed of a normal state of mind, capable of contemplating the objects of his bounty; and that he was a free agent. The evidence was clearly insufficient to support the verdict of the jury.

The order granting the motion for a new trial is affirmed.

YORK, P. J., and WHITE, J., concur.



OFTEDAL et al. v. CALAWAY.

Civ. 3008.

District Court of Appeal, Fourth District, California.

March 25, 1943.

Hearing Granted May 24, 1943.

1. Physicians and surgeons ⇐14(4)

A physician is required only to have the degree of learning and skill ordinarily possessed by physicians of good standing practicing in the same locality and to use ordinary care in applying such skill and learning in the treatment of patients.

2. Physicians and surgeons ⇐18(8)

Whether a physician has exercised degree of learning and skill ordinarily possessed by physicians of good standing practicing in the same locality in a particular case can be established only by expert testimony.

3. Evidence ⇐574

Where matter at issue is one within knowledge of medical experts only and is not within common knowledge of laymen, the expert evidence is conclusive.

4. Physicians and surgeons ⇐18(6)

Negligence of a physician will not be presumed, but must be affirmatively proved.

5. Physicians and surgeons ⇐18(6)

In absence of expert testimony to the contrary, a physician will be presumed to have exercised ordinary care required of him in treating his patient.

6. Physicians and surgeons ⇐15, 18(6)

Where due care, diligence, and judgment are exercised by physician, mere failure to diagnose correctly does not necessarily render the physician liable for malpractice and it is not only necessary for plaintiff to prove mistake, but also that the mistake was due to failure to exercise ordinary care and skill in making diagnosis.

7. Physicians and surgeons ⇐14(1)

A physician is not held to a higher degree of responsibility in making a diagnosis than in prescribing treatment.

8. Physicians and surgeons ⇐15

The mere fact that some physician other than defendant physician might have elected to treat a case differently does not necessarily establish negligence on part of defendant physician.

9. Trial ⇐311

Where evidence disclosed that case history given to physician included statement that 12-year-old patient had eaten molded bologna, and that the patient vomited, carried temperature, and had an attack of diarrhea, jury would not be justified in drawing on their common knowledge as basis for finding the physician negligent in failing to have x-rays taken before determining that cause of patient's illness was ptomaine poisoning, and not

appendicitis, and to say that failure to do so was the "proximate cause" of death of the patient which allegedly resulted from incorrect diagnosis.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

10. Trial ⇐47(1)

In action for death of 12-year-old patient allegedly resulting from fact that physician improperly diagnosed case and treated patient for ptomaine poisoning instead of appendicitis, question propounded by plaintiff to physician who was made the plaintiff's witness as authorized by statute, concerning the physician's practice in regard to removing an infected appendix, did not disclose what answer was sought to be elicited which would be relevant, and objection thereto was properly sustained, in absence of offer of proof. Code Civ.Proc. § 2055.

11. Physicians and surgeons ⇐15

In action for death of 12-year-old patient based on alleged fact that physician improperly diagnosed case as ptomaine poisoning instead of appendicitis, ultimate question to be determined was what the physician did on the particular occasion and whether what he did was consistent with reasonable degree of learning and skill usually possessed and rendered by others of his profession in the same locality and under similar circumstances having regard to the state of scientific learning at the time.

12. Appeal and error ⇐1031(4), 1032(2)

Prejudicial error will not be presumed in a ruling sustaining an objection to introduction of evidence, and if error is alleged to exist it must be made to appear affirmatively in the record.

13. Appeal and error ⇐205

Where question to which objection was sustained does not itself indicate that the answer to it will be favorable to the party seeking to introduce the testimony and on a relevant issue before the ruling will be reviewed on appeal, an offer of what is proposed to be proved must first be made to the trial court.

14. Physicians and surgeons ⇐18(8)

In action for death of 12-year-old patient based on alleged fact that physician improperly diagnosed case and treated patient for ptomaine poisoning instead of appendicitis, plaintiff failed to establish by expert testimony that physician failed to use that degree of care and diligence ordinarily used by other physicians of good standing practicing in the same locality.

15. Appeal and error ⇐882(14)

Where one ground of motion for nonsuit was that plaintiff was not a party interested, and, after the motion was granted on another ground, defense counsel remarked that the point was of no importance "at this time" and that defendant would withdraw the point "at present", the point was "waived" and could not be presented on review. Code Civ.Proc. § 376.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by Horace B. Oftedal and his former wife, Vera Lawless, against A. A. Calaway, for the death of the minor son of the plaintiffs resulting from malpractice. From an adverse judgment, plaintiff Vera Lawless appeals.

Affirmed.

Julius Hansen and Rae B. Carter, both of Fresno, for appellant.

Hadsell, Sweet, Ingalls & Carroll and Chester O. Hansen, all of Fresno, for respondent.

GRIFFIN, Justice.

This is an action for damages for the death of a minor son, Donald Oftedal, aged 12 years, brought by Horace B. Oftedal and Vera Lawless, his former wife, against A. A. Calaway, a physician and surgeon, practicing his profession in Fresno.

The complaint alleges generally that on March 2, 1939, the respondent doctor entered upon an employment in endeavoring to cure the minor son of plaintiffs of a malady, but "did not use due or proper skill" in that he did not properly diagnose the malady, did not cause an X-ray picture of the child to be taken "at the proper time" and that he diagnosed the malady as an "antitoxin poisoning" and treated the child for such poisoning when, as a matter of fact, he was suffering from

appendicitis and should have been treated for it; that as a result thereof, the child died.

An answer was filed denying specifically and generally these allegations. During the trial and at the conclusion of plaintiffs' case, plaintiff Vera Lawless filed an amendment to the complaint alleging that plaintiffs on March 9, 1939, were living separate and apart and that she was the mother of the child and had the legal as well as the actual custody of him.

A motion for nonsuit was granted as to both plaintiffs. Plaintiff Vera Lawless alone appealed from the judgment of dismissal. Respondent Dr. Calaway was called by appellant under section 2055 of the Code of Civil Procedure as her witness. After stating his qualifications as a licensed general practitioner in Fresno for 21 years, and specializing in gynecology and obstetrics, he testified generally that he had been the family physician for plaintiffs for many years and was the attending physician when Donald, the minor child, was born; that on Thursday, March 2, 1939, a Mrs. Lashley, the boy's aunt with whom the child had been living for several years, brought Donald to his office for an ailment; that he inquired of Donald as to his troubles and that "he says: 'Well, my stomach hurts and I have been vomiting * * *' and I says, 'Do you remember eating anything unusual?' He says: 'Yes, when I came home from school yesterday afternoon,' he says, 'I went to the ice box and got a piece of bologna that was molded.' He says, 'I ate that,' and he says, 'That night I began vomiting.'" He then testified that that was about the only history he then obtained; that he took him into the examining room and examined his abdomen by palpation and percussion, used the stethoscope to examine his chest and lungs, took his temperature, which was around 100 degrees; that he found his abdomen was soft but tender all over; that he complained of a soreness of the whole abdomen, lower and upper, and more in the pit of his stomach; that he told Mrs. Lashley to take him home and put him to bed and apply an ice pack to the lower part of his abdomen and put him on a boiled "skim milk diet"; that he sent him out some "elixir cascara fidext" to remove the cause; that he explained that in an attack of ptomaine this was essential; that other medication followed to slow down peristalsis of the valves. He then testified that Mrs. Lashley inquired as to what was wrong with the boy and that he replied he had an attack of ptomaine "due, probably, to this food he ate"; that he had a general "enteritis of the whole intestinal tract" which he explained to her; that when he was taking history he told her "It sounds like we might have an attack of appendicitis"; that that was before he got all of the history, but after the history of eating the molded bologna the conclusion was that he had an attack of ptomaine poisoning or gastro enteritis; that he then told her that his own boy had appeared very much the same and that he had waited two or three days and then operated. He then said that early Saturday morning about one o'clock, he was called to the Lashley home; that he examined Donald again and found no ice pack on him; that he asked Mrs. Lashley "why they had not kept the ice pack on," as suggested and she replied that they had no way of fastening it on; that by palpation he found no rigidity in the abdomen; that the boy complained of general soreness of the entire abdomen; that he suggested that they take the youngster to the hospital; that later that morning, Saturday, March 4, they took him to the hospital; that he then visited him there and had the nurse take his temperature and that he found it was normal; that he examined him and ordered a complete laboratory test consisting of blood and urine analysis, and prescribed a low enema; that on the same evening he saw him again and examined the charts and compared them with his physical findings; that his temperature was 100.4 degrees; that he examined his chest with a stethoscope and looked at his throat; that his abdomen was still "sept," i. e., "no rigidity"; that the physical findings recorded on the chart were "head and neck, normal; chest normal. And abdomen distended; tenderness in the left side, vomiting, diarrhea, urine cloudy, his skin dry, and glands normal." On March 4, 1939, there was filled out by the nurses and by the doctor a chart designated "working diagnosis." It reads: "After physical examination, ptomaine due to eating molded biloni * * * possible appendicitis involved. * * * General condition: temperature, 98; pulse rate 120. Respiration: rate 88; nutrition, etc., obese." The doctor testified that on March 4, he again examined the boy and found his temperature around 104 degrees with

the pulse slightly above normal. The fifth visit was on Sunday, March 5th, and he found him to be practically the same. His temperature was 97 degrees. He examined the chart kept by the nurses and found that the boy's pulse was up a little. He testified that he suggested calling a consultation with another doctor; that Dr. Sciaroni was in the building so it was agreed he should be the one; that both he and Dr. Sciaroni examined the boy about in the same manner as had been done in the past; that they found "quite a bit of gas in the abdomen and intestines and that condition indicated ptomaine poisoning and that after the consultation he was still of the opinion that his diagnosis was correct. The following morning, Monday, March 6, he visited the child again. He testified that he found his condition about the same as the night before; that on Tuesday morning, March 7, he examined him again, went over his chest, examined his throat, palpated and percussed the abdomen and found that there was not any more distention and not any rigidity; that the temperature was 97.8 degrees and the pulse 96; respiration 18; that again that evening he saw him and his face "had some pallor," his lips were beginning to chap and he was "somewhat dehydrated" from the diarrhea and the vomiting. The following morning, Wednesday, March 8, at about 10 o'clock, he again examined him and his condition had not changed. He gave him some vitamins and ordered the discontinuance of the use of some narcotic drug (paregoric) because his pain did not seem so great. He testified that on Thursday, March 9, he found some rigidity; that he examined him again as before and about 11 o'clock a Dr. Morgan was called in at his suggestion; that Dr. Morgan examined Donald and made the "regular routine examination"; that in addition to the method of examination made by him, Dr. Morgan made a rectal examination; that Dr. Morgan suggested an X-ray be taken; that the X-ray plates were sent to another doctor for examination and report; that as a result thereof they decided that the boy had "an acute surgical abdomen"; that the mother and father were then told of the necessity of an immediate operation; that Dr. Morgan performed the operation and that he assisted with it; that it was then that he first discovered a "malformed" ruptured appendix; that it had produced an abscess and a condition of general peritonitis. Several hours after the operation the boy died.

Dr. Morgan, called as a witness for appellant, testified generally that he was called in at the time above mentioned; that he made the examination related by Dr. Calaway and ordered an X-ray; that the whole abdomen was tender and he "got no information on that examination"; that the blood count had already been taken when he arrived; that in addition to his own "impression" as distinguished from a diagnosis, he relied upon the X-ray diagnosis made by the doctor who took the X-ray picture. The witness was asked if he would "tell us what, in your opinion, created this condition of general peritonitis." He responded: "Well * * * very obviously, after we got in, we found out what it was. * * * We had an abscess around the appendix." He was then asked if his operative findings were at variance in any respect with his preoperative diagnosis. He answered: "Yes * * * there was a diverticulum in addition." The witness was then asked if, assuming the patient had complained of the conditions above described since March 1st, he could tell how long that condition he had found after the operation had been progressing, and he replied: "No * * * you could not * * * because * * * there is nothing to show us that that was the original infection," i. e., when the abscess began; that he could not tell whether the abscess was the original difficulty or some other condition led to the abscess, but he would say that the abscess had been there a greater length of time than a matter of hours.

The lay witnesses testifying for appellant were Mrs. Lashley, who testified generally that she told Dr. Calaway that part of the bologna she gave the boy for lunch was also eaten by herself and her husband and that they felt no ill effects therefrom; that at no time did Dr. Calaway make a rectal examination of Donald; that she visited the boy daily at the hospital; that on the morning of March 8, she saw Dr. Calaway at the hospital and that the doctor did nothing for Donald "only looked at him"; that no temperature was taken; that she discussed the boy's condition with the doctor, and that she said: "Donald is not getting any better to my estimation at all; he is very sick"; that the doctor said: "He is getting along just as well

as can be expected under the conditions." She then testified that the boy's "mouth was in terrible condition, his gums were getting dark, his lips were chapped and cracked; his teeth had a film over them. I couldn't wash them because they hurt so bad. He seemed to be having a terrible temperature. He hurt all over. His abdomen was infected. * * * I touched him and he says: 'Don't touch me. * * * I hurt so bad, don't bother me. Don't move me.'" She then testified that the following day, March 9th, she found his condition worse; that during that day the doctor told her Donald "had to be operated on * * * that he had appendicitis"; that she told Dr. Calaway: "Well * * * if Donald has to be operated on, we want Dr. Morgan to do the operation"; that when Dr. Morgan came "he gave him a thorough examination" and he said: "It looks to me like his appendix has exploded but I can't tell because I have to have a picture"; that he ordered an X-ray picture; that Dr. Calaway remained there throughout the time; that after the operation Dr. Morgan told her that he "found general peritonitis; his appendix had exploded and had grown to his bowel. I found large abscesses and general peritonitis. * * * I also found a growth on his bowels." The testimony of Mrs. Lashley was corroborated by that of Mrs. Lawless. In addition thereto she testified that she did not see Dr. Calaway take a blood or urine sample; that she asked Dr. Calaway if he was sure it was not appendicitis and that he replied: "No, I don't think it is. It is toxine poisoning."

This was the substance of the evidence received. Upon this evidence the court granted a nonsuit. This appeal followed.

[1-5] Before discussing the evidence, we deem it necessary in clarifying the position of both appellant and respondent to first quote the general rule set forth in Engelking v. Carlson, 13 Cal.2d 216, at page 220, 88 P.2d 695, at page 697: "The law has never held a physician or surgeon liable for every untoward result which may occur in medical practice. It requires only that he shall have the degree of learning and skill ordinarily possessed by physicians of good standing practicing in the same locality and that he shall use ordinary care and diligence in applying that learning and skill to the treatment of his patient. Hesler v. California Hospital Co., 178 Cal. 764, 174 P. 654. Whether he has done so in a particular case is a question for experts and can be established only by their testimony. Perkins v. Trueblood, 180 Cal. 437, 181 P. 642; Patterson v. Marcus, 203 Cal. 550, 265 P. 222. And when the matter in issue is one within the knowledge of experts only and is not within the common knowledge of laymen, the exper evidence is conclusive. Wm. Simpson C. Co. v. Industrial Acc. Comm., 74 Cal.App. 239, 240 P. 58; Johnson v. Clarke, 98 Cal.App. 358, 276 P. 1052. Negligence on the part of a physician or surgeon will not be presumed; it must be affirmatively proved. On the contrary, in the absence of expert evidence, it will be presumed that a physician or surgeon exercised the ordinary care and skill required of him in treating his patient. Donahoo v. Lovas, 105 Cal.App. 705, 288 P. 698."

It is appellant's contention that the negligence of the doctor was demonstrated by obvious facts or by a resort to common knowledge and therefore the jury had the right to decide without the aid of experts, that he in diagnosing and treating the patient, did not possess and exercise the required degree of skill. In support thereof she cites such cases as Ales v. Ryan, 8 Cal.2d 82, 64 P.2d 409, and McCollum v. Barr, 38 Cal.App. 411, 176 P. 463, 469. The latter case involved a fracture of the forearm. It was there contended that the defendant physician made a faulty and erroneous diagnosis of the injury in that he failed to have an examination by X-ray and failed to visually recognize the fracture. Experts testified in that case that the usual and recognized method of examination among the profession of such injuries for the purpose of diagnosis, was by X-ray, and the failure to use it would not be the exercising of ordinary skill and care. In passing upon the question the court said:

"But whether or not defendant should have used an X-ray in making his diagnosis was not the only issue. As to that the experts differed in opinion, and it was shown that surgery had been successfully practiced before the X-ray was discovered. Apart from the conflicting expert testimony on this point, there was testimony by two surgeons who examined plaintiff's wrist, one of whom was practicing in the locality, that the presence of a fracture was revealed readily without the use of the X-ray. May not the jury have been justified in finding that, by the exercise of ordi-

nary skill and care, defendant would have discovered at some time during his seven weeks' treatment of plaintiff, what these surgeons saw at once upon examining plaintiff's arm without using the X-ray?"

After quoting from Hesler v. California Hospital Co., supra, it was said, 38 Cal. App. at page 427, 176 P. at page 469: "It may be doubted that the degree of skill and care of a physician in diagnosing and treating disease is the same as that of a surgeon in all cases of surgery. A broken or dislocated member of the body, usually discernible to the eye or the touch of the surgeon, presents an entirely different problem from *internal disorders* whose manifestations are obscure and often misleading." (Italics ours.)

[6, 7] McBride v. Saylin, 6 Cal.2d 134, 56 P.2d 941, relied on by appellant, involved an injury to the eye by a piece of steel which had been imbedded in the vitreous. The defendant doctor in that case failed to discover its presence. It was testified by two other surgeons, who later removed it, that the customary means used by surgeons to determine the presence or absence of a foreign body in the eye are the ophthalmoscope and the X-ray. It was there held that the "fracture rule" in McCollum v. Barr, supra, applied, and that the evidence was sufficient to prove a prima facie case. Whether, under the history given the doctor of eating molded bologna and the symptoms manifested, he would have been justified in operating for appendicitis was, to say the least, a debatable question. If the doctor had operated for appendicitis and later discovered that the cause of the symptoms manifested was ptomaine poisoning, a grave question might have arisen as to his claimed negligence. When due care, diligence and judgment are exercised, a mere failure to diagnose correctly does not necessarily render a physician liable. It is not only necessary for the plaintiff to prove such mistake but also that the mistake was due to failure to exercise ordinary care, diligence and skill in making the diagnosis. Mere proof that the diagnosis was wrong would not in and of itself support a verdict. A physician is not held to a higher degree of responsibility in making a diagnosis than in prescribing treatment. Donahoo v. Lovas, 105 Cal.App. 705, 288 P. 698.

[8, 9] It is a recognized rule that the mere fact that some other physician might have elected to treat a case differently does not necessarily establish negligence. Jensen v. Findley, 17 Cal.App.2d 536, 544, 62 P.2d 430. We do not believe that the jury would have been justified in drawing upon their common knowledge as a basis for a finding that the respondent, in the instant case, was negligent in failing to have X-rays taken prior to March 9, 1939, and to say that his failure so to do was the proximate cause of the death of the child.

Dr. Logan Clendening, an eminent medical writer, in his book on "The Human Body," at page 84, says:

"Treatment of appendicitis is not so completely summed up by saying 'Surgery' as is popularly supposed. Acute appendicitis is still a dangerous condition, and operation at the acute stage still has a high mortality. Removal of the appendix in the interval between acute attacks—for this reason called interval appendectomy—is, on the contrary, one of the safest of operative procedures. Many surgeons for this reason believe it is best to allow the patient to get over the acute attack before operating. The handling of the acute attack, however, requires a very definite knowledge. It consists in doing nothing * * *.

"The time for operating in a case of acute appendicitis is determined by the judgment of the surgeon."

In the instant case the only witnesses called by appellant who qualified to testify as experts were the defendant and respondent doctor, called under section 2055 of the Code of Civil Procedure, and his consulting doctor, Dr. Morgan.

On examination of Dr. Morgan, appellant had him relate his general qualifications and the length of his practice in Fresno County. After testifying as to the facts above related he was asked by counsel for appellant: "And as a practicing physician and surgeon you are familiar, are you not, with the general ordinary standard of the ordinary care and skill of physicians and surgeons, practicing in this community?" Objection was made and overruled. He answered: "Yes." Then followed this question by Mr. Carter: "In any case, doctor, suggesting the presence of appendicitis, in the exercise of that standard of degree of care in this community is a blood count indicated?" Respondent's counsel was then allowed to cross-examine the witness on the pending question and he asked the witness if he was appearing as an expert "merely on fact mat-

ters or in the field of what other people do?" After objection, considerable argument ensued. The doctor then answered: "I don't get it. * * * I am here, as I take it, to tell the truth about this case, as far as I know it. * * * I cannot call myself an expert on any of this stuff, what I am after is to tell just what I did, and why I did it, and if I can help out things, get things straight, I will be glad to do it. I am not an expert, I don't know how you term an expert." Then followed a statement by Mr. Sweet to the court: "The matter is simply this, Your Honor: If this witness, who is subpoenaed here, desired to testify as an expert on the standards, of course that is his privilege." In the absence of the jury the court then remarked: "* * * I think that if this witness, himself, were to ask for advice of the court on the matter in question, that it would be the duty of the court to advise him on the matter, but I think, in the absence of his request, that it probably would be improper for the court to step in and tell him what he should or could or could not do." Then followed a statement by Mr. Hansen: "The reason I made the suggestion, Your Honor, so there won't be any question, the doctor asked me before he was called as a witness as to his rights in the matter, and he asked that Mr. Sweet and myself call the matter to the court's attention at the proper time. * * * He wanted to know what his rights were with reference to his own professional opinions and he asked me to tell Mr. Sweet to make the objection at the proper time because he did not want to be a party, as he told me, to any controversy. He testified to the facts. That is all he is supposed to do. So the court will understand our position and our motives in this matter." The Court: "Now, if he will ask the court for its advice, the court will give it to him." The objection was then overruled and the witness answered: "I cannot answer that Yes or No; but I can answer it. Let me explain a few things. * * * When we think of blood count as something which will indicate to us whether there is pus condition somewhere or reaction of the system to infection, it does not, in itself indicate appendicitis. We take those counts just to verify our idea that there is an infection process in the system, but we do not depend upon it to say we have appendicitis. * * * I have tried to explain to you, when we take counts, and I will also state a great majority of us do, when some of us do not." Counsel for appellant then inquired: "Doctor, in dealing with appendicitis and in the exercise of the standard of care of an ordinarily prudent physician and surgeon in the community, will you state whether or not you experienced any preliminary symptoms of an onset of acute appendicitis?" After the court overruled an objection the witness answered: "We usually expect some distress, abdominal distress, yes. Vomiting, some temperature at times." Question by Mr. Carter: "And so far as appendicitis is concerned or the onset of an attack of appendicitis, doctor, in the exercise of that standard of care that I refer to, what are the important symptoms of an attack of appendicitis?" Answer: "Well, pain, nausea and vomiting, as a rule, constipation; all those things are things you think of first, temperature, sometimes a rapid pulse, sometimes temperature and sometimes not, those all vary." Question by Mr. Carter: "Ordinarily, doctor, is it not a fact that the temperature tends to run approximately parallel with the degree of infection?" Answer: "I can answer that by saying ordinary conditions, as we have been taught * * * we always thought that it did, that the more severe the infection, the higher the temperature ran; but I have had cases of my own experience where I operated, cases with no temperature whatever, and still find a bad appendicitis. * * * I am trying to tell you that our concept of appendicitis has changed a good bit in our survey of cases; and you have to take each case in its own light and its own symptoms and history and evaluate each one. That is why we cannot say that this is the absolute rule, that a temperature signifies the extent of the infection. * * * It is something which might help us." Other similar testimony was elicited from the witness, over objection, generally as to what the presence of temperature signified; what factor constipation indicated, as well as the complaint of diarrhea. The doctor answered the questions propounded and stated that constipation was "a more constant factor by a great per cent" than "real high temperature"; that in a very great minority of cases had he encountered diarrhea; that it is the exception rather than the rule.

It becomes apparent from a relation of the testimony of this witness that appellant was not limited to any extent in her examination of the witness on the questions

propounded. If she claims some limitation, there was no offer of proof that would indicate any prejudice in any ruling of the court. We do not see that appellant was aided by the testimony of this witness in her endeavor to establish that Dr. Calaway failed to exercise the standard of care and skill usually possessed and rendered by others of his profession in the same locality under similar circumstances at the time.

Counsel concede that the next point attempted to be raised has not been directly decided in this state. Appellant called the respondent doctor as her witness under section 2055 of the Code of Civil Procedure, as related, in an endeavor to show by expert medical testimony that he failed to use that degree of care, skill and judgment ordinarily exercised by those practicing in the same locality. Certain questions were propounded in this respect, such as: "It is your practice, is it not, doctor, if you find an infected appendix before perforation, to *operation.* * * *" Objection was then made on general grounds and sustained. The next question was: "What is your practice with reference to an infected appendix when you feel the appendix is infected?" Objection was made on the same grounds with the additional objection that under section 2055 of the Code of Civil Procedure the defendant could not be called upon to give expert testimony, and particularly upon matters of opinion in the medical field. After consideration of certain authorities (See Anderson v. Stump, 42 Cal.App.2d 761, 109 P.2d 1027; Osborn v. Carey, 1913, 24 Idaho 158, 132 P. 967; Forthofer v. Arnold, 60 Ohio App. 436, 21 N.E.2d 869, 872; Pennsylvania Co. for Insurance on Lives v. Philadelphia, 262 Pa. 439, 105 A. 630, 2 A.L.R.1576; 5 Ann.Cas. 993; Philler v. Waukesha County, 139 Wis. 211, 120 N.W. 829, 25 L.R.A.,N.S., 1040, 131 Am.St.Rep. 1055, 17 Ann.Cas. 715; People v. Conte, 17 Cal.App. 771, 783, 122 P. 450, 457; People v. Barnes, 111 Cal.App. 605, 295 P. 1045; and Verdelli v. Gray's Harbor, etc., Co., 115 Cal. 517, 47 P. 364, 778, the court inquired if either side desired "to present anything further before the court rules on it?" No offer of proof was made. The objection was sustained. Counsel contends that the rulings of the court were prejudicially erroneous.

[10-13] The questions propounded of the defendant doctor in the instant case under section 2055 of the Code of Civil Procedure are fully set forth above. It is apparent the first question propounded, as recorded in the reporter's transcript, was either incomplete at the time the objection was made or if it was not, it was unintelligible. We cannot determine from the next question, as propounded, what answer was sought to be elicited which appellant could reasonably say was material or relevant to the facts in the instant case and would be of benefit to her in meeting the burden placed upon her. The objection to the question as propounded should have been sustained. In this form, the query would not present the question attempted to be raised on this appeal. The ultimate question to be determined was what the defendant did on this particular occasion and whether what he did was consistent with that reasonable degree of learning and skill usually possessed and rendered by others of his profession ("a hypothetical doctor"), in the same locality under similar circumstances, having regard to the state of scientific learning at the time. McBride v. Saylin, supra; Criss v. Angelus Hospital Ass'n, 13 Cal.App.2d 412, 56 P.2d 1274. After the objection to the question was sustained, appellant made no offer of proof as to what she expected to prove by the question or what the anticipated answer would be. Prejudicial error will not be presumed in a ruling of the trial court sustaining an objection to the introduction of evidence. If error is alleged to exist it must be made to appear affirmatively in the record, and where a question to which an objection is sustained does not itself indicate that the answer to it will be favorable to the party seeking to introduce the testimony and upon an issue material and relevant, before the ruling will be reviewed on appeal by this court an offer of what is proposed to be proved must first be made to the trial court so that this court can determine whether the proposed evidence would be material or relevant and beneficial to the party offering the evidence. Thompson v. Buffums', Inc., 17 Cal.App.2d 401, 62 P.2d 171; Hebrard v. Jefferson G. & S. M. Co., 33 Cal. 290; In re Claire, 9 Cal.App.2d 749, 753, 50 P.2d 1070; Swearingen v. Dill, 21 Cal.App.2d 151, 68 P.2d 388. Phillips v. Powell, 210 Cal. 39, 290 P. 441, is not applicable here, as contended by appellant. It was there held that an offer of proof was not necessary where the question as propounded showed the ma-

teriality of the testimony attempted to be elicited.

[14] Since the question propounded, according to the record before us, does not sufficiently present the question raised, we do not feel compelled to decide whether the defendant doctor could have been compelled to testify as a medical expert, over objection, when called to testify under section 2055 of the Code of Civil Procedure. Therefore, there appears to be no prejudicial error and no substantial testimony given by the doctors that would permit a recovery against the respondent based upon a cause of action for malpractice.

Appellant failed to show by expert testimony the essential elements mentioned in the case of Engelking v. Carlson, supra, particularly in the failure of appellant to show that the respondent, having the degree of learning or skill ordinarily possessed by other physicians of good standing practicing in the same locality, did not "use ordinary care and diligence in applying that learning and skill to the treatment of his patient." It seems clear to us that the matter in issue, under the cases cited, was one within the knowledge of medical experts only, and not one within the common knowledge of laymen.

[15] Respondent's contention that appellant has no right to maintain the action is not meritorious. From examination of the record it appears that that point was waived at the trial, at least as far as this appeal is concerned. Counsel for respondent moved for a nonsuit on the additional ground that under section 376 of the Code of Civil Procedure Mrs. Lawless was not a party interested. After the motion was made the court remarked that it had come to the conclusion that there was no expert testimony in the case to show that the defendant possessed the degree of learning or that he did not use the skill ordinarily possessed by other physicians of good standing practicing in the locality, and for that reason granted the nonsuit. It then stated that it then made it unnecessary for the court to pass upon the other ground that was raised under section 376 of the Code of Civil Procedure. Counsel for respondent then remarked: "I don't think it is of any importance at this time * * * We will withdraw the point, Your Honor, at present." From the record before us, it becomes obvious that the additional ground now urged was withdrawn and waived in the trial court, at least for the purposes of this appeal. We do not think that the respondent should be permitted to again present that point now. Ernst v. Searle, 218 Cal. 233, 22 P.2d 715.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concurred.



58 Cal.App.2d 9

PEOPLE v. KOERTS.

Cr. 3683.

District Court of Appeal, Second District, Division 2, California.

April 7, 1943.

1. Criminal law ⇐405

In prosecution for recording and registering wagers on result of horse races, it was not necessary to establish the corpus delicti beyond a reasonable doubt to make admissible in evidence statements made by defendant. Pen.Code, § 337a, subd. 4.

2. Criminal law ⇐409

In prosecution for recording and registering wagers on result of horse races, papers found in possession of defendant and testimony of officer concerning use customarily made of such papers by bookmakers sufficiently established fact that some one had recorded bets and rendered admissible admissions made by defendant to officers. Pen.Code, § 337a, subd. 4.

3. Criminal law ⇐1023(9)

Purported appeal from judgment of conviction was dismissed where defendant was placed on probation without pronouncement of judgment.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

John F. Koerts was convicted of recording and registering wagers on the result of horse races, and he appeals.

Affirmed.

Thomas Higgins, Jr., of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for respondent.

W. J. WOOD, Justice.

Defendant was found guilty of the violation of subdivision 4 of section 337a of the Penal Code, wherein it is made a criminal offense to record and register wagers upon the result of horse races. He has appealed from the order denying his motion for a new trial.

Police officers Jones and Fisk entered a bar room located at 725 East Fifth street in the city of Los Angeles early in the afternoon of July 20, 1942, and found defendant standing near the south end of the bar. Defendant was making notations on a pad with a pencil and two or three men were looking over his shoulder. As the officers approached the bartender called out "Dutch". One of the officers tapped defendant on the shoulder and took from his right hand the pad and pencil and from his left hand a "scratch sheet" and a dollar bill. A number of scratch sheets and racing forms were found on the bar. Officer Jones qualified as an expert on bookmaking matters. He testified that the pad on which defendant was writing was a betting marker and that the papers found on defendant were customarily used by bookmakers in Los Angeles. He described the manner in which they were used in placing bets on horse races. Officer Jones further testified that he had a conversation with defendant in which defendant stated that he had been taking bets at that location for about two days and that the pad from which he was writing when arrested contained a list of bets he had taken on that day; that his nickname was "Dutch".

[1, 2] It is now contended that: "The evidence was insufficient in that the corpus delicti was not established other than by the purported statements of the appellant made after his arrest". We find no merit whatever in this contention. It was not necessary to establish the corpus delicti beyond a reasonable doubt to make admissible in evidence the statements made by defendant. People v. Taylor, 40 Cal.App. 2d 324, 104 P.2d 846. The papers found in the possession of defendant and the testimony of Officer Jones concerning the use customarily made of such papers by bookmakers sufficiently established the fact that some one had recorded bets on purported horse races scheduled for that day. The court did not err in receiving evidence of the admissions made by defendant to the officers.

[3] There is a purported appeal from the "judgment of conviction", but defendant was placed on probation without the pronouncement of judgment. The purported appeal from the judgment is dismissed. People v. Patello, 125 Cal.App. 480, 487, 13 P.2d 1068; In re Phillips, 17 Cal.2d 55, 58, 109 P.2d 344, 132 A.L.R. 644. The order denying a new trial is affirmed.

MOORE, P. J., and McCOMB J., concur.



HARDY v. HARDY.

Civ. 13874.

District Court of Appeal, Second District, Division 2, California.

April 2, 1943.

Hearing Granted June 1, 1943.

1. Judgment ⇐186

In determining whether defendant sued on property settlement contract was entitled to summary judgment on ground that there was no issue of fact, court cannot construe contract on presumption that defendant might perpetrate a fraud on plaintiff.

2. Judgment ⇐181

It is not the claim of a party that creates an "ambiguity" precluding grant of summary judgment, but ambiguity must be found in language of writing itself.

See Words and Phrases, Permanent Edition, for all other definitions of "Ambiguity".

3. Evidence ⇐417(9)

Evidence cannot be received for purpose of interpolating into written agreement a provision not inserted by parties. Civ. Code, §§ 1638, 1639, 1643, 1644, 1647.

4. Evidence ⇐448

Where language of property settlement contract was so clear that its meaning could

be ascertained therefrom, parol proof could not be resorted to. Civ.Code, §§ 1638, 1639, 1643, 1644, 1647.

5. Evidence ⇐450(5)

As regards parol evidence, "ambiguity" can exist in a written contract only in those cases where language is susceptible of more than one meaning.

6. Judgment ⇐181

Where construction of contract is not dependent upon solution of an "issue of fact," that is, if alleged facts are accepted, they create only an "issue of law" and summary judgment is an appropriate remedy.

See Words and Phrases, Permanent Edition, for all other definitions of "Issue of Fact" and "Issue of Law".

7. Evidence ⇐458

Legislature did not intend that written contract should have anything added to it or taken from it by proof of surrounding circumstances. Civ.Code, §§ 1638, 1639, 1643, 1644, 1647.

8. Accord and satisfaction ⇐11(1)
Compromise and settlement ⇐5(2)

When genuine dispute exists between debtor and creditor as to sum due, and while debt remains unliquidated, debtor tenders check for sum less than creditor's claim with statement that check is given in full payment, by cashing the check creditor adopts terms which accompany tender and such acceptance constitutes "accord and satisfaction".

See Words and Phrases, Permanent Edition, for all other definitions of "Accord and Satisfaction".

9. Judgment ⇐181

A property settlement contract that husband would pay wife $250 per week but if husband's weekly amount received fell below $1,000 per week, amount payable to wife was to be reduced to one fourth of amount actually received by husband contained no "ambiguity" and presented no "issue of fact" as to whether parties intended that husband's earnings should be averaged for entire year and husband should pay an average of $250 if husband received an average income of $1,000 per week, and hence granting husband summary judgment in wife's action on the contract was not an abuse of discretion. Civ.Code, §§ 1638, 1639, 1643, 1644, 1647.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Myrtle Lee Hardy against Oliver Norville Hardy to recover on a property settlement contract. From a summary judgment for defendant, plaintiff appeals.

Affirmed.

Roger Marchetti and Bartlett & Kearney, all of Los Angeles, for plaintiff and appellant.

Benjamin W. Shipman, of Los Angeles, for defendant and respondent.

MOORE, Presiding Justice.

Plaintiff appeals from an adverse judgment following a summary proceeding. Her contention is that the court abused its discretion in not deliberately trying the action inasmuch as the contract pleaded is susceptible of more than one meaning and the ascertainment of its true import presented an issue of fact for the determination of the trial court. The contract evidenced a property settlement of the parties.

On the 6th of September 1933, the parties made their first agreement. It provided for the payment of certain sums by defendant to plaintiff, which provision is found in the Tenth paragraph of the agreement which is the only passage involved and reads as follows:

"Tenth: As and for the support of first party, second party shall pay to first party from this time forward, or until first party remarries (in the event of the dissolution for any cause of the existing marriage between the parties hereto) any person other than second party, the sum of two hundred fifty dollars ($250.00) per week but in the event the weekly amount received by second party from any source whatever, either as income, salary, royalty, commissions, bonuses and/or earnings (exclusive of any sum, income and/or dividends he may receive from or on account of said endowment policy of life insurance) falls below one thousand dollars ($1,000.00) per week, the amount which second party is required to pay to first party during the week or weeks when such income, etc. falls below $1000.00, is to be reduced to one-fourth of the amount so actually received by second party from the said source. Nothing herein contained shall require the second party to pay to the first party any part or portion of the amount he may be entitled to hereunder from and

out of said endowment insurance policy or any income or dividends arising therefrom."

The Amended Complaint

The parties were divorced shortly after the first agreement. They were subsequently reconciled, and after a second separation a second contract was executed on the 14th of April, 1937, which contained the identical Tenth paragraph. Thereafter defendant paid $250 per week except for certain designated weeks in which he paid nothing or 25 per cent of his income for those particular weeks. The complaint demands $21,625 as the total of sums unpaid. She derives this from the construction which she places upon the contract whereby she insists that the annual income of defendant should be averaged and that she should be paid on an average of $250 per week if defendant's income totaled $52,000 or more for the year and one fourth of his average weekly income if it fell below $1,000. She alleges in her complaint that a determination of the question whether, during any of the weeks listed in her pleading, the weekly amount of income received by defendant from all sources (except from a certain annuity life insurance policy) fell below $1,000 per week and to what extent defendant paid plaintiff one fourth of the amount actually received by him during any of such weeks, and whether defendant was at all relieved from his obligation to make such payment of $250 on the contingency specified in the contract and whether he complied with its provisions by paying the reduced amount and the extent of his default can be determined accurately and only by an accounting by defendant. She alleges that such determination involves the compilation of receipts for 90 separate weeks, the examination of "many contracts by him and by others"; that it was agreed that her support money would be reduced to less than $250 per week only in the event defendant's income should fall below $52,000 annually to "such an extent that his income during any year would average less than $1000 per week"; that she had demanded an accounting and that it was refused with the claim of defendant that the weekly income of defendant is to be determined at the end of each individual week solely on the basis of his actual receipts for such week and that the only income to be considered was his weekly salary of $1,000 and that if he failed to receive his salary in any week he was entitled to make a reduction by paying only 25 per cent of his actual income for the week; that an accounting would show that, during the entire four years prior to the filing of the action, or during each of the four years or during any year ending with any one week, or by averaging his income in any reasonable manner, the income of defendant would not during any of such periods fall below an average of $1,000 per week; that prior to the agreement she intended that in computing defendant's income in any year all sources of income should be included except that from an annuity policy and that plaintiff believes that paragraph Tenth did so provide; that the true construction of the language is in accordance with her intention and understanding at that time; that her intention and understanding was acquiesced in by defendant; that she never had any notice of a contrary construction or intention prior to the execution of the agreement with regard to the Tenth paragraph; that defendant had reason to suspect that plaintiff so understood the agreement; that the income of defendant in all negotiations between the parties was considered on an annual basis; that defendant was an actor in the motion picture industry; that it was a custom to employ actors of the importance of defendant under contract for a period of a year or years, the compensation to be based on the total to be paid for the year allowing a lay-off period of 12 weeks; that such custom was well known to both parties; that despite such custom defendant never discussed with plaintiff the possibility of his being entitled to claim a reduction of the $250 weekly by reason of the language of the Tenth paragraph; that on the 29th of May, 1937, defendant by letters written to plaintiff first asserted his construction of the contract, to wit: that since his compensation was only $100 for such week she should receive only 25 per cent of that sum.

She alleged that in November 1937 she brought an action against defendant for $1,750, being the total amount of sums claimed by her at the rate of $250 per week less the sums actually paid her and demanded a reformation of the contract in accordance with her understanding; that, in April 1940 other defaults having occurred, she dismissed such action; that defendant has not been prejudiced by the filing or the pendency thereof.

The Answer

By his answer, defendant along with other denials and positive allegations alleged that since the 14th of April 1937, he has paid to plaintiff $250 for each week for which he received $1,000 or more and 25 per cent of his earnings when his income was less than $1,000; that he has performed the contract except for the payment of $50 which he paid at the time of filing his answer; that about July 15, 1937, he made a complete accounting to plaintiff which he forwarded to her with a letter and a check in the sum of $325 in settlement of his obligation to her from the date of the contract to the date of payment; that the check was retained and thereafter defendant made other payments by check for the sums received by him for weeks while his income did not amount to or exceed $1,000; that the checks represented 25 per cent of his actual income for the particular week, of which fact plaintiff had knowledge; that such checks were not then cashed, but on August 17, 1937, plaintiff filed an action in the superior court, Number 419297; that at all times plaintiff knew (1) that he was under contract to Hal Roach Studios; (2) that the compensation received there was defendant's sole source of income; (3) that his income was $1,000 a week during certain weeks and less than $1,000 a week during other weeks; (4) that the amount of his compensation for any period was solely in the discretion of his employer; (5) that payment would be made to her as in the contract provided as to each week depending upon the amount received by defendant; (6) that he made payment and accounting of the compensation actually received by him. He alleged that his contract with Hal Roach terminated about April 5, 1940 at which time there was a controversy pending between Hal Roach and defendant with respect to eleven weeks which was settled by the payment to defendant of $1,100 after this action was commenced; that when his services for the Studios terminated plaintiff was holding the check for $325 in payment of all sums due her under the contract to August 7, 1937, together with his checks for 25 per cent of the amount he had received for weeks for which his income was less then $1,000 per week for designated weeks; that plaintiff cashed each of such checks after April 5, 1940, and dismissed the action 419297 on April 24, 1940; that defendant received no income between the last-mentioned date and the filing of this action except certain dividends in the sum of $199.99, $50 of which he paid plaintiff contemporaneously with filing his answer; that the contract including the Tenth paragraph was approved by the court, in the presence of plaintiff and her counsel; that in the year 1937 he paid plaintiff $4,850; in 1938, $11,225; in 1939, $10,150; in 1940, $2,500. Basing his plea upon the facts above recited defendant urges an estoppel against plaintiff.

The Motion

Defendant's motion for a summary judgment was made upon the ground that the agreement of April 14, 1937, "is clear and unambiguous and the parties have previously by their own acts and conduct acted in conformity with the provisions of the agreement, wherein and whereby each week since * * * April 14, 1937, was and constituted a separate accounting period, and plaintiff acted pursuant thereto and in conformity therewith and has dismissed prior proceedings for an adjudication * * *."

The motion was based upon the records and files and upon defendant's own affidavit as well as upon the affidavit and deposition of plaintiff.

By his affidavit defendant averred substantially the facts set forth in his answer; also that at the time of making the first agreement with the plaintiff he was working for the Roach Studios under a contract of November 11, 1929; that such contract provided that defendant's employment would be for a minimum of 40 weeks out of each year but that the contract could be cancelled by the studios at any time beyond 30 days' notice; that it provided for the payment of his weekly compensation for each week during which he worked but a compensation of $100 a week for such weeks that he did not work; that plaintiff was familiar with the terms of his contract with Hal Roach Studios; that in May 1941 defendant contracted for his corporation, to wit: Laurel and Hardy Feature Productions to make a picture for 20th Century Fox and by the terms thereof granted an option for the rendition of further service by the Laurel and Hardy Corporation; that during the term of his service to 20th Century Fox, defendant paid $250 for each of the 10 weeks while fulfilling his engagement.

In response to the motion and the affidavit of defendant, plaintiff filed her affidavit and the affidavit of one of her

counsel, to wit: Parker Veazey, Jr. No statement contained in either of such affidavits is pointed out as additional to the matters alleged in the amended complaint and pertinent to the motion and we find none. In addition to such affidavits, plaintiff objected to the filing of the motion for a summary judgment upon the grounds that the (1) moving papers were not identified and not served; (2) that such judgment rests only in the discretion of the court; (3) that defendant's affidavit does not show that he could testify competently to the facts; (4) that triable issues of fact existed.

The Merits

[1] Appellant contends that there is an issue of fact to be tried; that under the interpretation given the Tenth paragraph by the court below it might be possible for defendant to arrange to have an annual salary paid in a lump sum on one particular day in which event he would have his annual income paid for one week and no income for 51 weeks. We cannot construe the writing on the presumption that defendant might perpetrate a fraud upon plaintiff. Possibilities of misunderstanding and of wrongdoing are factors that govern parties in reducing their agreement to writing. But after it has been so reduced the courts have to determine only what the language used actually means.

Plaintiff resorts to a novel bit of logic in order to develop an ambiguity requiring a finding. She reasons thus: "I contend that out of defendant's total earnings for each year I should be paid $250 per week if such total shall amount to or exceed $52,000 per year; if it shall average less than $1000 weekly he need pay me no more than one fourth of such average weekly sum. Defendant contends that by the contract he owes me only one fourth of his weekly compensation actually received, when less than $1000. These diverse contentions create an ambiguity requiring a finding of the trial court."

[2, 3] It is not the claim of a party that creates an ambiguity. If one exists it must be found in the language of the writing itself. The phraseology of any agreement may be given a twist by a brilliant interpolation so as to make the meaning of the writing different from that which it would be if the plain import of the text is followed. But evidence cannot be received for the purpose of interpolating into an agreement a provision not inserted by the parties. Barnhart Aircraft, Inc., v. Preston, 212 Cal. 19, 24, 297 P. 20. Its meaning must be ascertained from the writing alone, if possible, Section 1639, Civil Code. The language of the writing if clear and explicit must govern its interpretation, Section 1638, Civil Code. It must be so interpreted as to make it reasonable and operative if it can be done without violating the intention of the parties. Section 1643, Civil Code. Its words are to be understood in their ordinary sense, Section 1644. It may be explained by the circumstances under which it is made, Section 1647, Civil Code. But the circumstances in this instance are disclosed by the writing itself.

[4-6] The language of the Tenth paragraph is so clear and explicit that its meaning can be ascertained therefrom. Therefore there is no necessity for resorting to parol proof. Taking its words in their ordinary sense we find nothing obscure. It records the evident covenants of the parties upon a subject familiar to them both. There is no ambiguity to be found in its language. An ambiguity can exist in a written contract only in those cases where the language is susceptible of more than one meaning. Where the determination of the meaning of a contract is not dependent upon the solution of an issue of fact, that is if the alleged facts are accepted, they create only an issue of law and summary judgment is an appropriate remedy. Bank of America v. Casady, 15 Cal.App.2d 163, 168, 59 P.2d 444.

In support of her contention, plaintiff cites Walsh v. Walsh, 18 Cal.2d 439, 116 P.2d 62. In that action an adopted son sued upon a property settlement agreement providing for his support. A summary judgment in favor of the defendant was reversed because there the Supreme Court held there was in fact an ambiguity inhering in the very text of the contract itself in the use of the words "child or children." The Supreme Court was of the opinion that the words "child or children" as used in the writing are ambiguous. The words vary in their meanings sometimes designating a minor and at other times designating the parental relationship. The phraseology of the passage under discussion in the Walsh case, considered in its entirety, has held nothing more than that where an actual ambiguity appears upon the face of the instrument such ambiguity should be determined deliberately, after the adduction of

permissible evidence, and not by a summary judgment. The case of McComsey v. Leaf, 36 Cal.App.2d 132, 97 P.2d 242, also cited by appellant, is not pertinent. The only point decided there was that the practice should be followed in resorting to summary proceedings only where it is plain that there is no substantial issue to be tried.

[7] The contract of the parties hereto was made at a time when they were dealing at arms' length. Each was represented by counsel. The writing was thereafter approved by the court. Had it been the intention of the parties to make an average of all of defendant's income for each year and to pay her an average of $250 per week if defendant received an average income of $1,000 per week for the entire year, it would have been recited. It is a reasonable construction of the contract that the parties contemplated payment from each week's income just as it should be received for each week. Such construction makes it operative definite, reasonable and capable of being carried into effect, Civ. Code, § 1643. In the absence of a provision by the parties for averaging the defendant's annual income over the fifty two weeks of the year, or for any other period of time, we conceive no basis or principle of construction upon which the court may prescribe a formula for authorizing such an averaging, Code Civ.Proc., § 1858. It would not have been proper to receive evidence in explanation of the contract so as to write into the instrument a provision not placed there by the parties themselves. Barnhart Aircraft, Inc., v. Preston, supra. It was not a part of the legislative scheme that a contract reduced to writing by the parties should have anything added to it or taken from it by proof of surrounding circumstances. Id.; Burt v. Garden City Sand Co., 237 Ill. 473, 86 N.E. 1055.

But if the context of the contract were not clear, the affidavit, as well as the deposition of plaintiff, proves that she had no positive conception that defendant's weekly income was to be totaled for a year, or for any other period, and then averaged for the weeks in order to ascertain the extent to which $1,000 per week exceeded his actual average weekly income. She averred that they discussed the terms of their contract on eight occasions "with uniform agreement"; that they did not use the word "average"; that the arrangement they discussed was "general"; that in all conversations he said that he would always pay her $250 a week for life and that they could not judge things correctly always in advance and predict "what the future would be and carry it along according to a fixed rule." Such averments clearly demonstrate that plaintiff conceives that the terms of their agreement were not accurately recorded in the writing, the only cure for which was an action to reform. She testified in her deposition that when she received his seventeen checks each in payment of $25 per week for 22 weeks, she knew he was not getting his full salary; that she cashed fourteen of such checks of defendant notwithstanding each of them bore such inscription as: "Account Hardy, payment in full, including week ending * * *" (giving the date of the week's end); that, also, she cashed six checks of defendant's counsel issued to her in payment of defendant's obligation; that she sued him for the deficiency she claimed in 1937 and dismissed her action in April 1940. Could such conduct signify anything but her acquiescence in defendant's construction of the contract?

[8] When a genuinely true dispute exists between a debtor and a creditor as to the sum due to the creditor and, while the debt remains unliquidated, the debtor tenders his check for a sum less than the creditor's claim with a statement that the check is given in full payment by his act in cashing the check, the creditor adopts the terms which accompanied the tender and will not be heard to say that he retained the amount upon any terms other than those imposed by the debtor. Johnson v. Burnett, 17 Cal.App. 497, 501, 120 P. 436. Such an acceptance of a lesser amount than that claimed by the creditor constitutes an accord and satisfaction. Robertson v. Robertson, 34 Cal.App.2d 113, 118, 93 P.2d 175. Therefore, plaintiff not only adopted defendant's construction of the contract by cashing the $25 checks and dismissing her action in 1940, but she actually accepted his offer as a full settlement of her claim.

Having knowledge of the eccentric methods of the studios in engaging actors for a period of time and knowing that during portions thereof the actors are not steadily at work or steadily on the same compensation, if she had understood that she was to receive one fourth of his annual income if it should amount to less than $52,000 per year, plaintiff, herself, would have required a definite sum per week and would have scorned the superfluous words about

those weeks when defendant's weekly salary should be less than $1,000. Acting under the advice of her attorney who counseled her at its execution and appeared for her at its judicial approval she must be held to have understood the full significance of the language to which she subscribed.

[9] In her effort to show that an ambiguity exists in the Tenth paragraph, plaintiff generously amplifies the record with extensive interpolations which she says set forth the correct construction of the passage. Such proposals mean nothing more than that by virtue of the understanding of the parties prior to the execution of the writing which was by reason of a mistake, mutual or otherwise, not expressed by the writing, it should be revised. It has not been reformed and in its extant form we find no ambiguity therein. No ambiguity appearing in the contract and therefore no issue of fact requiring a determination as a basis for judgment, the court below exercised a sound discretion in granting the summary judgment.

Affirmed.

W. J. WOOD and McCOMB, JJ., concur.



58 Cal.App.2d 30

UNION OIL CO. OF CALIFORNIA v. RECONSTRUCTION OIL CO. et al.

Civ. 13908.

District Court of Appeal, Second District, Division 1, California.

April 8, 1943.

Hearing Denied June 3, 1943.

1. Appeal and error ⇐1097(1)

Decision on prior appeal from judgment enjoining defendants from continuing drilling of oil well and awarding damages for oil sold therefrom, and in which a hearing was denied by Supreme Court, was the "law of the case" on appeal from subsequent judgment granted in proceeding to enforce terms of prior judgment in which the same questions were raised.

See Words and Phrases, Permanent Edition, for all other definitions of "Law of the Case".

2. Appeal and error ⇐1097(1), 1195(1)

The term "law of the case" is a phrase formulated to give expression to rule that final judgment of highest court upon question of law arising between parties to an action on given state of facts establishes rights of parties to that controversy and is a final determination thereof.

3. Appeal and error ⇐1097(1)

When a case once decided and remanded for further proceedings is again brought before the court upon substantially the same facts, court is precluded by doctrine of "law of the case" from reconsidering the questions of law presented and determined on former appeal, even though of the opinion that former decision is erroneous.

4. Appeal and error ⇐1097(2)

Doctrine of "law of the case" is not affected by fact that ruling in first appeal is erroneous and has been overruled by a later decision in another case.

5. Judgment ⇐501

A final judgment of court of competent jurisdiction may not be impeached collaterally for mere errors or irregularities committed by court in the exercise of its jurisdiction or in the course of proceedings, even though error is one of law and appears on the face of the record.

6. Judgment ⇐355

A judicial decree will not be set aside by reason of a change in law resulting from a subsequent decision by higher court reaching a contrary conclusion.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by the Union Oil Company of California against the Reconstruction Oil Company, Nathan Newby, Jr., Paul D. Newby and another, to enforce the terms of a judgment theretofore entered in favor of plaintiff and against defendants. Judgment for plaintiff, and the last two named defendants appeal.

Affirmed.

Newby & Newby, of Los Angeles, for appellants.

Kelley & Smith, Lawrence C. Kelley, and Myron E. Smith, all of Los Angeles, for respondent.

YORK, Presiding Justice.

The instant action was commenced on March 30, 1942, to enforce the terms of a judgment theretofore entered, to-wit, on March 22, 1935, in favor of plaintiff and against defendants, and which became final on appeal on April 2, 1937. Union Oil Co. v. Reconstruction Oil Co., 20 Cal.App.2d 170, 66 P.2d 1215.

To the complaint herein appellants filed their answer in which they denied certain allegations thereof, admitted that respondent had recovered the judgment here sued upon and alleged as special defenses:

(1) That the trial court erred as a matter of law in receiving evidence of the value of the oil and gas produced and sold by the Reconstruction Oil Company and rendering judgment for the amount thereof upon the ground that there were no allegations in the complaint asking for a money judgment as damages;

(2) That said judgment was void because the trial court erred as a matter of law in denying appellants a jury trial on the issue of damages;

(3) That these appellants received no part of the money from the sale of said gas and oil.

Respondent interposed a general demurrer to said answer which was sustained without leave to amend, whereupon judgment was entered against appellants for the sum of $25,364.51 together with interest and costs. This appeal is prosecuted from said judgment.

Appellants urge: (1) A judgment entered by the court in violation of the constitutional and statutory right of a jury trial may be collaterally attacked and its enforcement enjoined; (2) The judgment entered in the original action was void because it determined issues entirely outside the pleadings, in that the complaint therein contained no allegations of trespass or of damages; (3) The jurisdiction of courts of equity is based upon the fundamental doctrine that every wrong has a remedy.

Respondent argues that the issues raised herein are identical with those determined between the same parties in the original action (Union Oil Co. v. Reconstruction Oil Co., supra), and therefore are res judicata. Appellants counter with the argument that the fundamental basis of the decision in the original action was destroyed by the later decision of the Supreme Court in Pacific Western Oil Co. v. Bern Oil Co., 13 Cal.2d 60, at pages 69, 71, 87 P.2d 1045.

The original action was brought "to enjoin defendants from continuing the drilling of an oil well known as Hines No. 1 well which was alleged to have been located approximately 60 feet west from the southwest corner of plaintiff's lease and which in the process of drilling deviated from the vertical and entered and trespassed upon plaintiff's lease." [20 Cal.App.2d 170, 66 P.2d 1216.] The judgment "expressly ordered the defendants Reconstruction Oil Company, a corporation, Nathan Newby, Jr., Paul D. Newby and Felix Gillespie to plug up and abandon all of said well below a measured length of 1,700 feet from the surface of the ground. The judgment further provided that the plaintiff and interveners should recover from the last-mentioned defendants the sum of $22,557.05 together with interest thereon and the costs of suit." Union Oil Co. v. Reconstruction Oil Co., supra, 20 Cal.App.2d pages 173, 174, 66 P.2d page 1217.

On appeal from said judgment, the appellate court passed upon the identical questions here presented, to-wit: "The second contention advanced by appellants is that the judgment, in so far as it awards money damages to respondent, is void for the reason that the original complaint filed in the action demanded merely injunctive relief and no supplemental pleading was ever filed which demanded compensation by way of damages. It is urged, therefore, that the trial court was precluded from granting relief outside of the issues framed by the pleadings and that the award of damages was entirely unauthorized and beyond the court's power." Page 182 of 20 Cal.App.2d, page 1221 of 66 P.2d.

In passing upon this so-called second contention, the court therein stated at pages 183 and 184 of 20 Cal.App.2d, at page 1221 of 66 P.2d: "In giving consideration to the contention it may first properly be observed that at the time the action was instituted respondent had no cause of action for damages. The well had not then been placed on production and respondent had suffered no actual damage. The only relief for which respondent could then properly pray was that appellants should be restrained from causing damage in the future. This situation continued to exist until the well was placed on production during the pendency of the action. When

the well began to produce oil on August 30, 1934, then for the first time a cause of action for damages accrued and admittedly at any time thereafter respondent might properly have brought an action for legal relief by way of damages. However, it is a familiar principle of equitable procedure that equity having once acquired jurisdiction of the subject matter of an action will retain it to the end that a complete adjudication of all conflicting rights may be had and a final determination of all matters in controversy may be accomplished. The damage suffered by respondent occurred after the suit for injunctive relief had been filed and was a matter which grew out of the situation portrayed by the allegations of respondent's complaint. It was therefore purely incidental to the relief which respondent originally sought by its equitable action and a court of equity having properly acquired jurisdiction was justified in retaining it until all issues in the action should be determined. [Citation of authorities.] * * * We conclude therefore that, under the circumstances here presented, the trial court was not without power to make an award of damages that were purely incidental to the equitable relief originally sought and that no reversible error was committed in making such award in the absence of a supplemental complaint alleging the existence of facts which occurred subsequent to the filing of the original complaint."

On the original appeal, the court considered appellants' fifth contention "that the trial court erroneously refused their demand for a jury to try the issue of damages." In discussing this point (pages 188, 189 of 20 Cal.App.2d, page 1223 of 66 P. 2d), the court made mention of the fact that during the trial respondent demanded that the Reconstruction defendants produce records in their possession which would show the amount of money actually received from the sale of oil and gas recovered by the well; that finally after the trial court had announced its decision in favor of respondent, it ordered a further hearing be had "for the purpose of determining the amount of production of petroleum and gas from Hines No. 1 well and the value thereof. This hearing took place on March 15, 1935, at which time the court announced that the case was being opened 'to establish the amount of damage, under the pleadings.' Appellants then renewed their objection that the inquiry proposed to be conducted was outside the issues as framed by the pleadings. This objection was overruled. Respondent thereupon offered in evidence a report prepared by a firm of auditors for the Reconstruction Oil Company * * * which showed that the total amount received by the corporation from sales of oil and gas produced by the well up to 9 o'clock a. m. of March 15, 1935, was $22,557.05. Appellants stipulated that the report was accurate and that the above-stated amount was correct, but continued to object to the reception of the evidence on the ground that the question of damages was outside the issues of the case. * * * Subsequently * * * the court entered judgment whereby it was adjudged that respondent should recover from the Reconstruction defendants the total amount which the evidence showed had been received from the sale of oil and gas produced by the well, viz., $22,557.05. * * *

"It is our conclusion that upon the facts and circumstances of this case as they are disclosed by the record herein appellants were not entitled as a matter of right to a trial by jury of the issue of damages. The action as it was originally instituted was purely equitable in character and the relief which was sought was strictly equitable. Respondent's claim for damages arose after the suit was brought and came into existence as a result of the persistent and determined efforts of the Reconstruction defendants to complete the drilling of the well to the point of production and to continue the production of oil and gas from the well during the pendency of the action. That the trial court was fully justified from the evidence in finding that these appellants were deliberate and intentional trespassers on respondent's property and that the proper measure was applied to the question of damages are matters which, in our opinion, may not be successfully disputed.

"It is a settled principle of equity that the right to have an issue of fact tried by a jury does not exist in causes which are purely equitable in character. [Citation of authorities.] From this principle it follows that the granting or refusing of a demand for a jury trial as to some issue of fact in an action in equity is a matter which is confided to the trial court's discretion and if a jury is allowed in such a case its verdict is merely advisory to the court. [Citation of authorities.] In conformity with these established principles

it would seem proper that, in an action which is admittedly strictly equitable in character wherein the equitable relief of injunction is sought and an issue of damages is raised which is incidental to the principal issue which is whether or not an injunction shall issue, a trial by jury of the issue of damages does not exist as a matter of right and the grant or denial of a demand for a jury to try such an issue is entirely discretionary with the court."

The court then mentioned the fact that the decisions in California on this point are in conflict, cited those supporting the principle as above stated and also those to the opposite effect, concluding as follows (page 190, of 20 Cal.App.2d, page 1225 of 66 P.2d): "In the instant action where the facts disclosed by the record indicate that the correct measure of damages was applied by the trial court and that in our opinion a jury properly instructed and properly performing its duty could have returned no other verdict than one favorable to respondent for the precise amount which was here awarded as damages, we are constrained to follow the rule announced in the former of the two above-noted groups of decisions and to declare that no error was committed by the trial court in refusing the demand of appellants for a jury trial on the issue of damages."

[1] From the above it can readily be seen that the decision on the first appeal, and in which a hearing was denied by the Supreme Court, is the law of the case and that appellants cannot again raise the same questions which were there decided.

[2, 3] "The term 'law of the case' is a phrase which has been formulated to give expression to the rule that the final judgment of the highest court upon a question of law arising between the parties to an action upon a given state of facts establishes the rights of the parties to that controversy, and is a final determination thereof, and, like the final judgment in any other case, estops the parties thereto from afterwards questioning its correctness. * * * So, when a case once decided and remanded for further proceedings is again brought before the court upon substantially the same facts, the court is precluded, by this doctrine of the law of the case, from reconsidering the questions of law presented and determined on the former appeal, even though it may be of the opinion that the former decision is erroneous. * * * This rule as to the law of the case on a second appeal has been established by an unbroken line of decisions commencing with Dewey v. Gray, 2 Cal. 374, and has been again and again announced and applied." 2 Cal.Jur. 944, § 555, citing numerous authorities.

[4] The doctrine of the law of the case is not affected by appellants' argument that the ruling in the first appeal is erroneous and has been overruled by the later decision in the case of Pacific Western Oil Co. v. Bern Oil Co., 13 Cal.2d 60, 71, 87 P.2d 1045. "Right or wrong, it must be regarded as a final adjudication of the court and the law of the case when the case comes up on a second appeal on the same facts. Indeed, it is when the former rule is deemed erroneous that the doctrine of the law of the case becomes most important." 2 Cal.Jur. 956, § 561 and authorities there cited.

[5, 6] As was so aptly stated in the case of Sontag Chain Stores Co. v. Superior Court, 18 Cal.2d 92, 94, 113 P.2d 689, 690: "It is well settled that a final judgment of a court of competent jurisdiction may not be impeached collaterally for mere errors or irregularities committed by the court in the exercise of its jurisdiction or in the course of the proceedings, even though the error is one of law, and appears on the face of the record (31 Am.Jur., § 583, pp. 181, et seq.), and it has frequently been declared that a judicial decree will not be set aside by reason of a change of law resulting from a subsequent decision by a higher court reaching a contrary conclusion. 95 A.L.R., 708 et seq., note. The reason for the rule is that there must be an end to litigation, and hence it is the long established policy of the law to, so far as possible, prohibit the further contest of an issue once judicially decided and to accord finality to judgments."

The latest case in which the finality of a determination is passed upon in California is the case of Panos v. Great Western Packing Company, 21 Cal.2d 636, 134 P. 2d 242, decided on February 23, 1943.

For the reasons stated, the judgment appealed from is affirmed.

DORAN and WHITE, JJ., concur.

57 Cal.App.2d 867

ALPHA STORES, LIMITED, et al. v. NOBEL et al.

Civ. 6354.

District Court of Appeal, Third District, California.

March 29, 1943.

1. Lis pendens ⇐18

An execution purchaser or other purchaser of land involved in litigation, without actual notice of pendency of action, is not affected by proceedings unless a notice of lis pendens is filed. Code Civ.Proc. § 409.

2. Judgment ⇐747(5)

Where execution sale of land claimed by mining company occurred pending other proceedings on mining company's cross-complaint seeking to quiet title to same land against defendants, but no notice of lis pendens had been filed, fact that notices of location of land by defendants were recorded did not charge execution purchasers with notice of pendency of proceedings to quiet title, and judgment in favor of defendants in such proceedings was not "res judicata" in subsequent quiet title action by execution purchasers against defendants. Code Civ.Proc. §§ 409, 1908.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

3. Trial ⇐396(4)

Where trial court in action to quiet title based its findings that allegations of answer were true and that allegations of complaint were untrue, upon a prior judgment which it erroneously held was a bar to the action, such findings were without support in the evidence.

Appeal from Superior Court, Nevada County; George L. Jones, Judge.

Action to quiet title by the Alpha Stores, Limited, and others against R. E. Nobel and others. Judgment for the defendants, and the plaintiffs appeal.

Judgment reversed.

H. Ward Sheldon, of Nevada City, and Lynne Kelly, of Grass Valley, for appellants.

P. H. Johnson and C. K. Curtright, both of Sacramento, for respondents.

ADAMS, Presiding Justice.

Appeal from a judgment for defendants in an action to quiet title.

Plaintiffs brought this action on April 28, 1938, seeking to quiet title to an unpatented placer mining claim in Nevada County, hereinafter called Lot 80, alleging that they "are now and for a long time hitherto have been the owners, in the possession and entitled to the possession" of said claim. Defendants answered denying any interest of plaintiffs, and set up, as a special defense, that in a prior action the title of defendants to said claim had been quieted, that plaintiffs were in privity with the plaintiffs in said former action, and are therefore estopped by the judgment in said action, and that said judgment is res adjudicata and a bar to the present action.

Plaintiffs claim title as purchasers at an execution sale. On August 14, 1935, Alpha Stores, Ltd., commenced an action against You Bet Mining Company for a balance due upon an open book account, and on August 15, 1935, had an attachment levied against the property in controversy. Judgment for plaintiff in said action was entered September 10, 1935, a sheriff's sale on execution was held on November 7, 1935, the sheriff issued a certificate of sale to Alpha Stores, Ltd., on November 8, 1935, and a sheriff's deed covering several mineral locations, including Lot 80, followed on November 10, 1936. The Nevada Irrigation District, plaintiff in this action, thereafter acquired an undivided interest by deed from Alpha Stores, Ltd.

Prior to the commencement of the foregoing action, and on May 8, 1935, Nobel et al. (defendants in the action on appeal) had commenced an action in the Superior Court of Nevada County to restrain the You Bet Mining Company and its agents from interfering with said plaintiffs' occupation of said Lot 80. The You Bet Mining Company had filed an answer and also a cross-complaint seeking to quiet title to the land. The action was tried on the cross-complaint and the answer thereto as a quiet title action. Judgment was rendered in favor of the Mining Company on January 17, 1936, but on February 28, 1936, the court reopened the case for further evidence, and thereafter made new findings. It found, among other things, that at the time of the commencement of the action, and ever since the 7th day of February, 1930, plaintiffs in said

action and their predecessors in interest had been and were the owners, in possession, and entitled to the possession of the land in suit, subject to an easement not of importance here; that said plaintiffs ever since said 7th day of February, 1930, had been in actual, open, notorious, hostile, adverse, exclusive, continuous and uninterrupted possession of said land, under a claim of right, pursuant to a mineral location made on said 7th day of February, 1930; that on said date said land was unoccupied United States mineral land, open and subject to location as a mining claim, and that on said date plaintiffs and their predecessors in interest located it as and for a mining claim. A judgment quieting the title of Nobel et al. was entered June 29, 1936, subsequent to the date of the sheriff's sale to plaintiff Alpha Stores. Said judgment was affirmed by this court September 23, 1937. Nobel v. You Bet Mining Co., 22 Cal.App. 2d 623, 72 P.2d 205.

Thereafter, the action now before this court was commenced, plaintiffs seeking to quiet their own title to Lot 80 as against Nobel et al. As hereinabove stated, defendants Nobel et al. answered denying any interest in plaintiffs, and set up the special defense aforementioned. The trial court found that none of the allegations in plaintiffs' complaint were true; that all of the allegations of the amended answer were true; that plaintiffs were barred by the judgment in Nobel v. You Bet Mining Company from asserting any claim to the property in controversy; that defendants were and ever since the 7th day of February, 1930, had been the owners and entitled to the possession of same, subject only to the paramount title of the United States; and that defendants ever since said date had been in the actual, open, etc., possession of same. A decree quieting defendants' title followed, and plaintiffs have appealed.

As we view this case, two questions are presented for review, first, are plaintiffs in this action barred by the judgment in Nobel v. You Bet Mining Company as found by the trial court; and, second, was there evidence properly before the trial court to support its findings that none of the allegations in plaintiffs' complaint were true and that all of the allegations of defendants' amended answer were true.

Whether plaintiffs herein are bound by the judgment in Nobel v. You Bet Mining Company appears to depend upon the construction to be put up on section 1908 of the Code of Civil Procedure. That section provides that the effect of a judgment or final order in such an action is that "the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding."

It appears to be conceded that plaintiffs are successors in interest to defendant in Nobel v. You Bet Mining Company, by title subsequent to the commencement of that action, and that they are here litigating for the same thing and in the same capacity; plaintiffs contend that they had no notice of the pendency of the preceding action. Defendants make no contention that plaintiffs had actual notice, and it is conceded that no notice of lis pendens was filed for record in said action. But respondents contend that the filing of such notice is not the only way in which a party may be charged with constructive notice under the foregoing section, and that the absence of a notice of lis pendens is therefore not conclusive; and that plaintiff Alpha Stores, Ltd., as an execution purchaser, is chargeable with notice "of all documents of record, having any bearing on the title to the property thus acquired"; that there were of record a notice of location of the lot in controversy by defendants, recorded March 3, 1930, and an amended notice of location recorded December 8, 1934, and that these were sufficient to put plaintiff, as execution purchaser, upon notice that respondents were claiming the property as their own; also that because in the prior action the court found that Nobel et al. were in possession, such possession was notice to plaintiffs.

[1] Assuming for the moment, but not deciding, that such notices were sufficient to show that respondents were claiming the property at the time plaintiffs purchased it, we cannot see that they did or could constitute constructive notice of the pendency of the action between Nobel and You Bet Mining Company, so as to make the judgment in said action conclusive upon plaintiffs in this action. The fact that plaintiff is an execution purchaser charges it with no greater burden than that imposed upon any other purchaser for value. It is said in 16 Cal.Jur. 646, section 2, that under the California rule a purchaser of land in-

volved in litigation, without actual notice of the pendency of the action, is not affected by the proceedings unless a notice of lis pendens is filed; and in 16 Cal.Jur. 661, section 15, that "purchaser" includes "execution purchaser."

[2] Section 409 of the Code of Civil Procedure provides that in an action affecting the title or the right to possession of real property from the filing of a notice of lis pendens for record only, shall a purchaser of the property affected thereby be deemed to have constructive notice of the pendency of the action. In Orekar v. Lager, 122 Cal.App. 370, 10 P.2d 178, where a notice of lis pendens had been filed by plaintiff in a former action but none had been filed by the defendant therein who set up an affirmative defense based upon a cause of action different from that set up by the plaintiff therein, the court held that the notice filed by plaintiff was not constructive notice of the relief sought by defendant, and that a purchaser without actual notice of the claims of defendant took title free and clear of any rights asserted by defendant's pleading in the case, and free and clear of any subsequent judgment rendered therein granting affirmative relief to defendant. Petition for hearing in the Supreme Court was denied in said cause. If, in that action, a notice of lis pendens filed by plaintiff was not constructive notice of the pendency of that action sufficient to make the judgment binding upon a purchaser without actual notice, it follows that in this case, where no such notice was filed by either party, plaintiff herein, as a purchaser pendente lite, cannot be charged with notice.

In Page v. W. W. Chase Co., 145 Cal. 578, 79 P. 278, it was held that section 409 of the Code of Civil Procedure, providing for the filing of notice of lis pendens, applies to an action to foreclose the lien of a street assessment, and that, in the absence of such filing, there is no constructive notice of the pendency of such action, and a purchaser who takes title from the defendant pending such action, without actual notice of its pendency, and who was not a party to the judgment foreclosing the lien, is not bound thereby. The court said, pages 581, 582 of 145 Cal., page 279 of 79 P.:

"The rule of the common law that a purchaser pendente lite of the subject of the controversy took as a volunteer or intruder, and in subordination to the judgment thereafter rendered in the action, is not in force in this state. In lieu thereof, section 409, Code Civ.Proc., authorizes the plaintiff in any action affecting the title to real property to file in the office of the county recorder of the county in which the property is situated a notice of the pendency of the action, and declares that 'from the time of filing such notice for record only shall a purchaser or incumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action.' 'The general rule is that one not a party to a suit is not affected by the judgment. The exception at common law is that a pendente lite purchaser, though not a party, was so affected. The qualification of the doctrine made by our statute is that such purchaser is not affected unless notice of such lis pendens be filed with the recorder.' Richardson v. White, 18 Cal. [102], 103."

Also see Ault v. Gassaway, 18 Cal. 205; Foster v. Warren, 39 Cal.App.2d 470, 475, 103 P.2d 591.

In view of the foregoing, we hold that the finding of trial court that plaintiffs are barred by the judgment in Nobel v. You Bet Mining Company is without support in the evidence or in law.

[3] As to whether there is evidence in the case to support the findings that all of the allegations contained in the amended answer are true, and that none of the allegations in the complaint are true, an examination of the record discloses that at the trial when plaintiffs called their first witness, defendants objected to the introduction of any evidence on behalf of plaintiffs, on the ground that the judgment in Nobel v. You Bet Mining Company was an estoppel. In support of said objection they introduced in evidence the judgment roll in Alpha Stores, Ltd. v. You Bet Mining Company, recorded abstract of judgment, recorded certificate of sale by sheriff, sheriff's deed to Alpha Stores, Ltd., and deed, Alpha Stores, Ltd., to Nevada Irrigation District; also the judgment roll, reporter's transcript and recorded judgments in Nobel v. You Bet Mining Company, the recorded location notice Octo Placer Mining Claim, and recorded amended location notice Octo Placer Mining Claim, and the pleadings in Alpha Stores v. Nobel.

They then argued that an execution purchaser is the successor in interest of the judgment debtor; that the cross-complaint in Nobel v. You Bet Mining Company was

the same as the complaint herein and dealt with the same thing (Lot 80); that if evidence necessary to sustain this action would have authorized a recovery in the prior one, the judgment is a bar; that plaintiffs, to sustain their title, must show title in You Bet Mining Company; that what might have been presented in the original action, but was not, could not be relied upon in a second one; that the sheriff's deed to plaintiffs was no more than a quitclaim deed, and carried only such title as the debtor had at date of sale, which was nothing.

It was also urged that Alpha Stores had notice of the prior action because of (1) the open and notorious possession of Nobel et al. from February 7, 1930, as found in said action, which was constructive notice, because as execution purchaser it was bound to take notice that some one other than the judgment debtor was in possession; and (2) because the original judgment in Nobel v. You Bet Mining Company was of record before the date of the sheriff's deed to plaintiffs, and gave notice of the pendency of the action.

The trial court at first overruled defendants' objection to the introduction of evidence of title on the part of plaintiffs, but it subsequently sustained said objection, saying: "It seems to me from the statements by the plaintiffs as to their source of title, and also from the records such as I have been able to examine, and the legal effect of some of the others being apparent, that the title now claimed by the plaintiffs must really depend on the ownership by the You Bet Mining Company of the property in dispute, that is, the ownership at the date of the filing of the lien of the plaintiffs, Alpha Stores, Limited. It also seems to me that as to the title or such title as was acquired by the plaintiffs, Alpha Stores, Limited, by virtue of a sale under execution that it, in effect, took as the successor of its debtor, the You Bet Mining Company; the effect of that conclusion being that the Alpha Stores, Limited, could only claim title as in privity with the You Bet Mining Company. The action of Nobel v. You Bet Mining Company, to quiet title, had been brought prior to the filing of the attachment, so that the attaching creditor could not have been made a party when the action was commenced. The judgment in the case of Nobel v. You Bet Mining Company, in my judgment, affirms first that the company had no right, title or interest in the property involved, and therefore, if the title of the plaintiffs in this case depends upon such title as the You Bet Mining Company had at the date of the filing of the lien, it would be clear that the attaching creditor acquired no title by the Sheriff's deed. I would like to have had more time in which to go into this, but it seems to me from such examination as I have been able to give it, that the attaching creditor in this case could not acquire a title superior to that of the defendants, Nobel and others. I think the objection to the question is good and the Court will so hold."

From the foregoing it is apparent that the trial court based its findings that the allegations of the answer were true and the allegations of the complaint were untrue, upon the judgment in Nobel v. You Bet Mining Company. Said judgment not being binding upon plaintiffs in this action it follows that the said findings of the court are without support in the evidence.

The judgment is reversed.

SCHOTTKY, J., pro tem., and THOMPSON, J., concurred.



57 Cal.App.2d 642

STEELE v. WARDWELL et al.

Civ. 3042.

District Court of Appeal, Fourth District, California.

March 16, 1943.

1. Partnership ⇐213(3)

Where complaint for personal injuries alleged that three defendants and a fourth defendant were copartners but did not allege that the three defendants or the copartnership had anything to do with operations out of which action arose, and court enlarged scope of allegation and instructed jury that since the allegation had not been denied it was to be taken as true that defendants were acting as copartners during all transactions involved in case, it was an abuse of discretion to refuse to permit the three defendants to amend their answer for

purpose of denying existence of partnership.

2. Partnership ⇐216(2)

Where allegations in paragraph 1 of complaint for personal injuries that four defendants were copartners was immaterial unless it was considered in connection with allegation of third and fourth paragraph in which it was attempted to connect three defendants with ranch operations out of which action arose, and the three defendants denied allegations in third and fourth paragraph and denied that plaintiff was employed by them, refusing to permit the three defendants to introduce evidence for purpose of disproving existence of partnership relations between them and the fourth defendant was error notwithstanding the three defendants had not denied allegations in paragraph 1 of complaint.

3. Partnership ⇐200

Where action was not against copartnership as a separate entity but against individuals, their liability, if any, was an individual liability regardless of whether it arose from a partnership relation.

4. Trial ⇐260(1)

Refusing to give requested instructions the substance of which was sufficiently covered in other instructions was not error.

5. Appeal and error ⇐1046(5)
Trial ⇐29(2)

Where farm laborer was injured when gears of power take-off connecting rotary tiller and tractor became engaged and defendants attempted, through expert witnesses, to show that it was not possible for gears to have become engaged because of defective or dangerous condition in machinery, remarks of trial court, implying criticism of knowledge of expert witnesses and indicating that court knew enough about machinery to understand that badly worn condition might cause a jar to throw it into gear, was improper and was not cured by general instruction that jury were not to infer from any statement of court that court had any opinion regarding verdict which should be rendered.

Appeals from Superior Court, Kern County; Warren Stockton, Judge.

Personal injury action by Herman D. Steele against Robert Wardwell and others. Judgment for plaintiff, and defendants appeal.

Reversed with instructions.

Arthur C. Fisher, of Los Angeles, for appellants.

Harvey, Johnston & Baker, of Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is an action for damages for injuries sustained by the plaintiff on March 17, 1941. The plaintiff had been hired by the defendant Robert Wardwell as a farm laborer. He was in charge of a rotary tiller which was pulled by a tractor operated by his brother Tom Steele. The working part of the tiller consisted of a cylinder on which were some fifty blades about seven inches long. When in operation the cylinder revolved rapidly and the blades cut into the ground. There was a flap or guard at the rear of the tiller, made of heavy boards, which could be raised or lowered. There was a connection between the tiller and the tractor which is called a power take-off, with a separate gear and lever so the cylinder on the tiller could be operated by the engine of the tractor whether or not the entire outfit was moving over the ground.

On this occasion Robert Wardwell, with two other men, approached the outfit as it was being operated in the field. The plaintiff's brother stopped the tractor and, leaving the engine running, moved the lever on the power take-off so the cylinder on the tiller ceased to revolve. He turned sideways in his seat on the tractor and began to smoke. The plaintiff went to the rear of the tiller, the flap or guard of which was up, and getting down on his knees he reached under the cylinder of the tiller and attempted to pull out some wire which was caught there. As he was doing this the power take-off became engaged, the cylinder of the tiller suddenly began to revolve, and the blades caught the plaintiff's arm causing the injuries in question.

The complaint in this action named as defendants Robert Wardwell and his wife, J. H. Maurer and his wife, three fictitious defendants, and also all of these defendants as "copartners doing business under the firm name and style of Brown Copartnership." Paragraph I of the complaint alleged that the four named defendants and the three fictitious defendants "at all times herein appearing" were and are "copart-

ners doing business under the firm name and style of Brown Copartnership," that the Wardwells were husband and wife, and that the Maurers were husband and wife. Paragraph II alleged that the three fictitious defendants and Brown Copartnership were sued under fictitious names as the plaintiff was ignorant of their true names but that when he ascertained the true names he would move to amend his complaint accordingly. Paragraph III alleged that on March 17, 1941, the plaintiff was employed by the defendants as a laborer upon the premises occupied and operated by the defendants and each of them. Paragraph IV alleged that on March 17, 1941, while plaintiff was so employed on said premises, and in the course of his employment by, and while acting under the direction and control of, the defendants and each of them, the defendants and each of them without warning to the plaintiff carelessly and negligently provided, without reasonable safeguards to permit the plaintiff to work in reasonable safety, a rotary tiller and tractor which the defendants knew, or in the exercise of ordinary care should have known, was dangerous to the plaintiff, with the result that the plaintiff was injured.

The defendant Robert Wardwell answered and the defendants Jean Wardwell, J. H. Maurer and Mrs. J. H. Maurer filed a separate answer. Neither of these answers mentioned paragraph I of the complaint or in terms denied its allegations. Robert Wardwell's answer contained a paragraph which reads: "Admits that on March 17, 1941, plaintiff was employed by this answering defendant, but denies that any of the other defendants, or any other person except this answering defendant, was the employer of said plaintiff." The answer filed by the other three named defendants contained the following: "Deny, insofar as said allegations refer to or relate to these answering defendants, each and every allegation in Paragraphs III, IV, V and VI of the complaint filed herein, and particularly deny that on the 17th day of March, 1941, at the time the alleged accident occurred, plaintiff was employed by these answering defendants or any or either of them."

When the plaintiff rested the three named defendants who thus separately answered moved for a nonsuit as to them on the ground that no evidence had been introduced to substantiate the allegations of the complaint as to any defendant except Robert Wardwell. Counsel for plaintiff opposed this motion on the ground that these defendants had admitted the existence of the partnership by failing to specifically deny the allegations of paragraph I of the complaint. These defendants then asked leave of court to amend their answer, in furtherance of justice and for the purpose of setting forth the true facts, by denying the existence of any partnership relation between them and Robert Wardwell at the time in question. The court refused permission to amend and denied the motion for a nonsuit. Counsel for these defendants then offered to prove that no partnership relation existed between Robert Wardwell and any of these three defendants, that none of them had any connection with the operations of Robert Wardwell on the premises where this accident occurred, that they had no interest in such operations or the proceeds thereof, and that they did not in any manner employ or authorize the employment of the plaintiff. They not only offered to prove these things but they called witnesses to the stand and attempted to bring out evidence to this effect. Objections to the offers of proof and to the introduction of such testimony were sustained on the ground that this matter was not relevant to any issue in the case since the partnership relation had been admitted by failing to deny paragraph I of the complaint.

At the conclusion of the evidence these three named defendants again moved for a nonsuit as to them on the ground that there had been no evidence to in any manner connect them with the employment of the plaintiff or his alleged injury, and on the further ground that the plaintiff had alleged that "Brown Copartnership" was a fictitious name, that he would amend the complaint by inserting the true names when the same were ascertained, and that no request for such an amendment had been made. Counsel for the plaintiff then asked leave to amend his complaint so as to show the true name of the partnership but withdrew that motion when it was suggested that this might give an opportunity to anyone thus named to appear and defend. The motion for nonsuit was again denied, as was also a motion for an instructed verdict with respect to the three defendants who had separately answered. In his instructions, the court instructed the jury that the allegations of paragraph I of the complaint had not been denied and it must therefore take these as true "for the pur-

poses of this action"; that it must take as true the fact that Robert Wardwell, Jean Wardwell, J. H. Maurer and Mrs. J. H. Maurer were and are "during all the times and all the transactions involved in this case, copartners doing business under the firm name and style of Brown Copartnership"; that the plaintiff was claiming liability against these four persons "as copartners and not otherwise"; that "it is admitted that these persons are copartners and constitute a copartnership"; that "the court therefore instructs you that the copartnership owed a duty to provide a safe place and appliance for the benefit of any servant"; and that if the servant was injured through the negligence of any copartner in the active management of any copartnership business the partners "are each and all liable" for any such negligence if it proximately caused any injury. The jury returned a verdict in favor of the plaintiff and separate appeals have been taken by Robert Wardwell and the other three named defendants.

[1] With respect to the appeal of the three named defendants other than Robert Wardwell, it seems obvious that the judgment must be reversed. Their appeal is largely predicated on the fact that a verdict was rendered against them because of the rulings of the court and its instructions to the jury to the effect that their answer admitted the existence of a copartnership with the defendant Robert Wardwell, and that by reason of this admission they were liable for any injury sustained by the plaintiff during the course of his employment by Wardwell and resulting from the negligence of Wardwell. It may first be observed that while paragraph I of the complaint alleged that these three defendants with Robert Wardwell and three fictitious defendants were copartners doing business under the firm name and style of "Brown Copartnership," it was not there alleged that these persons or that copartnership had anything to do with the operations out of which this action arose. In opposing the motion for a nonsuit made by these three appellants and their subsequent attempts to amend their answer and to introduce evidence to support their contention that they had no partnership relation with Robert Wardwell, the respondent was compelled to and did couple the allegations of paragraph I of the complaint with the other allegations contained in paragraphs III and IV thereof, to the effect that he was employed by the four named defendants and each of them on premises operated by all of them, and that he was furnished an unsafe appliance by the four named defendants and each of them. However, in its instructions, the court enlarged the scope of paragraph I of the complaint and, in effect, instructed the jury that since that paragraph had not been denied it must take as true not only the fact that the four named defendants were copartners during all the times involved in this case, but also the fact that they were acting as copartners during "all the transactions involved in this case." Under the circumstances which here appear, we think it was an abuse of discretion to refuse to permit these three appellants to amend their answer in this regard, to the end that the true facts might be ascertained.

[2-4] In any event, the court erred in its repeated rulings by which it refused to permit these three appellants to introduce evidence for the purpose of disproving the existence of a partnership relation between them and the appellant Robert Wardwell. As we have pointed out, the allegation in paragraph I of the complaint, that the four named defendants with the fictitious defendants were and are copartners, is immaterial in this action unless it is considered and taken in connection with the allegations of paragraphs III and IV in which, for the first time, it is attempted to connect these defendants with the ranch operations out of which this action arose. These three appellants not only denied each and every allegation in paragraphs III and IV of the complaint, but they particularly denied that at the time in question the respondent was employed by them or by any or either of them. While this answer may not be a model it specifically denied the allegations of the complaint which were essential to connect these appellants with the accident in question, it followed substantially the form in which the relation between any copartnership and the injuries to the plaintiff were alleged in the complaint, and these denials were broad enough to cover any employment of the respondent by these appellants whether that employment was direct, by an agent or through a partnership relation. The respondent seems to contend that the denial of these three appellants, to which we have referred, was of no effect in this regard because that answer was filed by them as individuals and not for them as members of a copartnership, it being argued that it follows that they were not entitled to attack

the existence of a copartnership since they appeared as individuals and not as members of the partnership. The action was not against a copartnership as a separate entity but as against these individuals and their liability, if any, is an individual liability whether or not it arises from a partnership relation. Ferry v. North Pacific Stages, 112 Cal.App. 348, 296 P. 679; Billings v. Finn, 55 Cal.App. 134, 202 P. 938; Maclay Co. v. Meads, 14 Cal.App. 363, 370, 112 P. 195, 113 P. 364. An issue was clearly presented as to whether these three appellants had in any way employed the respondent and the issue was sufficiently presented as to whether they had employed him through the act of one of their copartners. The court erred in entirely taking that issue away from the jury. There is no merit in appellant Robert Wardwell's contention that the court erred in refusing to give five instructions requested by him. The substance of the matter thus requested was sufficiently covered in other instructions which were given.

The important question presented in connection with the appeal of this appellant is in regard to the effect of certain comment and statements made by the trial court while evidence was being received. The entire case of the respondent was based upon the theory that he had been furnished equipment with which to work which was in an unsafe and dangerous condition. While there was some contention that negligence existed in that this appellant had raised the flap or guard at the rear of the tiller and had directed the respondent to work with the flap thus raised, a matter with respect to which the evidence is in conflict, the respondent's case was mainly predicated upon the theory that the arrangement on the tractor for putting the power take-off into gear was so worn or defective that the touching or manipulation of the tiller teeth by the repondent, in his effort to remove the wire, threw the mechanism into gear and started the cylinder and teeth on the tiller to revolving. The respondent's brother, who was operating the tractor itself, testified that when he stopped the tractor on this occasion he threw the power take-off out of gear, that he did not put it into gear again, and that he did not touch or kick the gear mechanism. The other witnesses testified that they did not see anyone put the power take-off into gear. The undisputed evidence is that the tractor was purchased in January, 1941, and the rotary tiller in March, 1941.

There is no direct evidence of any defect in the tractor except that it was hard to put in gear. The respondent testified that on the day preceding the accident Robert Wardwell had put the guard or flap up and told him to leave it that way, which he did; that on that occasion, while the tractor was stopped with its engine running but with the power take-off out of gear so that the tiller teeth were not revolving, Robert Wardwell had pulled some wire from the tiller cylinder in a manner similar to that employed by the respondent on the next day, and had directed the respondent to keep such wires out of the machine. He also testified that a day or two before the accident occurred he heard a conversation between his brother Tom and Robert Wardwell in which Tom told Robert that he could hardly get the tractor in gear, that sometimes he had to kick the lever in order to get the power take-off in gear, and that Robert Wardwell replied: "He would see about that, he didn't think the tractor is what it should be any way." He further testified that he had observed that in the operation of the gears of the tractor it was difficult sometimes to operate, that he had himself operated the tractor on the day before the accident and found that it was hard to put the power take-off into gear, that it "took a little effort to put it in gear" but that "it wasn't hard to take out of gear." Tom Steele testified that on the day before the accident he told Robert Wardwell that the gears were in bad shape, that it took some time to get it in and out of gear and Wardwell said that "He knew, he didn't think the tractor was much good." Several witnesses testified that this outfit was in good condition. There was no other direct evidence as to its actual condition.

In an effort to prove that the accident had not happened because of any defect or dangerous condition in the machine the appellants put on two expert witnesses, and it is in connection with their testimony that the remarks of the court which are claimed to be prejudicial were made. One of these witnesses after testifying that he was familiar with this tractor, was asked "if it would be possible when the clutch is disengaged and the power take-off is out of gear to cause the power take-off to become effective and start the revolving of those teeth by any manipulation of the teeth themselves?" He replied, in effect, that it would be impossible to do so, giving his reasons. Respondent's counsel moved to

strike out this answer on the ground that the question had included nothing as to the condition of the mechanism and that if the mechanism were in bad shape the answer might be different. The court then asked the witness: "Your answer, Mr. Hitchcock, is based upon the supposition that all the machinery is in good repair and working order?" The witness replied: "Yes, sir," and the court remarked: "That is fine." The other expert witness, after testifying that he was familiar with tractors of this kind having devoted his efforts chiefly to them for six years, was asked a similar question as to whether it would be possible to throw the machinery into gear by manipulating the teeth or moving the cylinder on the tiller while the clutch was disengaged and the power take-off out of gear on the tractor. Respondent's counsel made the same objection as before and the court remarked: "Yes, I feel that I know something of my own knowledge about this and that is why I am getting particular, because no man can testify what will happen to machinery in case a certain thing happens unless he knows the condition of that machinery and the condition of this machinery is not stated, and also machinery might be in such awfully bad shape that a jar might throw it into gear." The appellants' counsel suggested that the question was "if it were out of gear." The court replied: "All right, I know enough about machinery that it might be so badly worn and damaged and one thing and another that a jar might throw it into gear, at least I think I do." Appellants' counsel then asked the witness: "Regardless of the condition of the tractor we have here, would it be possible by manipulating the teeth of this tiller or any similar device to start the power take-off mechanism of the tractor in operation if the clutch were out and the power take-off lever were out of gear," to which the witness replied: "It would be impossible." When asked to explain the reason why it would be impossible respondent's counsel objected and the court said: "Let him explain if he can, I am interested." Thereafter, the witness was permitted to explain why he thought it was impossible to put the machinery in gear by manipulating the cylinder on the tiller. Later, on cross-examination, this witness was asked by respondent's counsel: "You do recognize this, do you not, that with respect to any old mechanism, sometimes they get in such a condition that a slight jar will cause the gears to engage?" The witness replied: "It depends on the circumstances under which that slight jar happens." In one of his instructions the court told the jury that there had been uncontradicted testimony of expert witnesses "to the effect that the power takeoff from the tractor to the tiller could not possibly have been engaged and put in operation by any action in connection with the tiller or the teeth on the tiller." He then told the jury that an expert witness may give his opinion as to any material matter in which he is versed but that "you should carefully consider such expert information and should weigh the reasons, if any, given for it."

[5] There was no direct testimony as to how the gears on this machinery became engaged so as to cause the cylinder and teeth on the tiller to revolve. It seems quite clear that the respondent was relying upon an inference which might be drawn from the established fact that the gears did become engaged, to the effect that there was some defective and dangerous condition in the machinery which made it possible for this to occur. The appellants were attempting, through expert witnesses, to show that this was not possible. The respondent made no attempt to combat that theory by the testimony of other expert witnesses but relied entirely on cross-examination of the appellants' witnesses. It was in that situation that the remarks of the court which are here complained of were made. These remarks were not merely comments upon the evidence which had been received but the court went farther and after an implied criticism of the knowledge of the witness who had testified, stated that he knew something of his own knowledge about this situation and that he knew enough about machinery to know that a number of things, including the fact that it was badly worn, might cause a jar to throw it into gear. Not only would such statements coming from the trial judge probably have a great influence upon the jury (See Anderson v. Mothershead, 19 Cal.App.2d 97, 64 P.2d 995), but in practical effect the trial judge testified on this point, as well as clearly intimating to the jury that he did not consider the testimony given by the experts as entitled to much weight. While his later instructions on this subject were correct, strictly speaking, they were so worded as to rather emphasize the opinion he had previously expressed. There was no testimony from any other

witnesses along the line of the matter volunteered by the trial judge and his statements were of such a nature that it hardly seems possible that they were not prejudicial, or that their effect could have been cured by the general instruction which the court later gave that "You are not to infer from any statement or act of mine, or from any of the instructions given you, that the court has any opinion as to what verdict should be rendered herein." This was a close case and the statements made by the court may well have been the determining factor. In our opinion, the entire case should be reversed to the end that all of the issues should be fully and fairly tried.

The judgment as against all four appellants is reversed, with instructions to permit the appellants, other than Robert Wardwell, to amend their answer by denying the existence of such a partnership, should they so desire.

MARKS and GRIFFIN, JJ., concurred.



58 Cal.App.2d 114

KOPNER v. FREAD.

Civ. 13968.

District Court of Appeal, Second District, Division 1, California.

April 12, 1943.

1. Trusts ⇐89(1)

In action by decedent's widow against decedent's former wife to quiet title to realty and note, wherein former wife interposed cross complaint, evidence sustained finding that decedent made no oral promise to reconvey realty to former wife if decedent should fail to return to her certain jewelry, so as to authorize declaration of resulting trust in former wife's favor with respect to realty.

2. Appeal and error ⇐994(3)

In action tried by court, credibility of witnesses was for court.

3. Husband and wife ⇐266

Mere existence of marital relations does not raise presumption of fraud or undue influence in connection with contracts and conveyances made between husband and wife.

4. Contracts ⇐147(3)

In order to ascertain intention of parties to an instrument, instrument must be read as a whole.

5. Appeal and error ⇐1008(1)

Where decedent and former wife had entered into property settlement agreement purporting to determine their present and future property rights, question whether by terms of agreement note was assigned to decedent as decedent's separate property, so as to pass to widow by decree of probate court, was a question for trial court.

6. Husband and wife ⇐273(12)

In action by decedent's widow against decedent's former wife to quiet title to realty and note, wherein former wife interposed cross complaint where decedent and former wife had entered into property settlement agreement purporting to determine their property rights, evidence sustained finding that by terms of agreement, note had been assigned to decedent as decedent's separate property so as to pass to widow by decree of probate court.

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by Frances Hettick Kopner against Ethel R. Fread, etc., to quiet title to realty and to a note, wherein defendant interposed a cross complaint seeking to have a resulting trust declared in her favor with respect to the property. Judgment for plaintiff, and defendant appeals.

Affirmed.

Pierson & Block, of Compton, for appellant.

Austin & Austin, of Compton, for respondent.

DORAN, Justice.

This is an appeal from a judgment in an action to quiet title to a certain parcel of real property and to a promissory note. The action was instituted by respondent as the surviving spouse of Albert R. Kopner, deceased, alleging that the whole of the estate of said deceased was assigned by

the probate court to respondent and that appellant claimed and asserted an interest in the particular real and personal property here in question adverse to respondent. Appellant, a former wife of the deceased, interposed a cross complaint seeking to have a resulting trust declared in her favor with respect to the property in question. After hearing the evidence the trial court found in favor of respondent and entered judgment decreeing respondent to be the owner of the property.

Appellant married the said Albert Kopner in the year 1919. The property here in question was acquired by appellant and Kopner during their marriage. The real property was acquired as their community property and the promissory note was made to them as joint tenants, having been received by appellant and Kopner on the sale of certain real property held jointly. Appellant and Kopner separated in the month of March, 1939, and entered into a property settlement agreement under date of March 6, 1939. By the terms of this agreement Kopner expressly conveyed to appellant all of Kopner's right, title and interest in the real property in question.

This agreement recited that "it is the desire of both the husband and wife hereto to settle and determine their respective claims for support and maintenance and to determine their respective property rights for the present and for the future and to release each other of and from all claims of every kind and character except as specifically herein provided." The right, title and interest of the respective spouses in other specific property was disposed of by the provisions of the agreement, and the agreement also contained the following provision, quoted in part.

"Eighth: The wife specifically agrees that all of the property and interests of every kind whatsoever, real, personal and mixed, regardless of where situated, now belonging to or held by and/or in the name of the husband, whether pursuant to this agreement or otherwise, or which may hereafter be acquired by him in any manner whatsoever, including his future earnings, is and shall be deemed to be and constitute his sole and separate property, and the wife hereby expressly recognizes all of such property and interests as such separate property of the husband, free and clear of any claims of the wife, that the same constitutes community property, and free and clear of any and every claim, demand, right, title, interest, or apparent interest therein of the wife, or which may be made or asserted by her, now or hereafter, whether arising out of such marriage relation or under the laws with respect to community property or otherwise, and the wife hereby expressly disclaims, waives, releases, surrenders, relinquishes and forever quitclaims unto and in favor of the husband any and all such claims, demands, right, title, estate, interest and/or apparent interest, community or otherwise, which she may have, make or assert, now or hereafter, in or to any such property, including future earnings of the husband, * * *." A like provision was included on the part of the husband in favor of the wife.

By the terms of the agreement the wife transferred to the husband all of her title in a certain automobile and all of her title and interest in a certain cafe business, as well as all of her right and title in and to the cash in a certain bank account. By the agreement, also, the wife was given custody of the child of the parties, under certain conditions, the husband to pay the wife for the support, maintenance and education of said minor child. Both husband and wife waived right of inheritance in the other's estate. The wife waived attorney's fees, court costs, alimony, support or maintenance, except as provided in the agreement; and it was provided that the property settlement agreement might be incorporated into and become part of any decree of divorce thereafter entered. An interlocutory judgment of divorce was entered in an action between appellant and Kopner on March 30, 1939.

On May 19, 1939, appellant executed and delivered to Kopner the following instrument:

"May 17, 1939

"For value received I hereby sell and assign all my right, title and equity in house and lot and furnishings at 713 So. Mayo Ave., Compton, Calif., described as follows:

"Lot 15 of Tract 6187 County of Los Angeles, State of California as per map recorded in book 65, of page 85 of maps in the office of the County Recorder of said County:

"All this I hereby agree to transfer to Albert R. Kopner.

"Ethel R. Kopner"

This instrument was acknowledged before a notary. The property described

therein is the same real property which had been assigned to appellant by the provisions of the property settlement agreement referred to above. The circumstances under which appellant executed the instrument above quoted were related by appellant at the trial as follows.

"I had been working at the cafe after my divorce, working regular shift just like any of the rest of them, and it just didn't work out like he thought it was going to, that was the understanding at the time of the divorce that I was to stay there and continue to work. I decided I was going to go out and stay with my mother so I told him on this date I was going to quit, for him to get somebody else to take my place. He said, 'You had better make some arrangements to take care of that property down there if I get a chance to sell it.' I was working in the dining room. He told me he would draw up some kind of paper. He wrote it up, typed it up and brought it back with pen and ink and I just glanced at it and signed it. He said he would never use it unless he got my jewelry and if he did sell the property it would be only after he had been able to give my jewelry back to me."

The substance of appellant's cross complaint is as follows. The facts as to the marriage and divorce of appellant and Kopner are set forth, alleging that the final decree of divorce was entered April 23, 1940. The execution of the property settlement agreement, the terms thereof regarding the real property in question, and the delivery of the promissory note to appellant and Kopner are alleged. It is then alleged that no disposition was made of said note and that the note was not mentioned in the property settlement agreement. It is next alleged that during or about the month of October, 1938, Kopner, in order to secure certain sums of money, pledged as security therefor certain valuable jewelry which was the separate property of appellant; and that at the time of the execution of the property settlement agreement referred to, the said jewelry had not been redeemed from the pledge. That after appellant had become the owner of the said real property by virtue of the property settlement agreement, appellant and Kopner entered into an oral agreement, whereby the said Kopner agreed to redeem from said pledge the jewelry and return the same to appellant, and appellant in consideration thereof agreed that she would deed to said Kopner the said real property hereinabove described; but that Kopner should not use the said deed, record the same, or be deemed the owner of said real property unless and until he should secure the return of said jewelry to appellant; and that in the event the said Kopner could not return said jewelry to appellant, he should return said deed to appellant and the same should be of no force or effect. It is then stated that the said Kopner did not during his lifetime return the said jewelry to appellant, nor return the said deed to her; but that he did not cause the deed to be recorded. That Kopner died on July 9, 1941, and that appellant is informed and believes that the said deed was caused to be recorded by respondent's attorneys. The marriage of Kopner with respondent is then alleged, together with the disposition of Kopner's estate through assignment thereof to respondent by the probate court. Appellant then claims ownership in the real and personal property above mentioned and prays for a decree accordingly.

At the trial the only testimony regarding the alleged agreement concerning the jewelry was that of appellant. Respondent has pointed out several instances wherein the evidence is in conflict or inconsistent with the testimony of appellant as to the oral agreement concerning the pledged jewelry. It should also be pointed out that in considering the evidence on this point a question naturally arises as to why appellant should have agreed to convey her real property to Kopner in exchange for her jewelry, when Kopner was quite plainly already obligated to return the jewelry to her. The trial court found that it was not true that appellant had conveyed her real property to Kopner in consideration of an agreement on his part to redeem appellant's jewelry; but that the real property was conveyed by appellant to Kopner for a valuable consideration.

[1-3] Appellant's sole argument for a reversal of the judgment as to the real property is based upon the proposition that it is clearly established by the law of this state that the violation of an oral promise to reconvey property creates an involuntary trust. In thus making her argument, appellant apparently ignores the fact that the trial court found that no such oral promise was made. In the light of the record, this finding is supported by the evidence. The question of the credibility of the witnesses was one for the trial

court to decide. Appellant does not otherwise attack the court's finding that the deed passed for a valuable consideration, nor has appellant attempted to show that no consideration was otherwise given for the deed. Appellant's claim to the real property was based upon a specific charge that Kopner had failed to live up to his promise to redeem the jewelry. This was the "unfair advantage" upon which appellant based her cross complaint. Since the court found upon sufficient evidence that such an unfair advantage was not taken of appellant, there is nothing left upon which to base a presumption of undue influence. The mere existence of the marital relation does not raise a presumption of fraud or undue influence in connection with contracts and conveyances made between the spouses. Dimond v. Sanderson, 103 Cal. 97, 37 P. 189; Donze v. Donze, 88 Cal.App. 769, 775, 264 P. 294; 3 Cal.Jur. Ten Year Supp. 646, Community Property, § 131.

[4] Appellant, however, contends that the instrument above quoted does not show an intention to carry the transfer of the realty into present effect, but cites no authority for her contention. This contention is not sustained by authority on the question. See 9 Cal.Jur., p. 96, Deeds, § 3; Id., p. 107, § 13. In order to ascertain the intention of the parties the instrument must be read as a whole.

[5] As to the promissory note, the trial court found that it was not true that no disposition was made thereof during the lifetime of said Albert R. Kopner; that by the terms of the property settlement agreement referred to in the cross complaint, said note was assigned to Kopner as his separate property. In view of the terms of the property settlement agreement above quoted, the question of title to the note was purely one of fact. The agreement plainly provided that appellant thereby assigned all her interest in property of every kind which was held by Kopner at the time of the signing of the agreement. If the note in question were then held by Kopner, the note was by the terms of the agreement assigned to him as his separate property.

Regarding the note, appellant, called as a witness on behalf of the plaintiff pursuant to the provisions of section 2055 of the Code of Civil Procedure, testified as follows:

"Q. This note that is in question here signed by Mrs. Van Zile, where was that note kept all this time? A. As far as I know, it was in the bank, at least the payments were made directly to the bank.

"Q. That was in Mr. Kopner's possession, was it not? A. It was both of us, his and mine.

"Q. After the separation what happened to the note? A. There was nothing ever done to it. I talked to him about it and he said the bank had taken it for security for some other note that was there at the bank and until that was paid out it would stay there and after that he would have it credited to my savings account at the bank.

"Q. That was a note owned by Mr. Kopner, was it not? A. Him and me.

"Q. Have you ever had possession of the Van Zile note? A. Yes, at the time it was first made out, sure.

"Q. You had possession of it? A. Sure, it was there at the cafe, but I believe it was taken to the bank, I am not positive.

"Q. Did you take it to the bank? A. No.

"Q. Did Mr. Kopner take it to the bank. A. I am not positive if it was at the bank or the cafe, but I believe it was at the bank.

"Q. But at any event you did not have possession of it at the time you executed the property settlement agreement? A. No, I did not.

"Q. It was then either at the cafe or the bank? A. Yes, sir."

[6] From the foregoing testimony of appellant it might be inferred that her husband, Albert R. Kopner, held the note at the time of the signing of the property settlement agreement. It is at least plain that appellant did not have possession of the note when the property agreement was entered into; and it is also apparent that Kopner had control over the note, using it as he saw fit. When the terms of the property settlement are read in the light of this testimony it cannot be said that the findings of the trial court with respect to the note are not sustained by the evidence before the trial court. Moreover, the language of the property settlement agreement evinces an intent on the part of husband and wife to dispose of all their property interests between them, in the manner set forth in the agreement. An-

other circumstance, which the trial court might properly have considered in making its findings as to both the real and personal property involved, was that appellant does not appear to have raised any serious question of title to this property during the period of over two years which elapsed between the time when she executed the deed, and the property settlement agreement, and the date of Kopner's death.

For the foregoing reasons the judgment is affirmed.

YORK, P. J., and WHITE, J., concur.



STANDARD OIL CO. OF CALIFORNIA v. JOHNSON, State Treasurer.

Civ. 6826.

District Court of Appeal, Third District, California.

March 30, 1943.

Hearing Granted May 27, 1943.

1. Commerce ⇐40(1), 63

Where railroad from its California office would communicate to oil company at its California office orders for shipment of fuel oil, oil was loaded in railroad's tank cars in California, and forthwith, under standard bills of lading on which oil company was designated as consignor and railroad as consignee, transported to destination outside California, payment was made by railroad from its California office to oil company's California office and price payable was price at point of shipment plus freight charges, the sales were not sales in "interstate commerce" but constituted "intrastate transactions" subject to California retail sales tax act. Gen.Laws 1937, Act 8493.

See Words and Phrases, Permanent Edition, for all other definitions of "Interstate Commerce" and "Intrastate Transaction".

2. Commerce ⇐40(1)

The mere use of standard bill of lading and designation of seller as consignor could not be allowed to change what was essentially an intrastate transaction into an interstate transaction.

3. Licenses ⇐1

The retail sales tax is purely an "excise tax" for the privilege of doing certain acts under the protection of the state and all who do such acts should pay equally. Gen.Laws 1937, Act 8493.

See Words and Phrases, Permanent Edition, for all other definitions of "Excise Tax".

4. Commerce ⇐13

The fact that exercise of privilege, which is made subject of retail sales tax act, may also involve interstate commerce does not deprive the state of its power to levy tax on the privileges and benefits conferred by it. Gen.Laws 1937, Act 8493.

5. Commerce ⇐63

Where railroad from an office in California would communicate to oil company at its California office orders for shipment of fuel oil, oil was loaded in railroad tank cars in California, and forthwith, under standard bills of lading on which oil company was designated as consignor and railroad as consignee, transported to destination outside of California, even if the sales involved interstate transactions, imposition of retail sales tax on the sales would not impose an unequal or discriminatory "burden on interstate commerce". Gen.Laws 1937, Act 8493.

See Words and Phrases, Permanent Edition, for all other definitions of "Burden on Interstate Commerce".

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Action by the Standard Oil Company of California against Charles G. Johnson, as State Treasurer, etc., for recovery of retail sales taxes. Judgment for plaintiff, and defendant appeals.

Reversed.

Earl Warren, Atty. Gen., H. H. Linney, Asst. Atty. Gen., and Adrian A. Kragen, Deputy Atty. Gen., for appellant.

Pillsbury, Madison & Sutro and H. H. McElroy, all of San Francisco, for respondent.

SCHOTTKY, Justice pro tem.

This is an appeal from a judgment against appellant as Treasurer of the State

of California, for the recovery of retail sales tax in the sum of $120,196.76, together with interest in the sum of $22,662.84.

The case was tried on a stipulation of facts and no additional evidence was introduced. Certain paragraphs of said stipulation of facts set forth that California is a great oil producing state and that a large proportion of its production is shipped to points outside of the state for use in other states and in foreign countries; and that a portion of the oil so produced in California and shipped outside its borders is the fuel oil in question which was delivered to respondent pursuant to the provisions of the contract hereinafter referred to. Appellant objected to the materiality of these facts but the trial court overruled the objection and admitted the entire stipulation. Briefly the facts are as follows:

Respondent oil company contracted with the Southern Pacific Company to supply said railroad company (hereinafter called the Railroad) with fuel oil for its operations in California, Oregon, Nevada, Arizona, Utah and elsewhere. Except for California, none of the states mentioned has appreciable fuel oil production and it was necessary that the Railroad's needs be supplied outside those states for use therein. The contract, first entered into in 1928, which contract was under consideration by this court in Standard Oil Co. v. Johnson, 56 Cal.App.2d 411, 132 P.2d 910, was amended on January 1, 1936, subsequent to the enactment of the California Retail Sales Tax Act, Gen.Laws 1937, Act 8493, and all sales here involved were under the amended contract.

All deliveries under the contract were made from respondent's sources of production within California. The method under which orders were given and billed under the contract was substantially as follows: The Railroad from its San Francisco office would communicate to respondent at its San Francisco office, or elsewhere in California, orders for shipments of fuel oil. Fuel oil was loaded in tank cars of the Railroad at Tracy, Richmond, El Segundo or Seguro, California, and forthwith, under standard bills of lading on which respondent was designated as consignor and the Railroad as consignee, transported to destination outside of California. Respondent was not liable for demurrage if the cars were promptly loaded or if delay was due to causes beyond the reasonable control of respondent. Payment for the fuel oil was made by the Railroad from its San Francisco office to respondent's San Francisco office.

The prices which the Railroad paid for the fuel oil were determined under the contract. The price to be paid for fuel oil to be delivered at the four major consumption points outside of California was the price payable at the point of shipment "plus the current rail freight between such point of shipment and such point of delivery." Thus the Railroad paid the same price for fuel oil delivered outside of California as it would have paid for the fuel oil delivered in California. Respondent added to its price the freight costs for the transportation from California to the point of delivery, collected those from the Railroad, and then the Railroad received the same amount back again by reason of its charge for freight.

The Board of Equalization of the State of California determined that such transactions were subject to the measure of the retail sales tax and assessed an additional tax against respondent. After petition for reassessment had been denied, respondent paid a part of said tax under protest and thereafter filed its action for refund.

The trial court determined that the sale and delivery of oil to the Railroad was a transaction in interstate commerce and on the basis of that determination gave judgment in favor of respondent.

In Standard Oil Co. v. Johnson, supra, which was essentially a companion case of the instant case and argued on the same day, we had before us a case involving the contract as it existed prior to its amendment in 1936. The only material difference between the contract involved in the instant case and the one involved in the former case is that under the former provision the delivery of the fuel oil was f.o.b. Southern Pacific Company tank cars at Tracy or El Segundo, California, whence it was transported by Southern Pacific Company to its various destinations outside of the state. Respondent Oil Company in that case contended, as it contends here, that the transactions were in interstate commerce and that the imposition of a tax would result in a discrimination against interstate commerce in violation of the Constitution of the United States; and appellant State of California contended that the transactions were solely intrastate, and that the imposition of the tax upon the

seller did not discriminate against nor impose a burden upon interstate commerce nor constitute a regulation thereof. In reversing the judgment of the court below we upheld the imposition of the sales tax upon the sales there involved upon the ground that the transaction was intrastate and upon the further ground that the imposition of the tax neither discriminated against nor imposed any burden upon interstate commerce. In our opinion in that case we reviewed a number of decisions of the United States Supreme Court and of other courts which have a bearing on the issue involved in the instant case, and reference is hereby made to our opinion in that case for a review of said decisions. As already pointed out, the chief difference between the facts in the former case and in the instant case is that the 1928 contract between respondent Standard Oil Company and the Railroad was amended so that after the fuel oil had been delivered into the tank cars of the Railroad at the shipping point, it was transported to destinations outside of California under standard bills of lading in which respondent was consignor and the Railroad was the consignee; the freight charge was paid by respondent to the Railroad and the amount thereof was added to the price of the oil, so that, in effect, the cost of the transportation from the point of shipment to the destination outside the State was borne by the Railroad as under the former contract.

In arguing for a reversal of the judgment appellant makes two main contentions which are: 1. The sale and delivery of the fuel oil here involved was an intrastate transaction; 2. Even if the sale and delivery of the fuel oil here involved were part of an interstate activity the tax would apply. Respondent counters by contending that (1) The sales were sales in interstate commerce; and (2) The tax cannot apply to this interstate commerce.

In support of his first contention appellant argues that under the facts of the instant case the sale and delivery of fuel oil by respondent was an intrastate transaction and the gross receipts therefrom subject to the California Retail Sales Tax Act. Appellant asserts that in the instant case there was "a sale and delivery in California, a local, intrastate transaction and that the form used to direct shipment to the final destination of the oil is not of moment in view of the fact that the purchaser had actual possession of the oil in California"; and it argues that the mere use of a standard bill of lading and a designation of respondent as consignor should not allow the parties to change what is essentially an intrastate transaction into an interstate transaction; and that the whole purpose of the amendment of the contract in 1936 was to make the delivery ostensibly f.o.b. outside of California instead of, as under the former provision of the 1928 contract, f.o.b. point of delivery to the tank cars, and thus to avoid the payment of sales taxes to the State of California.

Respondent, in reply, points out that the Railroad had an overwhelming need for oil in Oregon, Nevada, Arizona and Utah and that, because no sufficient quantity of oil was available in those states, it was necessary to look to other states for the necessary oil, which could only be obtained through interstate transportation; that both the purchase and the transportation were necessary elements, and that together they were interstate commerce, as the need for oil could not be fulfilled without interstate transportation. Respondent argues that no matter where possession of the oil was taken or by whom or how the oil was shipped, interstate commerce was the very soul and substance of the transaction and that there would not have been a transaction without interstate commerce. "It is in this essential respect," states respondent, "that this case differs from those to which appellant refers" [and which we will refer to hereinafter]. "In none of those cases," continues respondent, "does it appear, as it does here, that interstate movement of the goods was so much of the essence of the particular transaction or that the particular transaction was so much a part of a great interstate movement of an essential commodity."

With reference to this phase of the argument advanced by respondent we believe that it must be held that our decision in Standard Oil Co. v. Johnson, supra, determines it adversely to respondent's contention. Under a state of facts which, with the exception hereinbefore noted, was in all respects similar to those of the instant case, we there held that the sales were intrastate transactions subject to the provisions of the Retail Sales Tax Act.

Appellant contends that the facts of the instant case bring it directly within the decision of the Supreme Court of the United States in Department of Treasury of Indiana v. Wood Preserving Corp., 313

U.S. 62, 61 S.Ct. 885, 888, 85 L.Ed. 1188. In that case Wood Preserving Corporation, a Delaware corporation, qualified to do business in Indiana, was engaged in the business of purchasing, selling and treating railroad ties. Indiana laid a tax on the corporation's gross receipts from the sale of untreated ties to the Baltimore and Ohio Railroad. The corporation received orders for ties from the railroad in Ohio and then by mail or telephonic communication with the producers in Indiana purchased ties to meet such orders. The Indiana producers delivered the ties to a loading point in Indiana where they were examined by a railroad inspector and an agent of the Wood Preserving Corporation, and those accepted by the railroad inspector were loaded on freight cars furnished by the railroad, and sent on bills of lading, with the corporation as consignor and the railroad's chief engineer in Ohio as consignee. The corporation did not pay freight to the railroad for transportation. In reversing the Circuit Court of Appeals, 7 Cir., 114 F.2d 922, and affirming the judgment of the District Court, the Supreme Court said:

"As to these dealings, it appears that respondent received in Indiana the ties it purchased from the local producers and that respondent sold and delivered these ties in Indiana to the Railroad Company. The fact that the delivery by the producers to respondent and respondent's delivery to the Railroad Company took place at the same time is not important. Respondent was in Indiana acting through its agent at the designated points on the railroad line. The Railroad Company was at the same points represented by its inspector. The ties brought there by the producers were then examined and those found by the inspector to be in accordance with specifications were accepted. In these transactions, respondent through its agent at once accepted from its vendors the ties which the Railroad Company found satisfactory and then and there sold and delivered these ties to the Railroad Company. These were local transactions—sales and deliveries of particular ties by respondent to the Railroad Company in Indiana. The transactions were none the less intrastate activities because the ties thus sold and delivered were forthwith loaded on the railroad cars to go to Ohio for treatment. The contract providing for that treatment called for the treatment of ties to be delivered by the Railroad Company at the Ohio plant, and the ties bought by the Railroad Company in Indiana, as above stated, were transported and delivered by the Railroad Company to that treatment plant. Respondent did not pay the freight for that transportation and the circumstance that the billing was in its name as consignor is not of consequence in the light of the facts showing the completed delivery to the Railroad Company in Indiana. See Superior Oil Co. v. Mississippi, 280 U.S. 390, 50 S.Ct. 169, 74 L.Ed. 504."

Appellant relies also upon O'Kane v. State, 283 N.Y. 439, 28 N.E.2d 905, 908. In that case appellants were in the investment business in New York City and received written confirmation of sales of stock from banks in foreign states and mailed stock with draft attached to buyers in the foreign state after offer to purchase and memorandum of sale and agreement to sell were made in New York where the stock was located. Title to the stock did not pass until payment was received by appellants. The State of New York attempted to levy a tax upon all sales or agreements of sale, at so much a share. Appellants argued that the tax was in violation of the power of Congress over interstate commerce. The New York Court of Appeals upheld the tax and in connection with the interstate commerce argument said:

"It is a matter of historical record that the Founding Fathers were concerned lest State rivalries should lead to the stifling of trade carried on beyond the confines of any single State. But it was not thereby intended that commerce among the several States, when once protected from the dangers of local prejudice, should altogether escape its proportionate share of the cost of government. McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 60 S.Ct. 388, 84 L.Ed. [565, 128 A.L.R. 876]; Felt & Tarrant Mfg. Co. v. Gallagher, 306 U.S. 62, 59 S.Ct. 376, 83 L.Ed. 488; Southern Pacific Co. v. Gallagher, 306 U.S. 167, 59 S.Ct. 389, 83 L.Ed. 586; Henneford v. Silas Mason Co., 300 U.S. 577, 57 S.Ct. 524, 81 L.Ed. 814; Western Live Stock Co. v. Bureau of Revenue, supra [303 U.S. 250, 58 S.Ct. 546, 82 L.Ed. 823, 115 A.L.R. 944]. In the Berwind-White case the courts sustained the sales tax imposed on the buyer although the goods previously had been transported interstate. The contract between the seller and the buyer was made in New York and the goods were delivered in New York. In answering the claim of

immunity from taxation because interstate commerce had preceded the taxable event the court said in part: 'As we have often pointed out, there is no distinction in this relationship between a tax on property, the sum of all the rights and powers incident to ownership, and the taxation of the exercise of some of its constituent elements. * * * Taxation of property or the exercise of a power over it immediately preceding its previously contemplated shipment interstate has been similarly sustained. (Cit.) For reasons already indicated all such taxes upon property or the exercise of the powers of ownership stand in no different relation to interstate commerce and have no different effect upon it than has the present sales tax upon goods whose shipment interstate into the taxing state was contemplated when the contract was entered into.' * * * In the case at bar certain goods, to wit, shares of stock, were located in this State and were part of the common mass of property which undoubtedly was subject to taxation. The taxable event, to wit, the making of the agreement for the sale of the property, occurred in this State prior to the transportation of the goods in interstate commerce and was an exercise of one of the incidents of ownership. In imposing a tax on the exercise of one of the incidents of ownership, no discrimination was practiced on interstate commerce. Appellants object to the taxation of a local event because it is followed by interstate commerce. But unless local events occurring after interstate commerce has ended are clothed with a greater sanctity than are possessed by local events preceding interstate commerce, such objection must fail. McGoldrick v. Berwind-White Coal Mining Co., supra. Indeed, it would appear that no such distinction has been drawn. Coe v. Town of Errol, supra [116 U.S. 517, 6 S.Ct. 475, 29 L.Ed. 715]; Bacon v. People of State of Illinois, supra [227 U.S. 504, 33 S.Ct. 299, 57 L.Ed. 615]; Federal Compress & Warehouse Co. v. McLean, supra [291 U.S. 17, 54 S.Ct. 267, 78 L.Ed. 622]. The simple grant of power to the Congress to regulate interstate commerce would not seem of itself to lead to any distinction such as is contended for by appellants."

In State Board of Equalization v. Blind Bull Coal Co., 55 Wyo. 438, 101 P.2d 70, 72, cited by appellant the retail sales tax of Wyoming was involved. Defendant sold coal at its mine in Wyoming, said coal being taken from the mine in trucks by the purchasers and transported into Idaho whence they had come for the sole purpose of buying the coal, and with the intention of transporting it into Idaho. The imposition of the retail sales tax upon these transactions was held not to constitute a burden on interstate commerce, and the court in a well-reasoned opinion said:

"The manufacture, production and sale in one state of a commodity for transportation or use in interstate commerce, and its keeping, use and sale in the state to which it is transported have been treated as local transactions that may be the subjects of non-discriminatory taxes. We refer to only a few of the illustrative cases. * * * [Citing cases] * * *

"Recent cases, from Wiloil Corp. v. Pennsylvania, 294 U.S. 169, 55 S.Ct. 358, 79 L.Ed. 838, to McGoldrick v. Berwind-White Coal Mining Co., supra, do not presage any extension of tax immunity under the commerce clause."

While contending that the transactions were in interstate commerce no matter where possession of the oil was taken or by whom or how the oil was shipped, respondent argues that any possession that the Southern Pacific Company may have taken of the oil in California was of a distinctly qualified kind, as it was taken in its capacity as a common carrier for transportation under standard commercial bills of lading and title to the property and unfettered ownership did not pass until the property reached its destination, and after the Railroad's function as common carrier was finished. Appellant in reply states that the fact cannot be ignored that the Southern Pacific Company through its California office purchased the fuel oil from respondent and received possession of it in California when the oil was delivered into the Railroad's tank cars in California, and that the fact that the Southern Pacific Company as a common carrier transported the oil to a destination outside of the State does not relieve respondent from the retail sales tax.

[1, 2] We have reached the conclusion that the sales here involved were intrastate transactions and subject to the California Retail Sales Tax Act. The mere use of a standard bill of lading and a designation of respondent as consignor should not be allowed to change what is essentially an intrastate transaction into an interstate transaction. As was said in Department of

Treasury of Indiana v. Wood Preserving Corp., supra:

"The ties bought by the Railroad Company in Indiana, as above stated, were transported and delivered by the Railroad Company to that treatment plant. Respondent did not pay the freight for that transportation and the circumstance that the billing was in its name as consignor is not of consequence in the light of the facts showing the completed delivery to the Railroad Company in Indiana."

Furthermore, under the contract all oil was to be accepted or rejected by the Railroad at the time of tender of delivery, which must be taken to mean as of the time of delivery into the tank cars of the Railroad; and the amount of the transportation charge was to be added to the price of the oil.

[3-5] Even if our conclusion that the sales herein involved are intrastate transactions should not be correct, we are still of the opinion that the sales tax was properly assessed. The retail sales tax is purely an excise tax for the privilege of doing certain acts under the protection of the State of California, and all who do such acts should pay equally. The fact that the privilege exercised may also involve interstate commerce does not deprive the state of its powers to levy a tax upon the privileges and benefits conferred by it.

In the case of State of Wisconsin v. J. C. Penney Co., 311 U.S. 435, 61 S.Ct. 246, 249, 85 L.Ed. 267, 130 A.L.R. 1229, the court said: "A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society."

In McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 60 S.Ct. 388, 391, 84 L.Ed. 565, 128 A.L.R. 876, the court said:

"It is only when the tax operates to regulate commerce between the states or with foreign nations to an extent which infringes the authority conferred upon Congress, that the tax can be said to exceed constitutional limitations. * * *

"But it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business, Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254, 58 S.Ct. 546, 548, 82 L.Ed. 823 [826], 115 A.L.R. 944. Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless falls short of the regulation of the commerce which the Constitution leaves to Congress. * * *

"If, as guides to decision we look to the purpose of the commerce clause to protect interstate commerce from discriminatory or destructive state action, and at the same time to the purpose of the state taxing power under which interstate commerce admittedly must bear its fair share of state tax burdens, and to the necessity of judicial reconciliation of these competing demands, we can find no adequate ground for saying that the present tax is a regulation which, in the absence of Congressional action the commerce clause forbids."

And as was said by Mr. Justice Reed, speaking for the court in Best & Co., Inc., v. Maxwell, 311 U.S. 454, 61 S.Ct. 334, 335, 85 L.Ed. 275: "The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce."

No question of multiple taxation is involved, as it is not contended that this fuel oil was taxed in any other state.

We do not believe that there is any rational basis upon which we could conclude that the imposition of the retail sales tax upon the sales herein involved would impose an unequal or discriminatory burden upon interstate commerce, and we are satisfied that under the later decisions of the Supreme Court of the United States the power of the State to impose a sales tax upon such transactions should be sustained.

As we view the matter, this was in essence and effect an intrastate transaction even though the oil purchased was to be used by the Southern Pacific Company in operations outside of the State of California. The Southern Pacific Company through its California office purchased the oil and received possession of it in its tank cars in California, even though it was by

its orders consigned to the railroad company at points outside of the state. The Southern Pacific Company was the carrier and the amount of the freight charges was merely added to the purchase price of the oil. As quite frankly admitted by counsel for respondent upon the oral argument, the freight was paid instead of the tax. We do not believe that the taxing power of the state can be taken away by so transparent a subterfuge, nor do we believe that the founding fathers in placing the commerce clause in the Constitution of the United States ever contemplated or intended that a state should be deprived of its power to tax such a transaction.

The judgment is reversed.

ADAMS, P. J., concurred.

THOMPSON, J., deeming himself disqualified, did not participate in the decision.

Hearing granted; TRAYNOR, J., not participating.



57 Cal.App.2d 949

DAUPHINE v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 14006.

District Court of Appeal, Second District, Division 2, California.

April 5, 1943.

1. Workmen's compensation ⇐1939

In a compensation case, reviewing court is not to determine weight to be given the evidence or which of two opposing inferences should be drawn therefrom.

2. Workmen's compensation ⇐746

In determining whether widow was entitled to compensation for death of county employee, sustained while driving toward his office from park to which he had gone from his home to inspect certain meters at beginning of day, the test was whether decedent's work reasonably necessitated his use of his automobile on the occasion of his accident.

3. Workmen's compensation ⇐723

A workman injured while in execution of special mission for employer will not be denied compensation because he was on his way to his place of work.

4. Workmen's compensation ⇐746

The "going and coming rule" did not bar recovery of compensation for death of county employee who, having authority to inspect certain allegedly defective meters in park, drove in his automobile from his home to a clinic for a metabolism test at beginning of day, then went to park to inspect meters, and then started toward his office, but was killed in a collision.

See Words and Phrases, Permanent Edition, for all other definitions of "Going and Coming Rule".

5. Workmen's compensation ⇐665

An injury sustained on a trip made by an employee solely for personal advantage is not compensable.

6. Workmen's compensation ⇐619

An injury sustained on a trip made by an employee solely for his employer is compensable.

7. Workmen's compensation ⇐661

Where employee sustains injury on trip for combined advantage of employer and employee, compensation is determined according to whether employer's interest was major factor in inducing the travel, or whether service of employer was at least incidental to or a concurrent cause of the trip.

8. Workmen's compensation ⇐746

Where county employee, who had authority to inspect allegedly defective meters in park, drove in his automobile from his home to clinic for metabolism test at beginning of day, drove from clinic to park, and later started from park toward his office, but was fatally injured in collision, collision occurred in his "course of employment" so as to make his death compensable.

See Words and Phrases, Permanent Edition, for all other definitions of "Course of Employment".

9. Workmen's compensation ⇐52

The Workmen's Compensation Act should be liberally construed in favor of an injured employee.

Original proceeding by Ada E. Dauphine, claimant, against the Industrial Accident Commission, the State Compensation In-

surance Fund, insurer, and the County of Los Angeles, employer to review an order denying compensation for the death of Everett G. Dauphine.

Order annulled with directions.

Fred M. Cross, of Los Angeles, for petitioner.

Everett A. Corten, Atty., for Industrial Accident Commission, of San Francisco, and R. C. McKellips, Asst. Atty., of Auburn, for respondents.

MOORE, Presiding Justice.

[1, 2] The question presented by this original proceeding for review is whether decedent's surviving widow is barred from recovering compensation for the loss of her husband by virtue of the "going and coming" rule or did he receive his fatal injuries in an automobile collision while engaged on a special mission for his employer. In approaching a solution we are not unmindful of the wholesome guiding rules by which the reviewing court is not to determine the weight to be given the evidence (Dearborn v. Industrial Accident Commission, 187 Cal. 591, 203 P. 112), or which of two opposing inferences should be drawn therefrom. Western Pacific R. R. Co. v. Industrial Accident Commission, 193 Cal. 413, 224 P. 754. But measured by the testing tape, to wit, whether his work reasonably necessitated his use of his automobile on the occasion of his accident (I Campbell, Workmen's Compensation p. 177), we are forced to the conclusion that decedent's errand on the morning of his tragic collision was in prosecution of his official duties and that his resultant death is compensable.

Decedent, Everett G. Dauphine, was chief assistant to the County Forester and Fire Warden who was the head of the Department of County Forestry and Fire Warden. Such Department maintained divers and numerous field offices, warehouses and parks in separate and remotely distant points within the county. His home was in Inglewood and about twelve miles from his office in the City of Los Angeles. Ordinarily he rode the trolley car and drove his automobile only when it was necessary for him to visit some public property in connection with his official duties which occurred only three or four times a month. On the 10th day of February, 1942, about 8 a.m., decedent left his home in Inglewood in his own automobile for his office.

Decedent's duties required his supervision of finances and personnel and his inspection of camps, warehouses and parks in all nonincorporated areas. He spent eight hours each month in making such inspections. Also he was the department's business and fiscal manager. Admittedly his "functions were broad enough to include a discretion to perform such duties on his way" to and from his home without a previous order from his superior. Complaints had been made by a park patron who had deposited his coin in a light meter slot without success and without recovering his money. Such complaints required an investigation by decedent. In addition to such specific complaint, decedent had knowledge that the revenues formerly received from the patrons of the tennis courts who deposited their moneys in the meter slots for light had offset the electric bill for the park. As fiscal manager of the department and author of its budget then in the course of preparation it was important that decedent ascertain possible sources of revenue. Moreover, decedent was under bond to collect all moneys received at the park and he had been especially requested by his superior in authority to collect such moneys. That decedent had not learned of the removal of the meters from the park prior to his visit is immaterial so far as his obligation to make the inspection was concerned. The record does not disclose the slightest motive for his visit to the park aside from his official duties.

Excepting his automobile he had no available means of conveyance from his home to Ladera Park some two and one-half miles distant. With office engagements for nine o'clock, it was not unreasonable for decedent to calculate on completing his inspection at Ladera Park so as to reach the civic center on time. Having disposed of a personal matter at a point about a half mile southwest of his home he proceeded in a northwesterly direction to Ladera Park where he arrived at 8:30. He asked the maintenance man for the foreman and stated that he had called to check the meters. He made his exit on Slauson Avenue which bounds the park on its north side. It is true that after leaving Ladera Park decedent might have proceeded east on Slauson to Figueroa, a principal cross-town boulevard, as was his habit in driving from his home to his office. But it is not unreasonable for a motorist to vary his route of travel in crossing a great city.

The course he chose was not unusally hazardous. Neither was it longer than that which he customarily traveled. Accidents happen on any street or boulevard. But the question of his lack of care is not involved. The only ultimate fact to be found by the commission was whether decedent was driving within the scope of his employment at the time of his collision. We think that no other finding could reasonably have been made from the uncontradicted facts.

Respondent was evidently misled by the fact that on departing from his home decedent first visited a clinic for a metabolism test. But he could have made the visit to the clinic and have there taken the trolley car for the city. On leaving the clinic he drove northwesterly to the park, whereas, if matters at the park had not required his attention he would reasonably have traveled northeasterly from the clinic. His course from the clinic to the park was substantially the same as it would have been from his home to the park. As proof of his having deemed the park visit a duty at the time, it necessitated two and a half miles more travel than by going his customary route to his office.

[3, 4] (1) It is contended by respondents that decedent suffered his injuries while on the way from his home to his place of work; that the mission which took him to Ladera Park was not the major factor among the causes for his travel by automobile or for his pursuing the route along Cimmaron Street. No reasonable conclusion can be reached from the evidence other than that Mr. Dauphine went to Ladera Park for the sole purpose of discharging his duties and that in traveling from the park he took a proper course to reach his office. The work to be done created the necessity for his travel by automobile. If the workman is injured while in the execution of a special mission for his employer compensation will not be denied him because he was on his way to his place of work. Matthews v. Naylor, 42 Cal.App.2d 729, 109 P.2d 978. He is not under such circumstances bound by the going and coming rule. Fenton v. Industrial Accident Commission, 44 Cal.App.2d 379, 383, 112 P.2d 763. Decedent had arrived at the park to perform his special mission. After leaving the park and before the collision occurred he had proceeded some miles on his way to his place of work. Inasmuch as he was bent upon the performance of such official task, his injuries would have been none the less compensable had he driven southwest to reach the park or had he been injured on his way to the park. County of Los Angeles v. Industrial Accident Commission, 18 I.A.C. 102.

[5-7] His deviation from his course to the park in order to visit the clinic was not a material fact in view of his safe return to the course of travel toward the park. I Campbell's, supra, § 190. But since the decedent had already made his call at the park and performed his duties, compensation would not be denied him had the clinic adjoined the park so long as his work created the necessity for travel. I Campbell's, § 188; Marks' Dependents v. Gray, 251 N.Y. 90, 167 N.E. 181. If a trip is made by the employee solely for personal advantage it is not compensable; if made solely for his employer it is compensable. If the trip is for the combined advantage of the employer and the employee, compensation is determined according to whether the interest of the employer was the major factor in inducing the travel (Grieb v. Hammerle, 222 N.Y. 382, 118 N.E. 805, 7 A.L.R. 1075) or whether the service of the employer is at least incidental to or a concurrent cause of the trip (I Campbell's, supra, p. 177; Barragar v. Industrial Accident Commission, 205 Wis. 550, 238 N.W. 368, 78 A.L.R. 679).

[8] (2) Not only was decedent acting in the course of his employment at the time of receiving his injuries and therefore compensable but since his stop at the park was admittedly for a business purpose, his meeting with the colliding car was directly caused by the performance of his task. Having the authority to determine the time, place and manner of performing his "special mission," he has the right to compensation to the same extent as if he had been sent directly to the park by the Superintendent. His visit to Ladera Park was reasonably contemplated by virtue of his official duties. Employers' Liability Assurance Corp. v. Industrial Accident Commission, 37 Cal.App.2d 567, 573, 99 P.2d 1089; Union Oil Co. v. Industrial Accident Commission, 211 Cal. 398, 295 P. 513.

[9] (3) In view of the facts and of the doctrine requiring a liberal construction of the act in favor of an injured employee (Morrison v. Industrial Accident Commission, 42 Cal.App.2d 685, 690, 109 P.2d 767) we cannot avoid the conclusion that a finding and award against the applicant was

arbitrary and therefore in excess of respondent's jurisdiction.

The order of the Industrial Accident Commission is annulled and the commission is directed to make an award in accordance with the evidence adduced at the hearing.

W. J. WOOD and McCOMB, JJ., concur.



57 Cal.App.2d 805

PEOPLE v. CORONADO.

Cr. 2249.

District Court of Appeal, First District, Division 1, California.

March 29, 1943.

1. Prostitution ⇐1

Under statute providing that every man who places or leaves his wife in a house of prostitution, or connives at or consents to, or permits, the placing or leaving of his wife in a house of prostitution, or allows or permits her to remain therein, is guilty of a felony, proof of commission of any one or more of the disjunctively stated acts warrants conviction. Pen.Code, § 266g.

2. Prostitution ⇐1

Allegation or proof that an accused in placing or leaving his wife in a house of prostitution intending that she devote herself to prostitution or that she became a prostitute is unnecessary to warrant conviction, but the law is designed to prevent a man from placing or leaving his wife in such house for any purpose. Pen.Code, § 266g.

3. Prostitution ⇐4

Evidence sustained conviction for placing or permitting a wife to remain in a house of prostitution. Pen.Code, § 266g.

4. Prostitution ⇐5

In prosecution for placing or permitting a wife to remain in a house of prostitution, whether accused had connived at or consented to his wife's becoming an inmate of the house or whether since their marriage he had tried to dissuade her from following an immoral life were for jury, which was not bound to accept testimony of accused and his wife as true. Pen.Code, § 266g.

5. Criminal law ⇐824(1)

Where accused did not request or propose instructions, he could not complain that trial court should have given a quoted instruction.

6. Criminal law ⇐829(1)

Where subject matter of proposed instruction was substantially covered by instructions given, trial court did not err in failing to give proposed instruction.

7. Criminal law ⇐912

Where accused gave immediate notice of appeal from order denying his motion for new trial and his request for transcript was granted, accused had exhausted his remedy and trial court was without authority to entertain accused's second motion for new trial.

8. Criminal law ⇐912

When trial court has denied motion for new trial, accused's right to move for a new trial is exhausted, and the only remedy for the party deeming himself aggrieved is by an appeal from the order, for the trial court is without authority to entertain a subsequent motion to change or vacate its former order.

9. Criminal law ⇐938(1), 1156(3)

A motion for new trial on a claim of "newly discovered evidence" is to be looked upon by the courts with disfavor, and in determining such motion, an enlarged discretionary power is committed to trial court and its ruling thereon will not be disturbed on appeal unless a clear abuse of discretion is manifest.

See Words and Phrases, Permanent Edition, for all other definitions of "Newly Discovered Evidence".

10. Criminal law ⇐938(3)

A motion for new trial on ground of "newly discovered evidence" should be denied where it appears that prior to or during trial the evidence claimed to be newly discovered was known to accused and was then obtainable by him, even though the facts sought to be established would constitute a good defense to the charge.

11. Criminal law ⇐938(3)

Accused's failure to realize the materiality of evidence available to him

prior to commencement of trial did not bring such evidence within the category of "newly discovered evidence" for which new trial might be granted.

12. Criminal law ⇐938(2)

To entitle a party to new trial on ground of "newly discovered evidence", it must appear that the evidence and not merely its materiality is newly discovered.

13. Criminal law ⇐938(1)

Where accused who had been convicted of placing or permitting wife to remain in a house of prostitution claimed that his alleged wife was not his wife because at the time of his marriage to her he had a wife from whom he had not been divorced, invalidity of his marriage to his alleged wife could have been established by evidence showing such facts, and hence accused was not entitled to new trial on ground of "newly discovered evidence" that alleged wife had subsequently secured an annulment of their marriage. Pen.Code § 266g.

14. Marriage ⇐11

It is the fact of existence of an undissolved first marriage to a living spouse at the time of a second marriage that renders the second marriage void, whether or not it is afterwards so judicially decreed, and while a decree of annulment is "prima facie evidence" that the second marriage is void, and relieves party claiming under it from showing the facts upon which it is based, failure to obtain such decree does not affect validity of the second marriage.

See Words and Phrases, Permanent Edition, for all other definitions of "Prima Facie Evidence".

15. Criminal law ⇐1023(13)

Where accused appealed from order denying his first motion for new trial, he was not entitled to appeal from order denying a second motion for new trial.

PETERS, P. J., dissenting in part.

Appeal from Superior Court, Santa Clara County; William F. James, Judge.

Robert Coronado was convicted of placing or permitting his wife to remain in a house of prostitution, and he appeals.

Affirmed.

Elmer D. Jensen, of San Jose, for appellant

Earl Warren, Atty. Gen., and David K. Lener and John F. Hassler, Jr., Deputy Attys. Gen., for respondent.

KNIGHT, Justice.

The appellant was found guilty by a jury of having violated section 266g of the Penal Code, and among the grounds upon which he seeks a reversal is that the evidence is insufficient to support the verdict.

[1, 2] The code section under which he was convicted bears the heading, "Placing or permitting the placing of one's wife in house of prostitution," and it declares as follows: "Every man who, by force, intimidation, threats, persuasion, promises, or any other means, places or leaves * * * his wife in a house of prostitution, or connives at or consents to, or permits, the placing or leaving of his wife in a house of prostitution, or allows or permits her to remain therein, is guilty of a felony * * *; and in all prosecutions under this section a wife is a competent witness against her husband." It will be noted that the section is couched in broad terms and that the numerous acts specified therein as constituting the crime are stated disjunctively. Therefore, proof of the commission of any one or more of those acts is sufficient to warrant a conviction; and in construing said section the Supreme Court has held that to establish a case thereunder it is not essential for the People to go beyond the terms of the section and allege or prove that an accused, in placing or leaving his wife in the house of prostitution, intended that she should devote herself to prostitution, or that she did in fact afterwards become a prostitute; that the law was designed to prevent a man from placing or leaving his wife in a house of prostitution for any purpose, and that he is guilty of the crime denounced by the section even though he places or leaves her there to engage in some useful occupation, such as cook, seamstress, or housemaid. People v. Conness, 150 Cal. 114, 88 P. 821, 824.

[3] The parties here involved were married in Reno, Nevada, on March 5, 1940; and appellant was arrested in San Jose on May 25, 1942, while occupying an apartment with his wife, on East Santa Clara Street. The evidence in the case consisted in part of the testimony given by appellant and his wife, and the following are some of the material facts appearing therefrom: He was a professional

gambler and had been so for several years; and at the time of their marriage she was a prostitute and continued to be such up to within a few days prior to his arrest. He knew at the time of their marriage that she had been making her living as a prostitute, and that thereafter she was continuing to conduct herself as such. Both testified, however, that when they were married she promised him she would thereafter lead a moral life, and that her subsequent immoral conduct was carried on over his protest and against his will. They did not live together continuously following their marriage, but it does not appear from the evidence how much of the time they lived separate and apart, nor when or under what circumstances they left Reno. However, beginning early in March, 1942, or thereabouts, they lived together in a hotel in San Jose for about a month. Most of that time she was ill, but at the end of a month she left the hotel and rented an apartment on East Santa Clara Street, wherein she lived with a soldier for several days, and upon his departure she kept the apartment but became an inmate of a house of prostitution on Berryessa Road, in San Jose. She would leave the apartment every morning between ten o'clock and noon, go out to the resort on Berryessa Road, stay there through the night and return to the apartment around six or seven o'clock in the morning; and the prosecution proved by the testimony of the police officers that during the month of May and prior to the arrest on May 25th the appellant, on four or five occasions, drove his wife from the apartment on East Santa Clara Street out to said resort and left her there. In fact appellant and his wife both testified that he did so on two occasions; and appellant admitted that he knew at the time that the resort was being operated as a house of prostitution. It is quite obvious that the foregoing evidence is legally sufficient to establish a violation of that portion of the code section which makes it a crime for a man to place or leave, or to connive at, consent to or permit the placing or leaving of his wife in a house of prostitution.

Appellant's defense to the charge was based largely upon the testimony given by himself and his wife to the effect that ever since their marriage he had tried repeatedly to induce her to abandon her immoral mode of life, and that on the two occasions he drove out to the house of prostitution and left her there he did not know she had been an inmate thereof. In this connection they testified that when she left the hotel she did not tell him she was going; and that he did not learn of her whereabouts until about a week prior to his arrest, when he discovered she had been living in the apartment on East Santa Clara Street with a soldier; but that he was unaware that she had been or was then an inmate of the resort on Berryessa Road, and he sought a reconciliation; that while this was going on she asked him to drive out to the resort on Berryessa Road, saying that she wanted to get some things that belonged to her from a girl friend, and that in response to such request he drove her out there twice; that on one of the trips he asked her if she "was working there" and she said she was not. It was within a few days thereafter that he was placed under arrest while in her company in her apartment. At that time he had more than $700 in his possession, but they both testified that it was money he had won gambling; and both testified that he had never accepted any money from her under any circumstances.

It is appellant's contention that the testimony so given by himself and wife constituted a complete defense to the charge, and he bases such contention principally on certain language used in deciding the case of People v. Conness, supra, wherein the court in reversing the judgment for refusal to give an instruction stated in substance that the meaning of the word "allow" as used in the latter part of the code section was almost identical with that of the word "permit," which is also there used, and implies some sort of assent, active wish, or at least willingness, in his mind, after he had knowledge of her presence in the bawdy house, that she should remain there; that it implies something more than indifference to her whereabouts, or passive sufferance, in a case where the circumstances do not call upon him to interfere. The above doctrine is doubtless controlling in cases arising under that particular provision of the section which makes it a crime for a man to "allow" or "permit" his wife to remain in a house of prostitution; that is, where she is already there, and after he has knowledge of such fact he does nothing to interfere with her remaining there; but it is apparent that such doctrine can have no application to a case such as we have here, arising under those provisions of the sec-

tion which make it a crime for a man to place or leave his wife in a house of prostitution, or to connive at, consent to or permit the placing of her there. This is made clear by that portion of the decision in the Conness case wherein the court says: "*Where he does not, directly or indirectly, place or leave her in the house, or connive at, consent to, or permit of her going there* (using the word 'permit' in the same sense which we attribute to the word 'allow'), he must, to some extent, be an accomplice in her remaining there after he has knowledge of the fact." The distinction between the two types of cases is also apparent from the following instruction which the court quoted with approval in the later case of People v. Duncan, 22 Cal.App. 430, 134 P. 797, 800: "'The words "allow" or "permit," as used in the statute defining the offense alleged in the information, imply some sort of assent on the part of the husband to his wife's remaining in a house of prostitution. There must be some active wish or at least willingness in his mind after he has knowledge of her presence in the house that she should continue there. *To prove a defendant guilty of violating such statute, it is not necessary to show that he actually placed his wife in a house of prostitution.* It is only necessary to prove that his wife was in a house of prostitution; that he had knowledge of the fact that it was a house of prostitution and of the fact that his wife was in said house; and that after such husband had such knowledge he allowed or permitted her to remain therein.'" (All italics ours.)

[4] In any event, whether appellant connived at or consented to his wife becoming an inmate of the resort on Berryessa Road, or whether even since their marriage he had, as they claimed, tried to dissuade her from following an immoral life, were questions of pure fact for the jury to determine from all the circumstances shown by the evidence. People v. Conness, supra. It was not bound to accept their testimony as true, and there would seem to be substantial reasons for rejecting it. For instance, appellant and his wife testified that only on two occasions had he driven her out to the resort on Berryessa Road; whereas the prosecution proved by the testimony of police officers that he had driven her out there four or five times. Furthermore, on one of those occasions, after leaving his wife at the resort and on his way back to town the officers stopped him and asked him a number of questions, and at the trial he admitted that he gave them false answers. They asked him where he had been, and he replied, "Just going around." His wife's given name was Gayle, and they asked him who "the young lady was he had in the car" and he said just a friend; they asked him her name and he replied "Georgia"; that he did not know her last name, that she had "lots of last names." They asked him if she was "working" for him and he replied that he did not have any girls working for him. They then asked him if he was married, and receiving an affirmative reply, they asked where his wife was, and he replied that she was "visiting friends in the south" but he did not know "who the friends were." There was also testimony given in rebuttal by one of the police officers to the effect that "several years back" appellant "was operating girls" at a place on South First Street, in San Jose, but was told by the police that he would not be allowed to do so.

From the above it will be seen that the state of the evidence is such as to preclude this court from holding as a matter of law that the jury was unwarranted in disbelieving the testimony given by appellant and his wife as to his efforts to reform her. In other words, as said in substance in the Conness case, where there is evidence for the defense that the accused's husband tried in various ways to induce his wife to abandon the immoral life she was leading, the credibility of such evidence is within the exclusive province of the jury.

[5, 6] Also without merit are the contentions urged by appellant with respect to the instructions. The portion of the court's charge quoted in his brief and about which he complains is only part of an instruction which the court gave. The entire instruction as given meets the requirements of the law as laid down in the Conness and Duncan cases, supra. He also quotes another instruction which he argues the court should have given. But at the trial no such instruction was ever requested or proposed by him; in fact, so far as the record shows, he did not request or propose any instructions; that being so, he is not in a position to complain; and besides, it appears that the subject matter of the instruction he now

argues should have been given was substantially covered by one given by the court of its own motion.

At different stages of the case appellant presented and the trial court denied two separate motions for new trial, and at the time of denial of each motion appellant appealed from the order. The sole ground urged for reversal of the order denying his first motion relates to the question of the sufficiency of the evidence; and that question has already been discussed and determined on the appeal from the judgment. The second motion was based on an additional ground, to wit, newly discovered evidence, and in denying the motion the trial court held, first, that the law did not provide for consecutive motions for a new trial, and that since appellant had made one motion therefor which, prior to the presentation of the second motion, had been denied, and an appeal had been taken from the order of denial, he had exhausted his remedy, and the trial court was without legal authority to entertain a second motion; secondly, that in any event, no sufficient showing had been made that the evidence upon which his second motion was based was newly discovered evidence.

[7] The trial court's ruling is fully supported by the law and the facts. The record shows the following: The verdict was rendered on September 1, 1942, and on September 4, defendant moved for a new trial, urging as grounds therefor insufficiency of the evidence and that there was a failure to prove venue. The motion was denied, and appellant gave immediate notice of appeal from the order, requested a transcript, and an order was made granting the request. Also, at the same time, appellant made application for probation, and the cause was continued from week to week, at his request, until October 2, 1942, at which time he presented his second motion for new trial based on the ground of newly discovered evidence. The motion was denied and he then withdrew his application for probation, the reason for the withdrawal being that he had been previously convicted in another state on a charge of burglary. Thereupon sentence was pronounced, and he appealed from the judgment of conviction and the order denying his second motion for new trial.

At the outset of the hearing of the second motion for new trial the prosecution objected to the presentation thereof, and in response to the objection the trial court expressed doubts as to the right of a defendant to make a second motion for a new trial or the authority of a trial court to entertain such; but the court stated that subject to the objection appellant would be permitted to present the motion. Thereupon the motion was heard, and at the conclusion of the hearing the trial court denied the same on the grounds above mentioned, namely, that appellant had exhausted his remedy by a former motion, which was denied; and that no sufficient showing had been made that the evidence upon which the second motion was based was newly discovered evidence.

As to the first ground of denial, the case of People v. Martin, 199 Cal. 240, 248 P. 908, 909, is directly in point. There as here a motion for new trial was made and denied, and the defendant gave immediate notice of appeal from the order; whereupon the court continued the cause for pronouncement of judgment and to entertain an application for probation. At the time set therefor a second motion for new trial was made on an additional ground, supported by affidavits, and the motion was granted. The People appealed, and the order was reversed, the court saying: "There is no statutory or other authority for the presentation or consideration of a second motion for a new trial under the circumstances here shown. There was no showing that the order denying the first motion was entered prematurely or by inadvertence, as was disclosed in Robson v. Superior Court, 171 Cal. 588, 154 P. 8, nor was there any application for relief or showing pursuant to section 473, Code of Civil Procedure, and at the time the second motion was made the time for pronouncement of judgment had not expired. If such a proceeding were sanctioned the results pointed out in Coombs v. Hibberd, 43 Cal. 452, would be apparent, and the time limited within which a motion for a new trial might be made would be enlarged, and new trial proceedings would become interminable. See, also, People v. Center, 61 Cal. 191; Odd Fellows' Sav. Bank v. Deuprey, 66 Cal. 168, 4 P. 1173; Dorland v. Cunningham, 66 Cal. 484, 6 P. 135; Carpenter v. Superior Court, 75 Cal. 596, 19 P. 174; Holtum v. Greif, 144 Cal. 521, 78 P. 11. While the cases cited involved new trial proceedings in civil cases no authority has been noted which prescribes a different rule in criminal cases. Furthermore, an order denying a motion for a new

trial in a criminal case is an appealable order. Pen.Code, § 1237. The appeal from the order denying the first motion was announced in open court by the defendants immediately after the denial of the motion and prior to the pronouncement of judgment. Pen.Code, § 1182. Assuming that the said appeal was not premature, it would follow that said new trial proceedings were removed from the jurisdiction of the trial court by the taking of the appeal. This would afford an additional reason why the court could not thereafter, under the facts here shown, reconsider the same or a similar motion and enter an order thereon."

[8] In a later case, People v. Paysen, 123 Cal.App. 396, 11 P.2d 431, 432, the court said: "* * * it is well settled in this state that, when the trial court has made its order denying a motion for a new trial, 'the right to move for a new trial had thus been exercised and exhausted.' People v. Ingersoll, 21 Cal.App. 763, 132 P. 1052, 1053. See, also, People v. Martin, 199 Cal. 240, 248 P. 908; People v. Prudencio, 93 Cal.App. 241, 269 P. 698; People v. Walker, 142 Cal. 90, 75 P. 658; People v. Center, 61 Cal. 191; People v. Sing Lum, 61 Cal. 538; People v. Fice, 97 Cal. 459, 32 P. 531; People v. Wessel, 98 Cal. 352, 33 P. 216. Once a motion for a new trial has been ruled upon in a criminal case and an order made either granting or denying such application, the only remedy for the party deeming himself aggrieved is by an appeal from such order, for the court is without authority to entertain a subsequent motion the object of which is to change or vacate its former order."

[9, 10] With respect to the second ground of denial, it has often been declared in the decisions that a motion for a new trial based upon a claim of newly discovered evidence is to be looked upon by the courts with distrust and disfavor. People v. Yeager, 194 Cal. 452, 229 P. 40; People v. Oliver, 60 Cal.App. 693, 214 P. 272; 8 Cal.Jur. p. 427. For that reason it is held that in determining such a motion an enlarged discretionary power is committed to a trial court, and that its ruling will not be disturbed on appeal unless it is a case manifesting a clear and unmistakable abuse of discretion. 8 Cal.Jur. p. 442. Furthermore it is well settled that such a motion should be denied where it appears that prior to or during the trial the evidence claimed to be newly discovered was known to the defendant and was then obtainable by him (8 Cal.Jur. p. 428; see also cases cited in 4 Cal.Jur. 10-Yr. Supp. p. 752); and this is so even though the facts sought to be established thereby would constitute a good defense to the charge. People v. Kelly, 32 Cal.App.2d 624, 90 P.2d 605, 607.

[11, 12] In the present case the affidavits made by appellant and his counsel, upon which the motion was based, were sworn to on October 1, 1942, the day prior to the date set for the pronouncement of sentence. Appellant's affidavit was to the effect that he had "discovered" that Gayle Coronado "was in truth and in fact not his wife"; that such "discovery" was made for the first time subsequent to the trial and the denial of his first motion for new trial; and that on September 30, 1942, she had secured a decree annulling their marriage, wherein it was declared that said marriage was void from the beginning. In the affidavit made by appellant's counsel it was merely averred that on September 30, 1942, he learned for the first time that the marriage was void, when he was informed by Gayle Coronado's attorney that a decree of annulment had on that day been granted. However, it appears from the proceedings had at the hearing of the motion on October 2, 1942, including the statements and admissions made by appellant in open court at that time, that prior to the commencement of the trial and throughout its progress appellant had personal knowledge of all the facts and circumstances upon which he was basing his claim that Gayle Coronado was not his wife, and that at all times prior to the commencement of the trial and during its progress the evidence relating to those facts and circumstances was available to him and could have been produced at the trial had he chosen to do so. It is apparent from the nature of the evidence that had he done so it would have tended to show that he was a bigamist. However, admittedly he made no attempt to introduce any evidence of any kind relating to his marital status, the only excuse offered by him for not having done so being that he did not "realize the legal significance of that knowledge." Even assuming that to be true, failure to realize the materiality of evidence does not bring it within the category of "newly discovered" evidence. A similar situation was presented in People v. Kelly, supra, and the court there said: "The facts narrated in the affidavit do not constitute new evidence

which would entitle the defendant to a new trial. To entitle a party to a new trial on the ground of newly discovered evidence, it must appear that the evidence and not merely its materiality be newly discovered." (Citing cases.)

[13, 14] Appellant seems to contend that prior to the rendition of the decree of annulment it was legally impossible for him to establish that Gayle Coronado was not his wife. But such is not the law, for if as he claimed she was not his wife because at the time of his marriage to her he had a wife living from whom he had not been divorced, the invalidity of his marriage to Gayle could have been established by evidence showing those facts, regardless of whether a decree of annulment was ever obtained. See People v. Duncan, supra, in commenting on People v. Mock Yick Gar, 14 Cal.App. 334, 111 P. 1039. In other words, it appears from the proceedings had at the time of the hearing of the second motion that several months after his marriage to Gayle his lawful wife obtained a divorce from him in the court in which he was then being tried; and that he not only had actual knowledge of that divorce proceeding, but actively participated therein by filing certain waivers and stipulations. Obviously, therefore, he could have established the illegality of his marriage to Gayle at the trial of the present action by his own testimony or by introducing in evidence the decree of divorce, or both. Stated another way, it is the fact of the existence of the undissolved first marriage at the time the second marriage is contracted that renders the second marriage void, whether or not it is afterwards so judicially decreed; and while a decree of annulment is in itself prima facie evidence that the second marriage is void, and relieves a party claiming under it from showing the facts upon which it is based, the failure to obtain such a decree does not have any effect whatever upon the validity of the second marriage. It is nevertheless void from the beginning, and the decree of annulment is merely a judicial declaration to that effect. Here, as stated, appellant at all times prior to the commencement of the trial had personal knowledge of the facts and conditions relating to his marital status, but instead of taking advantage of them he admitted throughout the trial that Gayle Coronado was his wife, and never intimated otherwise. Therefore, having submitted the question of his guilt to the jury without disclosing the evidence relating to his marital status, the law will not permit him after the verdict has been rendered against him to have the verdict set aside so as to afford him a second opportunity to submit such evidence to a jury.

[15] In any event, it is unimportant so far as we are here concerned whether it be held that the evidence relied upon by appellant as the basis for the second motion was or was not newly discovered evidence, for the reason that under the authorities above cited the trial court was without jurisdiction to entertain the second motion. Furthermore the statute does not provide for more than one appeal from the action of a trial court denying a new trial; consequently, appellant having appealed from the order denying his first motion, he was not entitled to an appeal from the order denying his second motion.

For the reasons stated it is our conclusion that the appeal from the order denying the second motion for new trial should be dismissed, and that the judgment of conviction and the order denying the first motion for new trial should be affirmed. It is so ordered.

WARD, J., concurred.

PETERS, Presiding Justice (dissenting in part).

I concur and dissent.

This case presents a most peculiar situation. The appellant is charged with "placing" or "permitting the placing" of his "wife" in a house of prostitution. The evidence produced at the trial supports the implied finding of the jury that appellant committed the offense charged, in the sense that he permitted the placing in such a house of the woman to whom he had been married, and with whom he was living. But, after verdict, and before sentence, a judicial annulment of respondent's marriage to that woman was secured on the ground that he was lawfully married to another when he married the woman in question. The first wife had secured a divorce from defendant subsequent to his second marriage. The record shows that the same judge who presided at the criminal trial granted the annulment, and, further, that the prosecuting officials knew of the pending annulment proceedings. No contention is made, nor is it even suggested, that the annulment was secured improperly.

In other words, had the facts upon which the annulment was secured been disclosed at the criminal trial, appellant could not have been convicted lawfully of the offense of which he now stands convicted. We now know, as a matter of law, by virtue of the unchallenged annulment decree, that appellant did not commit the offense of which he stands convicted.

I agree that, under the circumstances here inclosed, the second motion for a new trial was improper. The trial court had exhausted its jurisdiction over such a motion when it ruled on the first such motion and an appeal was taken therefrom. For that reason, the appeal from the second order denying the motion must be dismissed.

So far, I agree with the majority opinion. But that opinion does not stop there. It goes on to hold that, on its merits, the second motion did not present a proper case for granting the motion for a new trial on the ground of newly discovered evidence. That holding, in my opinion, is sound. While it is true that litigants should not be permitted to sit back and allow a court to go on with the trial and to take their chances with a jury, and then, after they have lost that gamble come forward with the claim of newly discovered evidence to secure a new trial when they knew of the existence of such evidence during their trial, and while I agree that, normally, knowledge of the existence of facts without realization of their legal significance is sufficient ground to deny the motion, this is not an ordinary case. The present case is not one where the facts, if relied upon during the trial, would depend for their effectiveness on the credibility of witnesses. Here, it has been conclusively established by a judicial decree as a matter of law that appellant is not guilty of the offense charged. Under such circumstances, where the alleged "newly" discovered evidence is of such a nature that as a matter of law it demonstrates the impropriety of the conviction, it is my opinion that if a proper motion for a new trial is made, it should be granted. If this is not the law, it means that the trial court, while still possessing jurisdiction, is impotent to correct a situation where it knows, as a matter of law, that a convicted defendant is innocent of the charges upon which he has been convicted. I am not willing to agree that trial courts lack the power to correct such an injustice.

The difficulty in the instant case is, that the trial court had no jurisdiction to consider the second motion for a new trial, and this court cannot consider matters which appear only in proceedings on a void motion. It is not even intimated that the prosecuting officials connived in preventing the production of the evidence. Orderly administration of criminal procedure requires the defendant to urge his defenses, if any, in the manner provided by law. Not having done so, redress for any miscarriage of justice, if any occurred, must be had from the executive under his pardoning power.



57 Cal.App.2d 926

SUNSERI v. DIME TAXI CORPORATION et al.

Civ. 13710.

District Court of Appeal, Second District, Division 3, California.

March 31, 1943.

Hearing Denied May 27, 1943.

1. Trial ⇐343

Where evidence was in conflict as to position of pedestrian when struck by taxicab making left turn into private driveway across sidewalk and verdict was in favor of taxicab owners, it was not necessarily an implied finding of jury that pedestrian was on driveway or sidewalk when struck so as to be entitled to whatever right of way should be accorded a pedestrian in such position. Vehicle Code, §§ 551, 553, St.1935, pp. 186, 187.

2. Automobiles ⇐167(2)

Automobile driver in making a left turn into private driveway across sidewalk is required to take such precautions as a reasonably prudent person would take under the circumstances reasonably appearing to him at the time, and is not required to know in advance that such movement of the automobile can be made in safety.

3. Automobiles ⇐245(6, 55, 72)

In action for injuries sustained by pedestrian when struck by taxicab making left turn into private driveway across side-

walk, whether taxicab owners were guilty of negligence proximately causing injury and whether pedestrian was guilty of contributory negligence were questions for jury under conflicting evidence.

4. Trial ⇐143

Where there were substantial conflicts between evidence offered by plaintiff and that offered by defendants, and between statements of various witnesses called in behalf of plaintiff, the weight to be given to the evidence was within the province of jury.

5. Appeal and error ⇐1001(1)

Reviewing court will not disturb a verdict on the ground that it is not supported by sufficient evidence, if there is substantial evidence to support the verdict.

6. Judgment ⇐199(3)

To warrant conclusion as matter of law notwithstanding verdict for defendants, that defendants were negligent and that plaintiff was not contributorily negligent the evidence must be such that there is no substantial conflict as to the facts, and the facts must be such that reasonable persons can draw only the inference that defendants were negligent and that plaintiff was not contributorily negligent.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Frank Sunseri against Dime Taxi Corporation and others for personal injuries sustained by plaintiff as a result of being struck by a taxicab operated by defendants. Verdict and judgment for defendants, and plaintiff appeals.

Judgment affirmed.

John J. Craig and James J. McCarthy, both of Los Angeles, for appellant.

Reginald I. Bauder, of Los Angeles, for respondents.

PARKER WOOD, Justice.

Plaintiff appeals from a judgment in favor of defendants, rendered upon a verdict, in an action for damages for personal injuries sustained by plaintiff, a pedestrian, as a result of being struck by a taxicab operated by defendants.

There are two defendants in this action, the Dime Taxi Corporation, a corporation, and F. J. Burns, owners of the taxicab. The taxicab driver was not included as a defendant in the amended complaint.

Plaintiff contends the evidence was insufficient to justify the verdict.

The following facts were uncontradicted: At the time of the accident, on March 1, 1941, about 11 p.m., the plaintiff, his wife, sister and brother-in-law intended to go to a bowling alley at 7113 Pacific Boulevard, Huntington Park. It was not raining at the time of the accident, but it had been raining during that day and water covering a space about 4 feet in width was running in the street gutter next to the curb in front of the bowling alley. They went in an automobile, operated by plaintiff, into a driveway near that address and stopped at a place in the driveway where it crossed a public sidewalk. All of the occupants of the automobile except plaintiff alighted therefrom at the place where it stopped on the sidewalk. Plaintiff then backed the automobile into the street and parked it at the curb. While he was returning to the place where his passengers had alighted, he was struck by defendants' taxicab. Pacific Boulevard was about 100 feet wide and extended north and south. The bowling alley was on the west side of the boulevard. Street car tracks were on each side, and near the center, of Pacific Boulevard. An employee of defendants, who was driving defendants' taxicab in a northerly direction on Pacific Boulevard east of the center of the boulevard, turned the taxicab to the left and proceeded west toward the driveway south of the bowling alley. Several cars were parked at the west curb of Pacific Boulevard in the vicinity of the bowling alley. The street and driveway were well lighted and the windshield of the taxicab was clear. Adjoining the bowling alley building on the south side there were three business buildings. South of those buildings there was a driveway to a parking lot in the rear of those buildings. The driveway was about the width of an automobile, and was a continuation of a driveway that commenced at the west curb of Pacific Boulevard and extended across the public sidewalk which was in front of said buildings. In other words, there was a driveway, south of the bowling alley, extending east and west from Pacific Boulevard across the public sidewalk into a parking lot at the rear of the bowling alley and the other buildings. The defendants had a taxicab parking station in the parking lot.

Adjoining the bowling alley building on the north side there was a business building. North of that building there was another driveway. The fronts of the buildings referred to were about equi-distant from the street curb. The public sidewalk, which was cement, extended from the fronts of the buildings to the street curb.

Plaintiff testified in substance as follows: Plaintiff backed the automobile out of the driveway and parked it at an angle to the curb (which was the proper way to park at that place), in the first parking space north of and about 4 feet from that driveway. As parked, the left front door of the automobile was farther from the curb than the right front door. In order to avoid stepping in the water in the gutter, plaintiff alighted from the left front door, walked on his tiptoes in the street next to the water in the gutter, in a southerly direction toward the driveway, looking for a place to cross over the water and go upon the sidewalk. While walking toward the driveway, he was conversing with his brother-in-law, LoPorto, and "exchanging words" with his wife and sister who had started to walk north toward the bowling alley. He could not see down the street; he "just didn't look." He could see down one side of the street but he "just wasn't looking down there at all." He saw a big open space and cars toward Florence Avenue (which was south of the bowling alley). He did not look to see whether there were any northbound cars in the vicinity of the driveway. He paid no attention as to whether there were any northbound cars in the vicinity of that driveway. He looked but did not see any cars. He looked while he was facing south but did not see any car coming toward him. At the entrance of the driveway, he stepped over the water onto the driveway in one step, and then onto the sidewalk in another step. When he stepped on the sidewalk, he was struck from the rear by defendants' taxicab. He was struck below his knees while in the act of taking his second step. He had one foot on the sloping part of the driveway and one foot on the level part of the sidewalk when he was struck. He was on the flat portion of the sidewalk when he was struck. He stepped over the water, not into it, but his toes "just about touched the water." He did not jump, but stepped into the water about 1 foot and then stepped a "good 3 feet" over it onto the driveway. He fell on his arms and rolled over westerly when he was hit. He was knocked flat on the sidewalk and was under the taxicab up to his hips, but the taxicab backed up immediately. He was stunned when he was struck, but when he came to and "turned around and looked," the bumper of the taxicab was close to the curbline. He had no discussion with any one at the scene of the accident, but he heard a few mumbling words after he came to, to the effect that he was hit when he was in the street and was knocked 50 feet upon the sidewalk.

Plaintiff's brother-in-law, LoPorto, testified in substance as follows: He saw plaintiff park his car and walk back about 5 feet to the driveway. He did not remember whether plaintiff looked in the direction from which the taxicab was coming, but he (LoPorto) saw the cab make the left turn on the street car tracks in the middle of the street just as plaintiff was stepping over the water. He watched it come toward plaintiff, who was facing LoPorto (LoPorto was on the sidewalk, facing the street). When he first saw the taxicab it was in the middle of the street, and plaintiff was on the sidewalk. He first saw the taxicab when it was "running into the driveway" and plaintiff was "laid down on the sidewalk." He first saw the taxicab when it was "back about 5 feet," after he saw plaintiff. He first saw the taxicab when its lights came toward him. He first saw the taxicab when it was facing north and it "all at once" turned to the west. The only thing he remembered was when the taxicab struck plaintiff and then backed up. He had no conversation with the police officers at the scene of the accident, and he did not tell them that plaintiff had attempted to jump over the water. He called the officers' attention to plaintiff's clothes, which were all dry except the toe of his shoe. The taxicab driver told the officers he knocked plaintiff 50 feet, and he (the taxicab driver) told the witness he hit plaintiff in the street.

Plaintiff's sister testified in substance as follows: She and plaintiff's wife had started to walk on the sidewalk toward the entrance to the bowling alley (which was in a northerly direction from the driveway), and that plaintiff was on the sidewalk when she first saw him after he had parked his automobile. She saw him take "not more than" one step, and she then turned her head toward Mrs. Sunseri and heard a crash. She turned around and saw plaintiff lying on the sidewalk with the

taxicab "almost on top" of him and then the taxicab backed away about 2½ feet.

Plaintiff's wife testified in substance the same as his sister, except as follows: She saw plaintiff step over the water. She was facing north at the time of the accident. She recalled no conversation at the scene of the accident as to whether plaintiff stepped or jumped over the water.

A police officer who, according to testimony of the taxicab driver, arrived at the scene about 10 minutes after the accident, testified in substance as follows: Plaintiff was sitting in the center of the driveway, which was south of the bowling alley, when they arrived. There was another driveway north of the driveway where plaintiff was sitting, and plaintiff's automobile was parked in the first space north of this north driveway, (not north of the south driveway as plaintiff testified), a distance of approximately 29 feet from where plaintiff was when the witness arrived. He discussed the accident with plaintiff and LoPorto. Plaintiff told him he jumped over the puddle of water at the time of the accident. He found plaintiff's clothes were dry when he examined them at the hospital.

Another police officer, who arrived at the scene with the preceeding witness, testified in substance as follows: He had taken notes at the scene of the accident and had refreshed his memory therefrom. Plaintiff was sitting in the driveway when the witness arrived. LoPorto told him plaintiff was attempting to jump across the stream of water in the gutter and was hit by the taxicab. He measured the distance from plaintiff's parked automobile to where plaintiff was sitting in the south driveway and the distance was 28 feet. He talked with the driver at the scene of the accident but did not hear him, or any one else, say he struck plaintiff and knocked him 50 feet. He measured the red zone south of the south driveway and it was 9 feet in length.

The taxicab driver testified in substance as follows: He was traveling north on Pacific Boulevard, stopped for southbound traffic and then proceeded to complete a left turn into the driveway. He was traveling about 6 or 8 miles an hour when he turned toward the driveway and, although he looked, he saw no one. The first he knew of the accident was when he felt a "thump" and saw plaintiff's head above the hood of the taxicab. The impact put plaintiff in a sitting position on the right side of the front bumper. He applied the brakes and stopped immediately, at which time plaintiff rolled forward in a westerly direction onto the incline of the driveway. He stopped the taxicab at the curb, with the front wheels in the water, and he did not move the cab from that place before the police officers arrived. The taxicab had not started up the elevation of the driveway. While he was going to the place in front of the taxicab where plaintiff was, he noticed plaintiff's three companions strolling in a northerly direction. Plaintiff "hollered" and they rushed back to the scene of the accident. He did not tell any one he hit plaintiff and knocked him 50 feet.

[1] Plaintiff asserts that the driver of an automobile who intends to make a left turn between intersections and enter a private driveway must yield the right of way to a pedestrian who is on the private driveway. In support of that contention he cites sections 551 and 553 of the Vehicle Code, St.1935, pp. 186, 187. Section 551 provides that a driver who intends to make a left turn within an intersection is required to yield the right of way to a vehicle within the intersection approaching from the opposite direction. Section 553 provides that a driver who intends to enter a highway from a private driveway is required to yield the right of way to vehicles approaching on the highway. His argument is that since a driver who intends to make a left turn within an intersection, or enter a highway from a private driveway, is required to yield the right of way under the circumstances referred to in said sections of the Vehicle Code, therefore, "logically," a driver who intends to make a left turn between intersections and enter a private driveway is required to yield the right of way to a pedestrian who is on the driveway. It is not necessary, in this case, to determine the legal sufficiency of that assertion. That assertion, as it relates to this case, assumes it to be a fact that plaintiff was on the driveway when he was struck. The facts were determined by a jury and the verdict was for the defendants. It was not necessarily an implied finding of the jury that plaintiff was on the driveway or sidewalk when he was struck. There was testimony by the taxicab driver that the taxicab stopped at the curb, had not started up the elevation of the driveway, and its front wheels were in the water, when the taxicab stopped after it had

struck plaintiff. Plaintiff gave conflicting testimony concerning, among other things, his actions in crossing the water in the gutter. On one occasion, he said he stepped over the water and onto the driveway in one step, but did not step in the water. On another occasion, he said he stepped in the water at a place about 1 foot from the street side of the water and then stepped a "good 3 feet" over it onto the driveway. His brother-in-law made inconsistent statements concerning the place where the taxicab was when he first saw it. Some of the different places where the taxicab was when he first saw it, according to his testimony, were as follows: (1) in the middle of the street and facing north when plaintiff was stepping over the water; (2) "running into the driveway"; (3) "back about 5 feet" after he saw plaintiff; (4) when its lights came toward him (the witness); and (5) when it was facing north and it "all at once" turned to the west. The evidence was sufficient to justify a finding of fact that plaintiff was not on the driveway when he was struck.

[2] Plaintiff asserts further that "defendant had the duty, before he drove into the private driveway which intersected the sidewalk, to make the turn only when he had ascertained that the driveway was clear, and that no pedestrians were using said driveway and sidewalk." This contention is that the taxicab driver was required to know before making the turn that his contemplated movement of the taxicab could be made in safety. An automobile driver is not required to know that such a movement of an automobile can be made in safety. The requirement is that the driver take the precautions which a reasonably prudent person would take under the circumstances reasonably appearing to him at the time. Spear v. Leuenberger, 1941, 44 Cal.App.2d 236, 247, 112 P.2d 43. This requirement is recognized by plaintiff in his brief wherein he states: "The defendant should not have turned his vehicle into the driveway unless such movement could be made with *reasonable* safety * * *." (Italics added.) This further assertion of plaintiff, relative to the duty of the driver before going upon the driveway, is also based upon the erroneous assumption that it was necessarily an implied finding of the jury that plaintiff was on the driveway.

[3] The plaintiff and defendants were required to exercise ordinary care. Whether the defendants were guilty of negligence which proximately caused the injury, and whether the plaintiff was guilty of negligence which contributed proximately to the injury, were questions of fact to be determined by the jury. The jury had the benefit of the personal observation of the witnesses.

[4] There were substantial conflicts between the evidence offered by plaintiff and that offered by defendants. Also there were conflicting statements in the testimony of the witnesses called in behalf of plaintiff, which related to: whether plaintiff looked or did not look for moving automobiles; plaintiff's manner of crossing the water; where plaintiff was when he was struck; and where the taxicab was when plaintiff's brother-in-law first saw it. It was within the province of the jury to determine what weight should be given to the evidence.

[5] Upon an appeal in which it is contended that the evidence was insufficient to support the verdict, the reviewing court is not empowered to disturb the verdict if there was substantial evidence to support the verdict. Crawford v. Southern Pac. Co., 1935, 3 Cal.2d 427, 429, 45 P.2d 183.

[6] Plaintiff contends that it should be concluded as a matter of law, against the verdict of the jury, that defendants were guilty of negligence and the plaintiff was not guilty of contributory negligence. To make that conclusion the evidence must be such that there is no substantial conflict as to the facts, and from the facts reasonable persons can draw only the inference that defendants were negligent and plaintiff was not contributively negligent. Crawford v. Southern Pacific Co., supra, 1935, 3 Cal.2d 427, 429, 45 P.2d 183. The conflicts in the evidence in this action preclude the drawing of that inference and conclusion.

The judgment is affirmed.

SHINN, Acting P. J., and BISHOP, J. pro tem., concur.

Hearing denied; CARTER, J., dissenting.

STANDARD PIPE & SUPPLY CO. v. RED ROCK CO., Inc., et al.

Civ. 3052.

District Court of Appeal, Fourth District, California.

March 30, 1943.

Hearing Denied May 27, 1943.

1. Constitutional law ⇐33

Constitutional provision for mechanics', materialmen's and laborers' liens, though it creates a right, is not "self-executing" and is inoperative without legislation providing for enforcement of such right. Const. art. 20, § 15.

See Words and Phrases, Permanent Edition, for all other definitions of "Self-Executing Provision".

2. Mines and minerals ⇐36

Drilling for oil on the federal domain is regarded as a "placer mining" operation governed by federal laws applicable thereto. 30 U.S.C.A. §§ 101 note, 181 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Placer Mining".

3. Mines and minerals ⇐48

In California, oil is recognized as a "mineral" and drilling therefor is classified as a "placer mining" operation, although not coming within the technical definition of "mining" as used in statute pertaining to recording of conditional sales contracts of equipment used for mining purposes. Civ.Code, § 2980.

See Words and Phrases, Permanent Edition, for all other definitions of "Mineral" and "Mining".

4. Evidence ⇐34

Court would take judicial notice that no patent based upon mining claims could have been issued for entire tract of 1270 acres as to which there was no allegation that title was acquired under mining laws or for the 630 acres on which a lien was claimed for materials used in drilling for oil so as to characterize claimed lien as a lien upon mining claim. Code Civ.Proc. § 1183; Const. art. 20, § 15; 30 U.S.C.A. § 181 et seq.

5. Mines and minerals ⇐114½

A lien for labor or materials used in developing or working a mine on land title to which was acquired through mining claims attaches to all of a group of claims worked together as a mine, so that no question arises as to quantity of surrounding land necessary for convenient use and occupation of the mine. Code Civ.Proc. § 1183; Const. art. 20, § 15; 30 U.S.C.A. § 181 et seq.

6. Mines and minerals ⇐114

A claim of lien for labor or materials used in developing a mining claim is invalid if it does not claim a lien on all the property worked together as a mine. Code Civ.Proc. § 1183; Const. art. 20, § 15; 30 U.S.C.A. § 181 et seq.

7. Mines and minerals ⇐117

Where it was not alleged, proved, and found that 1,270-acre tract leased for the purpose of drilling for oil was a mining claim or group of mining claims, a lien claimed on 630 acres thereof for equipment and materials used in drilling a dry oil well was valid only as a lien for materials used in "placer mining" operations on agricultural lands, and could not be enforced without proof and finding as to the portion of land necessary for convenient use of the dry well. Code Civ.Proc. §§ 1183, 1185; Const. art. 20, § 15; 30 U.S.C.A. § 181 et seq.

8. Mines and minerals ⇐112(3)

One who furnishes materials used in drilling a dry oil well on agricultural land is entitled to a "lien" for such materials on the dry well together with a convenient space about it or so much as may be required for convenient use and occupation thereof to be determined by the court in rendering judgment. Code Civ.Proc. § 1185.

See Words and Phrases, Permanent Edition, for all other definitions of "Lien".

9. Payment ⇐46(2)

Ordinarily payments on account with materialman made during progress of well drilling operations should be credited against the first items of the account where some items are lienable and some are not.

Appeal from Superior Court, Kern County; William L. Bradshaw, Judge.

Action by the Standard Pipe & Supply Company against Red Rock Company, Inc., and Lida E. and Conrad C. Crookshank to foreclose a lien on realty for materials and equipment furnished by plaintiff and used

by first-named defendant in drilling an oil well on land leased from the Crookshanks. From a judgment directing foreclosure of the lien, Lida E. and Conrad C. Crookshank appeal.

Judgment reversed.

R. M. Crookshank, of Santa Ana, and Calvin H. Conron, Jr., of Bakersfield, for appellants.

Raphael Dechter and B. L. Hoyt, both of Los Angeles, for respondent.

MARKS, Justice.

This is an appeal by Lida E. and Conrad C. Crookshank from a judgment directing the foreclosure of a lien upon 630 acres of land in Kern County. We will hereafter refer to them as the defendants. The lien was claimed because plaintiff had furnished equipment and materials used in drilling a wildcat oil well. The well failed to produce.

Lida E. and Conrad C. Crookshank were the owners of all of Section 13, except ten acres thereof, in Township 30 South, Range 37 East, and all of Section 19 in Township 30 South, Range 38 East, M. D. B. & M. in Kern County. Under date of February 15, 1940, they leased all of the property to J. E. Johnson for the purpose of drilling for oil. Johnson's interest passed to the Red Rock Company, Inc., which started drilling in July, 1940, and stopped on September 27, 1940.

Plaintiff rented drilling equipment to the Red Rock Company, Inc., and sold it materials which were used in the drilling operations. The total rental and sales value of the equipment and materials was $8,004.11, including some charges for telephone calls which were admittedly not lienable. Plaintiff was paid $1,722.99 on account, leaving an unpaid balance of $6,281.12. A claim of lien on section 13 for that amount was filed. This action was brought to foreclose that lien.

At the trial it was admitted that the charges for rental of the equipment after the drilling had stopped, and charges for telephone calls made in an endeavor to collect the balance due, were not lienable items. Danaldson v. Orchard Crude Oil Co., 6 Cal.App. 641, 92 P. 1046. Judgment was rendered against the Red Rock Company, Inc., for $6,281.12, and $1.50, costs of verifying and recording the lien, and a lien for the sum of $3,078.05 was decreed foreclosed on the 630 acres of land in section 13.

Defendants Crookshank have appealed from the judgment. They urge two grounds for its reversal: (1) That it was improper to declare a lien on the whole 630 acres of land, and, (2) that as $1,722.99 had been paid plaintiff in July, 1940, during the progress of the drilling operations, the lienable debt should have been reduced by that amount.

The first question does not seem to have been clearly decided in California under the lien law now in effect. It will be helpful to review the progress of the lien law appearing in sections 1183 and 1185 of the Code of Civil Procedure through the various amendments material here.

[1] Section 15 of article XX of the state Constitution provides for mechanics', materialmen's and laborers' liens. It is settled that while this section creates a right, it is not self-executing and is inoperative without legislation providing for the enforcement of that right.

Section 1183 of the Code of Civil Procedure, adopted in 1872, gave materialmen and laborers furnishing material used in the construction, alteration or repair of any tunnel or mining claim, liens not exceeding in the aggregate an amount which the owner of the property would otherwise be liable to pay.

The first amendment important here was adopted in 1885, Stats.1885, p. 143 by adding to the section, "and any person who performs labor in any mining claim or claims, has a lien upon the same, and the works owned and used by the owners for reducing the ores from such mining claim or claims, for the work or labor done, or materials furnished by each respectively. * * *" The quoted clause was again amended in 1903, Stats.1903, p. 84, to read as follows: "And any person who performs labor in any mining claim or claims, or in or upon any real property worked as a mine * * * has a lien upon the same, and the works owned and used by the owners for reducing the ores from such mining claim or claims, or real property so worked as a mine, for the work or labor done or materials furnished by each respectively * * *."

Other amendments do not materially affect the question before us. The material part of the section now reads: "Any per-

son who performs labor in any mining claim or claims, or in or upon any real property worked as a mine, either in the development thereof or in working thereon by the subtractive process or furnishes materials to be used or consumed therein, has a lien upon the same and the works owned and used by the owners for milling or reducing the ores from the same, for the value of the work or labor done or materials furnished by each respectively, whether done or furnished at the instance of the owner of such mining claim or claims or real property worked as a mine, or his agent * * *."

Section 1185 of the Code of Civil Procedure was first adopted in 1872. None of its several amendments materially affect the question before us. It now reads: "The land upon which any building, improvement, well or structure is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, to be determined by the court on rendering judgment, is also subject to the lien, if at the commencement of the work, or of the furnishing of the material for the same, the land belonged to the person who caused said building, improvement, well or structure to be constructed, altered or repaired, but if such person owned less than fee-simple estate in such land, then only his interest therein is subject to such lien, except as provided in section 1192 of this code."

Originally the law provided for liens upon two different kinds of property which were classified by the process of obtaining title. One was upon mining claims as they are technically described in the federal and state laws where possessory rights or title are obtained by discovery of minerals and location under the mining laws. The other was upon other classes of property where title is obtained by means other than under the mining laws. While in Berentz v. Belmont Oil Mining Co., 148 Cal. 577, 84 P. 47, 113 Am.St.Rep. 308, it was held technically incorrect to refer to classes of liens, depending on the manner of obtaining title or possessory rights, we find that mode of expression convenient and will use it here. We will refer to liens on agricultural lands as meaning liens on lands not acquired under the mining laws, and to liens on mining claims as meaning liens on mineral lands acquired by mineral location under the mining laws.

Originally there were but two classes of liens in California. They were liens on agricultural lands and liens on mining claims. In describing the lienable lands in the two classifications in California Corrugated C. Co. v. Stewart, 215 Cal. 120, 8 P.2d 1013, 1014, it was said:

"The Mechanics' Lien Law provides for two distinct categories of liens. They are, first, liens for labor and materials employed or used in the construction of 'any building, wharf, bridge, ditch, flume, acqueduct, well,' etc., and, secondly liens for labor and materials employed and used on mining claims. Section 1183, Code Civ.Proc. Section 1185 of the same Code provides that 'the land upon which any building, improvement, well or structure is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, to be determined by the court on rendering judgment, is also subject to the lien.' In construing section 1185, it has been held uniformly with reference to the second category that, when the labor and materials are employed and used on a mining claim the mechanic's lien covers the entire mining claim. Williams v. Mountaineer G. M. Co., 102 Cal. 134, 34 P. 702, 36 P. 388; Berentz v. Belmont Oil Min. Co., 148 Cal. 577, 84 P. 47, 113 Am.St.Rep. 308. In such cases no question of fact as to the extent of land required for the convenient use and occupation of structure or improvement is presented. As a matter of law, the entire mining claim is subject to the lien.

"In connection with the first category of liens, when the land upon which the structure or improvement rests is a part of a larger parcel, a question of fact is presented as to what portion, if any, of such larger parcel is required for the convenient use and occupation of the structure or improvement. Western Well Works v. California F. Co., 60 Cal.App. 749, 214 P. 491. This question of fact must be determined by the court upon the trial of the case." We can find no deviation from these rules as applied to the two classes of liens.

In 1903 a third type of lien was recognized by the statute. This was "in or upon any real property worked as a mine." Insofar as this language of the statute is concerned it would seem that this provision would permit liens on agricultural lands worked as a mine as well as upon mining claims as they are technically known. As the law, prior to the amendment, clearly

provided for liens upon mining claims, and as some decisions seem to have held that the portion of agricultural lands which was worked as a mine was subject to a lien, and at least one other had held that it was not, the amendment would seem to have had as its purpose the clarification of the law so that laborers working on a mine located on agricultural lands could have a laborer's lien upon at least a portion of it to the value of the labor performed. See Williams v. Santa Clara Mining Ass'n, 66 Cal. 193, 5 P. 85; Bewick v. Muir, 83 Cal. 368, 23 P. 389; Morse v. De Ardo, 107 Cal. 622, 40 P. 1018. The judgment in the last cited case was explained in Berentz v. Belmont Oil Mining Co., supra [148 Cal. 577, 84 P. 49, 113 Am. St.Rep. 308], as follows: "* * * but it was not there decided that ground actually worked as a mine within a larger tract of agricultural land was not subject to a lien as such. The judgment of the lower court decreeing a lien upon 26 out of 160 acres of land including the mining works was reversed for want of a finding that the smaller tract was a mining claim."

[2, 3] Commencing in 1897 (Act Feb. 11, 1897, ch. 216, 29 Stats. 526, 30 U.S.C.A. § 101 note), Congress provided that the acquisition and sale of oil lands forming part of the public domain should be governed by the federal laws applicable to the location and sale of placer mining claims. Since that time, and, down to the passage of the Leasing and Prospecting Act, 30 U.S.C.A. § 181, et seq. the location and transfer of federal oil lands has been under the placer mining law. Since February 25, 1920, the right to drill on the federal domain has been governed by the Leasing and Prospecting Act. Under both of these acts the drilling for oil has been regarded as a placer mining operation. Also, in California, oil is recognized as a mineral, Callahan v. Martin, 3 Cal.2d 110, 43 P.2d 788, 101 A.L.R. 871, and drilling for it is classified as a placer mining operation (Berentz v. Belmont Oil Mining Co., supra), although it has been held that drilling for oil does not come within the technical definition of "mining" as that word is used in section 2980 of the Civil Code. Cornwell v. Buck & Stoddard, Inc., 28 Cal. App.2d 333, 82 P.2d 516.

Therefore, plaintiff's lien must rest upon the theory that it furnished equipment and materials which were used in a placer mining operation. This excludes from the case any consideration of a materialman's lien on a structure and the ground necessary for its convenient use when the structure is on agricultural land not worked as a mine.

[4] There is no allegation in the complaint, and no finding to the effect that defendants acquired title to their property under the mining laws. There was no evidence offered on this question. There were 1,270 acres of land described in the lease, and 640 acres of land described in the claim of lien. As said in Williams v. Santa Clara Mining Ass'n, supra [66 Cal. 193, 5 P. 89]: "We take notice that no patent, based upon 'mining claims,' could have been issued under any act of congress for the whole, or for 1,109 acres * * *." The complaint in the instant case alleges that all of section 13 was necessary for the use and occupancy of the oil well. The trial court found this to be true, but ordered that section 13, less the ten acres not owned by defendants, be sold. There is no evidence supporting this finding and none was offered on the question of the amount of land necessary for the use and occupation of the dry hole.

[5, 6] Had defendants' title been acquired through mining claims, such allegation and finding would have been unnecessary as all of a group of claims worked together as a mine are subject to lien. California Corrugated Culvert Co. v. Stewart, supra. Had defendants' title to the 1,270 acres leased for oil drilling been derived through mining claims and all of the leased property worked together as a mine, plaintiff's lien must fail because it filed its claim of lien on part of the property. Williams v. Mountaineer Gold Mining Co., 102 Cal. 134, 34 P. 702, 36 P. 388.

If there is any inference to be drawn from this situation it should be to the effect that defendant's title does not rest on mining claims but rather that they own agricultural lands which they leased for drilling oil, a placer mining operation.

The earliest case we have found bearing on the question before us is Willliams v. Santa Clara Mining Ass'n, supra. There, mining operations were conducted on a tract of 1,109.67 acres of agricultural land and 314.68 acres which had formerly been pueblo land belonging to the city of San Jose. Both tracts were owned by the Santa Clara Company. Plaintiff and his assignors performed labor on a mine on a portion of the

properties and filed claims of lien on all of the two tracts. The trial court ordered the whole of the two tracts sold to satisfy the lien. In reversing this judgment it was said: "The lands directed to be sold were not a 'mining claim,' either in the popular sense of the words, or as the term has been employed in judicial decisions, or as it is used in the Code. The Fremont grant is not a 'mining claim,' although many mines have been opened within its boundaries, and the owners of the grant may claim such mines to be their own. The right of the defendant the Santa Clara Company to a portion of the Rancho Los Capitancillos, or to a portion of the Pueblo lands of San Jose, and to extract ores therefrom, in no way depended upon a claim to the possession made in recognition of and in conformity to local rules adopted by miners of a mining district, or in accordance with the usages or customs of a locality. The defendant derived its title, as would seem, from the Mexican or Spanish government to the larger tract; certainly so as to the Pueblo land. We take notice that no patent, based upon 'mining claims,' could have been issued under any act of congress for the whole, or for 1,109 acres, of the Rancho Los Capitancillos. The plaintiff could not acquire the statutory lien upon the lands of the Santa Clara Company, simply because the statute does not authorize it. It may be that the statute is not sufficiently comprehensive; indeed, it would, perhaps, be difficult to say why one class of 'material-men' or laborers should have preference over another; why, for instance, the furnisher of seed, or the plowman, should not have a lien on the farm of him to whom the seed is supplied or for whom the plowing is done; but the legislature has seen fit to limit the benefit of the lien to particular classes, and we are not authorized to extend it to others."

The foregoing decision was further explained in Bewick v. Muir, supra [83 Cal. 368, 23 P. 390], where it was said: "The decision in Williams v. S. C. M. Ass'n, 66 Cal. 193, 5 P. 85, is not in conflict with this. Although there are some expressions in the opinion in that case which seem to countenance the opposite view, we think that what was decided was merely that the adjacent land, which the defendant held under a Spanish grant, was not mineral land, or appurtenant thereto. Such land was, therefore, not a mine or a mining claim in any sense, and consequently was not liable as such. If it shall turn out that some of the land involved here was of that character, then it is not liable."

Plaintiff relies strongly upon the case of Berentz v. Belmont Oil Mining Co., supra, as supporting the judgment. There the Supreme Court affirmed a judgment foreclosing a lien upon eighty acres of land upon which an oil well had been drilled. The court gave the reasons for its decision as follows: "The question, therefore, is whether this 80-acre tract of land in process of development as an oil mine is a mining claim within the meaning of the lien law, and we think that in any view of the case this question must be answered in the affirmative. Under the act of Congress of 1897 (Act Feb. 11, 1897, ch. 216, 29 Stats. 526 [30 U.S.C.A. § 101 note]), the location and sale of oil land is governed by the mineral laws of the United States applicable to the location and sale of placer mining claims, and if land is located and held under this law, it is a mining claim before patent in every sense of the word, and for the purpose of the lien law it does not cease to be a mining claim when, by a patent from the government, the fee is transferred to the locator or his assigns. This was clearly held in Bewick v. Muir, 83 Cal. [368] 372, 23 P. 389, and the authority of that decision has never been questioned." This is in accordance with a long, unbroken line of decisions which hold that where work is performed on a mining claim, or a group of claims worked as a mine, the laborer's lien attaches to the entire claim or group of claims and not merely to the ground actually worked.

Plaintiff relies strongly on the case of Standard Pipe & Supply Co. v. Marvin, 43 Cal.App.2d 230, 110 P.2d 476, 477. In that case certain of the defendants were adjoining owners of thirteen acres of land which they leased to defendant Marvin to be drilled for oil under a community lease. A dry hole resulted from the operations and plaintiff filed its lien on the thirteen acres which the trial court ordered sold to satisfy the debt. In approving that portion of the judgment the court said: "Defendants further contend that 'The finding of the trial court that the whole of the 13-acre tract described in the consolidated decree herein is necessary for "the convenient use and occupation" of the "dry hole", "found" to have resulted from the deepening of the existing dry hole on said premises, is not supported by the evidence.' In our opin-

ion the finding at which this contention is directed is an immaterial finding in this case. Under the evidence and findings, it is clear that the plaintiffs furnished materials for work done in the exploration for oil on the 13-acre tract, which tract was being worked by the lessee as a single development under a community lease covering the entire tract. The liens of plaintiffs were therefore liens for materials furnished to be used and consumed in the development of 'real property worked as a mine' within the meaning of the second paragraph of section 1183 of the Code of Civil Procedure and said liens extended to the entire tract. Berentz v. Belmont Oil Mining Co., 148 Cal. 577, 84 P. 47, 113 Am. St.Rep. 308. As was said in California Corrugated Culvert Co. v. Stewart, 215 Cal. 120, at page 122, 8 P.2d 1013, at page 1014, 'In such cases no question of fact as to the extent of land required for the convenient use and occupation of structure or improvement is presented.' "

We are in accord with the ultimate conclusion reached in that case as all of the thirteen acres was worked as a mine. If, as we assume, the thirteen acres was agricultural land (which does not appear from the opinion) we cannot agree that the finding that all of the thirteen acres was necessary for the convenient use and occupation of the dry hole was immaterial. The cases cited do not support that conclusion. Berentz v. Belmont Oil Mining Co., supra, dealt with eighty acres of land which formed what is technically known as a mining claim. Therefore, all of the claim was subject to the lien and not merely the portion necessary for the convenient use and occupation of the improvement. The quotation from California Corrugated Culvert Co. v. Stewart, supra, is taken from the portion of the opinion discussing liens on technical mining claims which we have already quoted. It is clearly not applicable in a case where a lien is claimed on a mine situated on agricultural land.

The last case necessary for us to notice is Gregg v. H. & M. Drilling Co., 92 Cal. App. 189, 267 P. 903. The individual defendants were the owners of twenty-four acres of presumably agricultural land. They leased the entire tract to one Daynes for oil development purposes who in turn leased a portion of the tract (probably five acres) to the H. & M. Drilling Company which secured permission from the owners to use a strip of land along the north boundary of the twenty-four acres as a driveway reaching from a public road to the five acres upon which it was proposed to drill. Plaintiff furnished gravel for this driveway to the H. & M. Drilling Company and filed a lien on the twenty-four acres for his bill. The trial court ordered the five acres, and the ground occupied by the driveway, sold to satisfy the lien. The appellate court reversd the judgment, holding that only the land occupied by the driveway, and sufficient ground for turning space on the five acres, could be subjected to the lien.

[7, 8] These authorities have caused us to reach the conclusion that since it was not alleged, proved and found, that the property of defendants was a mining claim or a group of mining claims, operated as one mine, as those terms are defined in the decisions, and as there is no evidence supporting the finding that the 630 acres are necessary for the convenient use of the dry oil well, the judgment cannot be allowed to stand. If the defendants' property is agricultural land plaintiff is entitled to its lien on the dry hole "together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, to be determined by the court on rendering judgment." Sec. 1185, Code Civ.Proc.

The lease indicates that the parties to it did not regard the entire property as a single tract to be developed by one mining operation. It was provided that "for the purpose of this drilling requirement the land shall be divided into 10 acre parcels by lines running north and south and east and west, each 10 acres to be as nearly square in shape as possible. It is intended hereby that the Lessee shall eventually (keeping at least one string of tools drilling at all times, but allowing said ninety [90] days interval between wells) drill the same number of wells to each distinct oil zone, provided however, that after one well on every 10 acres shall have been drilled by Lessee regardless of the zones to which said wells may be drilled, the Lessee shall not be required to drill any additional wells."

This provision would indicate that the parties to the lease believed that, if oil were discovered, ten acres of land was sufficient for the operation of each producing well and that sixty-three wells might have to be drilled.

[9] The question of credits on the lienable debt, raised by defendants, would seem to have some merit. The payments were made in July during the progress of the drilling which was suspended on September 27th. Ordinarily such credits would be applied on the first items of the account. Plaintiff urges that this question was waived at the trial.

The record shows that counsel for plaintiff offered to stipulate, and asked counsel for defendants to stipulate, that the lienable items of the bill amounted to $3,078.05. While counsel for defendants did not join in this stipulation the trial court evidently acted on it as though they had done so. As the judgment must be reversed this matter may be left to be determined at a future trial.

The judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concurred.

Hearing denied; TRAYNOR, J., dissenting.



57 Cal.App.2d 849

PEOPLE v. MUMMERT et al.

Cr. 3666.

District Court of Appeal, Second District, Division 2, California.

March 29, 1943.

Hearing Denied April 26, 1943.

1. Rape ⇐51(1)

Evidence establishing that four accused aided or abetted one another in raping prosecutrix sustained convictions of rape. Pen.Code, § 261, subd. 3.

2. Rape ⇐18

Where, from the first exhibition of an intent to rape prosecutrix, four accused had demonstrated perfect co-operation among themselves, and had aided and abetted each other by their actual presence and had rendered actual assistance to the perpetrator by their acts, accused were guilty of aiding and abetting each other as they successively raped prosecutrix, notwithstanding that prosecutrix made no attempt to engage the three disengaged accused to beat off her present assailant and had made no outcry. Pen.Code, § 261, subd. 3.

3. Rape ⇐18

Where, at time of rape by each of four accused, the other three stood nearby and abetted the perpetrator, and exemplified a united and single purpose which would brook no interference thereby encouraging and aiding each other, each accused was a "principal" in each of the crimes. Pen.Code, § 261, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Principal".

4. Rape ⇐54(2)

In prosecution against four accused for rape by aiding and abetting each other in raping prosecutrix, proof by disinterested witnesses and by aid of chemistry which proof left no room for speculation, sufficiently corroborated the details of prosecutrix' narrative. Pen.Code, § 261, subd. 3.

5. Rape ⇐6

Where every threat accompanied by waving a clenched fist at prosecutrix was heard or seen by four accused before each raped prosecutrix with the encouragement and assistance of the others, convictions of aiding and abetting the criminal were not required to be reversed on ground that no threat was directed toward prosecutrix. Pen.Code, § 261, subd. 3.

6. Rape ⇐1

The statute defining rape is divided into six subdivisions to put beyond doubt the rule that if the things mentioned in the subdivisions are proved, they would establish the crime, and it is not thereby intended to create six different kinds of crime. Pen.Code, § 261.

7. Rape ⇐59(5)

Where, in information for aiding and abetting in rape it was intended to establish the crime by proof of force and violence and evidence disclosed that prosecutrix' resistance was prevented by threats of bodily harm, trial court properly included such circumstances in its definition of rape and was not required to limit jury's consideration to circumstances alleged in the information. Pen.Code, § 261, subds. 3, 4; § 263.

8. Criminal law ⇐768(1), 1173(2)

In sex cases, accused should be afforded the benefit of a cautionary instruction, but where there is corroborative evidence, it is not necessarily prejudicial for

the trial court to refuse a cautionary instruction to accused.

9. Criminal law ⇐1173(2)

Where there was disinterested factual and scientific corroboration of the details of rape related by prosecutrix and such corroborative proof left no room for speculation, trial court's refusal of accused's offered cautionary instruction was not prejudicial.

10. Criminal law ⇐806(1), 807(1), 814(1)

Trial court properly rejected proposed instructions which were repetitious, argumentative or inapplicable to the facts.

11. Criminal law ⇐814(1)

In prosecution for rape by aiding and abetting where threats were made by four accused to prosecutrix in the course of perpetrating their crimes by force and violence and not to subdue prosecutrix, trial court was not required to charge concerning the threats. Pen.Code, § 261, subd. 3.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Warren Hershel Mummert and others were convicted of rape, and they appeal.

Affirmed.

Gladys Towles Root and Eugene V. McPherson, both of Los Angeles, for appellants.

Robert W. Kenny, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Appellants were jointly accused by amended information in four counts of rape on the same woman, on the same night. Each count charges a separate crime by the four men in that as each raped the prosecutrix the other three aided and abetted him; that each defendant accomplished his act without the consent of the young lady; that she resisted, but that her resistance was overcome by force and violence used upon her by defendants. Defendant Wayman Mummert is alleged to have suffered a previous conviction of possessing an illicit still. Since no point is made of that bit of personal history no further mention will be made of it. After conviction by a jury as charged and their motion for a new trial having been denied, they were sentenced to the state prison for the term prescribed by law "as to each count." They appeal from the order denying such motion and from the judgments rendered.

Three grounds of appeal are presented: (1) the judgments are contrary to the law and the evidence; (2) the court's refusal to limit the jury's consideration to subdivision 3 of section 261, Penal Code; (3) refusal of some and modification of others of certain instructions proposed by appellants and in misdirecting the jury by the instructions proposed by the People.

(1) The facts impliedly found by the jury established that the victim, a single girl, five feet three inches tall, weighing 138 pounds, was twenty years of age. Having hailed from Minnesota, she had lived at San Fernando five months prior to the trial. She there gained her livelihood by serving as a waitress. On the evening of her unfortunate experience she undertook to "hitch-hike" to Newhall, some ten miles north of her home. About 8 p. m., on Highway 99, north of San Fernando, on her signal for a ride the two-door sedan of defendants stopped and George Mummert alighted and invited the young woman to enter. She occupied the front seat between George and his brother Warren. They told her they were going to Newhall, whither she was bound to visit her brother who was there on furlough from Pearl Harbor. As they proceeded Wayman and defendant Lockhart occupied the rear seat. George and the two men in the rear seat were drinking liquor. Little was said during the time required to reach the turnoff leading to Mojave and away from Newhall. On observing that the car had taken a direction away from the road leading to her destination the girl asked permission to leave, but instead the automobile continued on its northerly course to a section strange to the wayfarer. She repeated her request to be allowed to leave, to which Warren replied that he wished to go down a couple of miles for a drink. When later, about 8:30 o'clock, they stopped on the side of the highway she and the Mummert brothers alighted and the girl attempted to run towards a car then about one-half mile distant, approaching from the north. When she had run about three yards one of the men grabbed her and threw her into the back seat beside Lockhart, who took hold of her shoulders. She attempted to kick Wayman Mummert, who held her by

the feet, and struggled, twisted and kicked to regain her freedom, all the time swearing at Wayman. In the course of her struggles, George shook his clenched fist at her and told her to "shut up"—that he did not "want to be caught with any screaming woman." Wayman removed to the front seat, whereupon Lockhart directed some honeyed words to the girl and assured her that he was unmarried; that if she would submit to him he would forbid his companions to molest her and would buy her a ticket to Newhall on the next day. She rejected every proposition advanced and refused liquor offered her. At about 9 o'clock, at a point about 17 miles south of Palmdale, the car turned off the highway a half mile into the desert where there was no living thing but cactus, stunted shrubs and denizens of the desert. All parties left the automobile for a moment, whereupon while the others were ten feet away Wayman returned, ordered the girl to re-enter the car and shoved her into the back seat with threats that he did not want to "fool around" with her. Upon her failure to remove her slacks he declared he would rip them off and would leave her in the desert with a broken body. Following her steadfast refusal to comply, while she was still sitting Wayman removed her slacks and shorts from her body, pulled her down and effected an act of sexual intercourse. She made no further resistance because of her fear that if she did so the men would perpetrate their atrocities, beat her and leave her there.

While Wayman enacted the scene above described his confederates continued to stand behind a bush ten feet away. Upon his leaving the automobile Lockhart entered immediately and ravished the girl. He was followed by George Mummert, who accomplished the same act. Following Lockhart's repetition of his crime, Warren Mummert followed the example of his companions and violated the girl as the car proceeded to Lancaster. The party arrived there about midnight. To none of the assaults made upon the girl did she make resistance because of the shock she suffered by the kidnapping and the violence of the initial assault upon her and her fear that the men would carry out their threats to kill or bruise her and leave her alone in the open space.

During the abuse of complainant the party traveled through an interminable silent waste with but few human habitations along the way, the girl always begging to be released. They passed through Palmdale without stopping. When they reached Lancaster she resorted to strategy to regain her liberty. After one of the men ordered that she be taken outside of town she persuaded them to allow her to dress in order to move to the front seat. On stepping out as if to enter the front seat she ran across the street to a cafe. There in an hysterical, weeping, nervous state she entered the restroom where she was found by the Eliopulos sisters, whose sympathies were aroused by the nervous and disheveled condition of the stranger and the bloodstains on her clothing. To them she related her experiences and they in turn led her to the substation of the sheriff's office. After reciting the facts to the deputy in charge the arrests of appellants followed. Each man was brought in alone to confront her. Each denied ever having seen the girl before. Each had bloodstains on the front of his clothing near the fly of the trousers; each denied knowledge of the origin of such stains. Chemical analyses of smears were taken from the young woman by a physician at Lancaster, who applied it to a slide and delivered it to deputy sheriff Campbell. This deputy took the shorts and overalls worn by Warren Mummert, the coat, shorts and trousers worn by Lockhart, the blue overalls from Wayman Mummert, the shorts of Wayman and George and a blanket and handkerchief found in the automobile nine miles north of Lancaster, and delivered them to Deputy Atherton, the forensic chemist of the sheriff's office. Also they found a hair-ribbon of complainant with the other items in the sedan. To the deputy sheriff each prisoner, separately and out of hearing of the others, denied knowledge of the origin of the bloodstains and each denied intercourse with complainant. In their presence she stated that she feared the men because one of them had struck her, one had threatened to hurt her and one had threatened to leave her on the desert. To her statement they declined to make response.

Atherton is a forensic chemist with the Bureau of Identification. He received the slide from Deputy Campbell April 30th and found on it bloodcells, epithelial cells and spermatazoa. He found it was human blood belonging to the same group as that taken from complainant's finger. He

found by chemical tests that the various articles of clothing taken off the prisoners, and the kerchief and blanket taken from the sedan, were stained with seminal fluid, and that the blood in every instance but one was demonstrated to be that of the prosecutrix.

[1] Appellants contended that there is an utter lack of evidence that they aided or abetted one another in the commission of the crimes; that after the girl had been thrown into the car no rape occurred until they had driven some distance; that at the time of each rape the unoccupied three stood some distance, except in the case of Warren. During the act of that defendant the car was speeding at forty-five miles per hour. But when the criminal acts of the first three occurred the requests of the girl to be allowed to leave the car had been ignored, after she had been grabbed, following her attempt to run, and violently pushed her into the car and threats had been made with clenched fists to "shut up." Immediately after her first break for liberty had been frustrated demand was made by Lockhart that if she submit to his desires he would protect her from the others. After she had rejected all of his proposals the car came to a stop about 9 p. m. in the desert, a half mile off the highway. There, with his three companions close by, Wayman required her to disrobe. His act in forcing her into the rear seat, in removing her clothing as she resisted and his aggressive action in assaulting her with the manifest approval of his companions, was sufficient violence to overcome her resistance.

[2, 3] The contention that the girl made no attempt to induce the three disengaged men to beat off her present assailant and that she made no outcry as they successively raped her is an idle mockery. From the first exhibition of a criminal intent toward her they had demonstrated perfect harmony and fraternal cooperation among themselves. For any man to stand by serenely and sympathetically in the presence of an act of rape by his associate is itself proof of his approval of and cooperation with the criminal act. That she should in her anguish make an outcry to such associates and thereby attempt to gain their protection is not necessary to render them guilty of aiding and abetting the criminal. They aided and abetted by their actual presence, and by their acts they rendered actual assistance to the perpetrator. Lassen v. Board of Dental Examiners, 24 Cal.App. 767, 772, 142 P. 505. At the time of the rape by each of the men the other three stood near by and abetted the perpetrator by presenting a show of force and by keeping watch against intrusion. As each without resentment toward his acting confederate and without concern for the girl permitted the outrage, they exemplified a united and single purpose which would brook no interference. Each thus encouraged and aided his several companions and was therefore a principal in each of the crimes. People v. Best, 43 Cal.App.2d 100, 105, 110 P.2d 504.

[4] There is no mark of improbability in the narrative of the prosecutrix. More than three hours were consumed by appellants in traveling the fifty miles with complainant, notwithstanding a paved highway and no delays on account of motor trouble. When they arrived at Lancaster, the girl was in a state of frenzy. Her hair was disheveled; her clothing was disarranged and unfastened. Her face was marked with her tears and her extreme nervousness belied the testimony of appellants that she had agreeably cooperated with each of them. Moreover, the clothing of each of the prisoners bore stains of his own seminal fluid, confused with the very menstrual blood of his victim. Such proof, furnished by disinterested witnesses and by aid of chemistry, leaves no room for speculation. Rather does it furnish factual and scientific corroboration of the details related by the prosecutrix.

[5] The claim that there was no threat directed toward the girl is of one with the contention that she made no complaint to the officers. The voice that quieted complainant declared that her broken body would be left on the desert. What girl would not subside at such show of violence reinforced by stern vocal demands? She not only related her sufferings to the authorities but submitted to an examination by a physician. Every denunciation of the screaming woman in the car and every threat accompanied by waving a clenched fist at her was heard or seen by all four men. But even though there had been no words spoken in advancing their common purpose, the act on the part of each of the four men in moving along amidst the desert at night, in harmony with his three confederates to the accomplishment of the several depraved, criminal acts upon a girl who had pleaded for her liberty, was of

itself the application of violence and rendered each of them guilty of kidnapping as well as of rape by force and violence.

[6-8] (2) Appellants assign as error the refusal of the court to limit the jury's consideration to subdivision 3 of section 261 of the Penal Code. That subdivision makes rape of an act of sexual intercourse where the female's resistance is overcome by force or violence. Subdivision 4 makes the act a rape if the victim's resistance is prevented by threats of great and immediate bodily harm accompanied by apparent power of execution. Because the court in its instruction included the circumstances prescribed in both subdivisions 3 and 4 in its definition of the crime, appellants contend that the accusation is drawn under subdivision 3 and that consideration should have been confined by instructions to whether her resistance was overcome by force and violence. This very contention was made in the case of People v. Craig, 17 Cal.2d 453, 110 P.2d 403, where the accused was charged in two separate counts of (1) statutory rape and (2) rape by force. Two separate judgments having been entered, they were on appeal consolidated into one judgment of conviction for rape. It was there held that the essential guilt of rape consists in the outrage to the person and feelings of the victim (section 263, Penal Code); that she was not doubly outraged, once by force and once because of her tender years, but suffered only a single offense. The reasoning and authorities cited by the Chief Justice in the Craig decision sound a nullity for appellants' contention. The purpose of dividing section 261 into subdivisions was to put beyond doubt the rule that if the things mentioned in the subdivisions are proved they would establish the crime. People v. Snyder, 75 Cal. 323, 17 P. 208. It was not thereby intended to create six different kinds of crime. In drawing the amended information the pleader followed the familiar rule which requires a succinct statement of the facts to be proved. From the pleadings it is clear that it was intended to establish the crimes by proof of "force and violence" as the circumstances under which defendants acted in accomplishing their crimes. The evidence having disclosed that other "circumstances" itemized in subdivision 4 accompanied their crimes, it was not amiss for the court to include such circumstances also in its definition of rape, since the existence of all six of the "circumstances" would not have increased the number of the crimes. Each rape would have meant only one outrage to the victim had she been at the same time under age, of unsound mind, subjected to narcotics and unconscious of the nature of the act, as well as being the victim of force and violence.

[9] (3) Appellants claim to be aggrieved because of the refusal of the court to read a cautionary instruction offered by their counsel. They contend that whenever a party is accused of a sex crime the court should admonish the jury to scan the testimony of the prosecutrix because of the ease of accusing and the difficulty of disposing of such an accusation. It is true that the Supreme Court has declared it to be a rule that in sex cases "the defendant should be afforded the benefit of a cautionary instruction * * *." People v. Putnam, 20 Cal.2d 885, 889, 129 P.2d 367; People v. Lucas, 16 Cal.2d 178, 105 P.2d 102, 130 A.L.R. 1485. But it has been repeatedly held in such cases that where there is corroborative evidence it is not necessarily prejudicial error for the court to refuse a cautionary instruction. People v. Garrett, 27 Cal.App.2d 249, 81 P.2d 241; People v. Agullana, 4 Cal.App. 2d 34, 40 P.2d 848; People v. Williams, 55 Cal.App.2d 696, 131 P.2d 851.

The practical demonstration of the fact of the sexual intercourse of appellants with the prosecutrix was made not only by the forensic chemist but also by the belated confessions of the prisoners, who at Lancaster denied they had ever seen the girl before. The age of the victim; the kidnapping of her on the highway when on her way to Newhall to visit her brother; the length of time required for them to travel the fifty miles; their drinking of liquor en route; their denials of the intercourse to the officers and their protestations of never having seen the girl; the fact that the four had five acts of intercourse with her within less than three hours after meeting her—these facts rendered cautionary instructions superfluous if not detrimental to a fair presentation of the cause to the jury. In the face of the facts presented by the People it was not unfair to the prisoners to let their own accounts of the occurrences in the desert and on the Lancaster highway go to the jury without sympathetic comment from the court. No prejudice was suffered by the rejection of cautionary instructions.

[10, 11] The numerous other instructions proposed by appellants and rejected by the court had no place in the record. They are either repetitious or argumentative or inapplicable to the facts. Merely because threats were made by the accused in the course of perpetrating their crimes by force and violence it was not for that reason necessary to charge the jury concerning the threats. It is clear that the threats were not made for the purpose of subduing the complainant but were uttered contemporaneously with and as oral expression of the application of the force and violence applied. Had appellants merely threatened; had they not continued away from the Newhall highway as she pleaded for her release; had they not caught her as she ran from them toward the approaching automobile and returned her to a seat in their sedan; had Wayman not forcibly removed her undergarments after her refusal to do so, it is not certain that threats alone would have detained her.

The judgments and the order denying the motion for a new trial are affirmed.

McCOMB, J., concurred.

W. J. WOOD, J., concurred in the judgment.



57 Cal.App.2d 979

GENUSER v. OCEAN ACCIDENT & GUARANTEE CORPORATION, Limited.

Civ. 13797.

District Court of Appeal, Second District, Division 3, California.

April 6, 1943.

1. Insurance ⇐143(3)

Where, through insured's mistake known to insurer, liability policy was issued on automobile which insured did not own or operate and in which he had no insurable interest, rather than on automobile owned by insured which both parties intended should be covered by policy, policy would be reformed. Civ.Code, § 3399.

2. Reformation of Instruments ⇐45(14)

Evidence that insured bought automobile on approval and ordered liability policy thereon, returned such automobile, and bought another automobile, and so informed insurer, although, through mistake, he repeated description of first automobile to insurer and policy was issued as covering first automobile, authorized reformation of policy so as to make it cover second automobile. Civ.Code, § 3399.

3. Insurance ⇐622(2)

An insurer may by contract of insurance limit time within which suit may be brought on policy so as to provide shorter time than is provided by law.

4. Insurance ⇐622(2)

A provision of automobile liability policy limiting right to sue thereon to period of two years and one day after insured's liability had been finally determined was valid.

5. Insurance ⇐623(4)

An insurer's denial of liability under a policy does not of itself constitute a "waiver" by insurer of a condition of policy limiting time for commencement of an action on policy.

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

6. Insurance ⇐623(1)

A provision of an insurance policy limiting time for commencement of action thereon may be waived by insurer, and such waiver need not be in writing, but may arise from such course of conduct as will equitably estop insurer from pleading prescribed limitation.

7. Insurance ⇐623(4)

The breach of a provision of automobile liability policy limiting action thereon to two years and one day after determination of insured's liability did not bar recovery, where insurer's denial of liability required insured to sue to reform policy before insured's liability had been determined, and insured's action to recover on policy was instituted only 15 days after obtaining judgment in reviewing court in reformation suit. Civ.Code, § 3399.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Suit by Frank S. Genuser against the Ocean Accident & Guarantee Corporation, Limited, for reformation of an automobile liability policy and for recovery thereon. From a judgment for plaintiff, defendant appeals.

Affirmed.

George H. Moore and Hugh B. Rotchford, both of Los Angeles, for appellant.

Hibbard & Kleindienst, of Los Angeles, for respondent.

SHINN, Acting Presiding Justice.

The judgment from which defendant The Ocean Accident and Guarantee Corporation, Ltd., appeals reformed a policy of automobile insurance issued by said defendant in favor of plaintiff by correcting the description of the property insured so as to describe a 1934 Ford car, Motor No. 18—705524, instead of a 1933 Ford, Motor No. 18—447073; the judgment also awarded plaintiff as moneys due under the insurance policy the aggregate sum of $3,350 and interest. The basis of the reformation of the contract which the court decreed is the one declared by section 3399 of the Civil Code, which reads: "When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised, on the application of a party aggrieved, so as to express that intention."

The court found: "That it is true that it was the intention of the plaintiff and defendant The Ocean Accident and Guarantee Corporation, Limited, to insure the plaintiff from liability caused by accident, as aforesaid, arising out of the use, ownership and maintenance of an automobile owned by plaintiff and in which he had an insurable interest, to-wit, a 1934 de luxe Ford coupe, motor No. 18—705524, and not to insure the plaintiff from liability in connection with the use, ownership and maintenance of any automobile not owned or operated by him or in which, or in the use of which he had no insurable interest. That through the mistake of plaintiff, known to defendant, a policy of insurance was issued upon an automobile which the plaintiff did not own or was not operating or in which he had no insurable interest. That each of plaintiff and said defendant, The Ocean Accident and Guarantee Corporation, Limited, intended and agreed that the legal consequences of their acts should be the indemnification of plaintiff against loss and damage from bodily injury and injury to or destruction of property caused by accident in the amounts specified in said Exhibit 'A' arising out of the ownership, maintenance or use of an automobile which plaintiff then owned, to-wit, a de luxe Ford coupe automobile, year model 1934, engine No. 18—705524."

[1] In Genuser v. Ocean Acc., etc., Corp., 1941, 42 Cal.App.2d 673, 109 P.2d 753, which was a different action brought by plaintiff herein against defendant herein for reformation of the same policy of insurance, it was held that the complaint, which alleged the same facts as those contained in the above quoted finding, was sufficient to state a cause of action for reformation of the contract. Accordingly, the court reversed a judgment which had been entered in favor of the defendant after the sustaining of its demurrer to the complaint. We adopt for the purposes of our decision what the court there said as to the sufficiency of the facts to establish a mistake warranting reformation. The sole question before us on this branch of the case is whether the evidence was sufficient to support the foregoing finding; the answer is in the affirmative.

[2] Plaintiff arranged to buy a used Ford car from a dealer. He paid the price asked for a 1933 car, motor No. 18—447073, and took possession of it under an arrangement that he might drive it for a few days and, if not satisfied, return it and exchange it for any other second-hand car the dealer had for sale. Title to the car was not transferred to him. Three days later he returned the car to the dealer and took in its place and acquired title to a 1934 Ford, motor No. 18—705524. On the day that he drove out the first car, through one Widenham, an insurance broker, plaintiff ordered from defendant a policy insuring him against public liability and property damage. He gave to Widenham and Widenham gave the company a description of the first car. Three days later he informed Widenham that he had purchased the second car instead of the first one, but through inadvertence he described to Widenham the 1933 car; Widenham on the same day notified defendant that plaintiff had actually purchased a different car and that the description of the 1934 car should be inserted in the policy in lieu of the first description,

but Widenham, due to plaintiff's mistake and inadvertence, repeated the description of the first car. The parties intended that the policy would describe a car which plaintiff owned, not one which he did not own. Plaintiff did not discover the mistake in the policy until after the 18th of April, 1938, on which date the car was involved in an accident, as hereinafter stated. All of the foregoing facts were found to be true and are fully supported by the evidence and the inferences reasonably deducible therefrom. The court further found that defendant knew that plaintiff did not own or have an insurable interest in the car described in the policy and that plaintiff had made a mistake in attempting to describe the 1934 car. This fact as to defendant's knowledge was one which was reasonably and logically to be inferred from the evidence. If defendant had been without such knowledge, the misdescription of the car would have been due to a mutual mistake. It was stipulated that insurance would have been issued on the 1934 car if it had been applied for, and at the same rate. Plaintiff made out a good case for reformation of the policy.

The second branch of the case has to do with the contention of the company that the present action was barred by a stipulation of the policy limiting the right to sue thereon to a period of two years and one day after liability of the insured against which he was protected by the policy had been finally determined by judgment or by written agreement of the insured, the claimant (for damages) and the company.

On April 18, 1938, plaintiff's minor daughter, for whose negligence plaintiff was liable under section 350 of the Vehicle Code, St.1937, p. 1596, drove the car into collision with another car, with resulting injuries to two occupants of the latter car. Both sued plaintiff. One recovered a judgment, which plaintiff paid December 19, 1938; the other case was compromised November 23, 1938, and plaintiff paid a sum less than the actual damages sustained by the plaintiff in that action. Plaintiff had tendered the defense of these actions to defendant, but defendant denied all liability under the policy and refused to defend and later refused to pay the sums for which plaintiff was liable on account of the accident and likewise refused to reimburse plaintiff for attorney's fees and expenses paid out in defense of the actions and which were included in the sum of $3,350 for which the judgment herein was rendered. The present action was filed February 13, 1941, or two years and from two to three months after plaintiff had paid the judgment obtained by one of the claimants and had settled with the other.

[3-5] In discussing defendant's contention that the action was filed too late, we accept as a settled principle of law that an insurer may by the contract of insurance limit the time within which suit may be brought on the policy so as to provide a shorter time than is provided by law. The limitation of the time for bringing suit to two years and one day was not of itself invalid; stipulations for shorter periods have been upheld. Tebbets v. Fidelity & Casualty Co., 1909, 155 Cal. 137, 99 P. 501. As his first excuse for not bringing suit within the limited period, plaintiff insists that defendant's denial of liability, of itself, constituted a waiver of the condition of the policy. He quotes the rule stated in Grant v. Sun Indemnity Co., 1938, 11 Cal.2d 438, 440, 80 P.2d 996, 997, as follows: "It is a well-recognized rule, which we conclude is applicable to the special circumstances here, that the insurer may not repudiate the policy, deny all liability, and at the same time be permitted to stand on a provision inserted in the policy for its benefit." We do not find authority which supports plaintiff's contention that denial of liability under a policy of insurance of itself constitutes a waiver by the insurer of a condition of the policy limiting the time for the commencement of an action. Undoubtedly denial of liability does excuse the insured from thereafter furnishing proof of loss (Hill v. Mutual Benefit Health, etc., Ass'n, 1934, 136 Cal.App. 508, 29 P.2d 285) and from compliance with other stipulations specifying conditions precedent to suit on the policy. Farnum v. Phœnix Insurance Co., 1890, 83 Cal. 246, 23 P. 869, 17 Am.St.Rep. 233. But there is no occasion for bringing suit on a policy unless the insurer denies liability in whole or in part, and the contract cannot be construed to mean that the limitation is effective where the company admits partial but not total liability and is not affective where it denies all liability. Joyce, the Law of Insurance, 2d ed., vol. 5, secs. 3211 and 3212.

[6] There is, however, a well settled rule under which the insurer may be precluded from asserting as a bar to the action

failure of the insured to sue within the time limited by the policy. It was stated in Sheard v. United States Fidelity & Guaranty Co., 1910, 58 Wash. 29, 107 P. 1024, 109 P. 276, that the limitation of the time for bringing suit is not controlling where there is a reasonable excuse for delaying the suit beyond the time agreed upon, and it was also stated in Thompson v. Phenix Ins. Co., 1889, 136 U.S. 287, 298, 10 S.Ct. 1019, 1023, 34 L.Ed. 408, 413: "While the validity of such a stipulation cannot be disputed (Riddlesbarger v. Hartford Ins. Co., 7 Wall. 386, 389 [74 U.S. 386, 19 L.Ed. 257]), we do not doubt that it may be waived by the company; and such waiver need not be in writing. It may arise from such a course of conduct upon its part as will equitably estop it from pleading the prescribed limitation in bar of a suit by the insured." This rule was followed by the trial court, which took into consideration everything that occurred from the time plaintiff discovered the mistake that had been made in writing the policy to the time when the present action was commenced. In determining whether the ruling was correct we must consider the same facts and should reach the same result, if the determination of the trial court finds reasonable support in the facts found.

The essential facts as found by the court and upon which plaintiff relies are the following: after the accident and prior to July 12, 1938, he demanded that defendant perform its obligations under the policy, which defendant refused to do, denying liability; on July 12, 1938, he brought an action, to which we have heretofore referred, for reformation of the policy; defendant demurred to his complaint, the demurrer was sustained, plaintiff amended, defendant again demurred, the demurrer was sustained, and on October 6, 1938, judgment was rendered in favor of defendant. On November 2, 1938, plaintiff appealed. On January 29, 1941, the District Court of Appeal, as above stated, reversed the judgment and fifteen days later, or some forty-three days before that decision had become final, plaintiff instituted the present action.

(In his complaint in the present action plaintiff prayed that it be consolidated for the purpose of trial with the former action, in which it was sought to reform the policy but not to recover on it. Defendant by special defense pleaded the pendency of the former action in abatement of the present one. At the inception of the trial defendant moved for judgment on the pleadings on the ground that another action was pending, which motion was denied; defendant then moved that plaintiff be required to elect to proceed with the trial of either the first or the second action and plaintiff elected to try the second one instead of the first. If the latter motion was not an abandonment of the defense of another action pending, it has been abandoned on the appeal by failure to present it.)

The court also found as follows: "That the delay, if any, in the commencement of this action for recovery on the said policy was caused by the fault of the defendant, The Ocean Accident and Guarantee Corporation, Limited, in refusing to reform the said policy to express the true intent and agreement of the parties thereto. That because of facts hereinabove found, the limitation prescribed by said policy for the commencement of suit to recover thereon is unreasonable." What the court really decided was not that the limitation prescribed by the policy was unreasonable, as the foregoing language might indicate, but that under the entire facts of the case, which are set forth in the findings at length, it would be unreasonable and inequitable to give effect to the limitation.

[7] We are entirely satisfied with this conclusion. The delay in filing suit did not result alone from defendant's denial of liability; it resulted from the consequences of defendant's denial, which imposed upon plaintiff the necessity to first establish his right by reformation of the policy. It would be a harsh rule indeed which penalized plaintiff where he acted with the utmost diligence to establish his rights under the policy against the persistent opposition of the defendant. Defendant's denial of liability forced the insured to bring suit for reformation of the policy. That action was instituted promptly and was prosecuted with diligence. From an adverse judgment in the trial court he appealed. At the time the appeal was taken plaintiff's liability to the persons injured in the accident had not been established. When the judgment for damages was rendered against him and when he settled the other claim it was too late for him to amend his complaint for the recovery of the amount of his damage, since the case was then on appeal. It is true, of course, that he could have brought another action

for damages before the appeal had been determined, but such an action would have had to remain untried until his right to a reformation of the policy had been determined. Presumably the defendant would have appeared in that action by demurrer and if it had, the demurrer would have been sustained, since without proof of the mistake in an action for reformation of the policy, plaintiff's 1934 car was not covered by the policy. Had plaintiff filed a second suit, the most that he could have hoped for would have been that the action would be allowed to rest until the first case had been decided. The institution of such an action would have been without purpose except, perhaps, the strategic one of avoiding the objection now urged by the defendant that the present suit is barred by the limitation. We cannot believe that plaintiff was required to take such a futile step for the preservation of his rights, or that the condition of the policy may reasonably or justly be given the effect of requiring plaintiff to bring a suit which could not reasonably or sensibly have gone to trial until the other action had been determined. We assume that the limitations of the time within which suit may be brought which are commonly found in insurance policies are placed there in good faith and to serve a wholly proper and meritorious purpose. We do not doubt that experience has demonstrated the wisdom of providing by contracts of insurance shorter periods for the institution of actions than those provided by law, but the purpose of such limitations is to obtain the advantage of an early trial of the matters in dispute and to make more certain and convenient the production of the evidence upon which the rights of the parties may depend. We think it would be wholly unreasonable to say that plaintiff was required to file his complaint with the county clerk under the circumstances that confronted him, when the case would have had to remain dormant or, if it had been pressed by either of the parties, defendant would have been subjected to unnecessary expense in the event it prevailed in the first action. Defendant would clearly have been in a position to defeat a recovery on the policy until the right to have it reformed had been established. Inasmuch as the defense of the first action rendered it impracticable, to say the least, to go to trial in a second action until the final determination of the first one, it is clear to us that defendant's conduct furnished the occasion for the delay and that it cannot take advantage of a situation which was of its own creation. It had a right, of course, to defend the first action, but in doing so it defeated the purpose of the stipulation which limited the time for bringing suit on the policy. Under these facts we believe that the trial court should have felt impelled to render judgment in favor of plaintiff.

The judgment is affirmed.

PARKER WOOD, J., and BISHOP, Justice pro tem., concur.



58 Cal.App.2d 121

PEOPLE v. SMITHERMAN.

Cr. 3668.

District Court of Appeal, Second District, Division 1, California.

April 12, 1943.

1. Criminal law ⇐1144(19)

Where accused, at time of pronouncement of judgment and after denial of motion for new trial, gave oral notice of appeal, appellate court would assume, in absence of anything in record to contrary, that appeal was from both judgment and order denying new trial, as stated in brief of accused.

2. Abortion ⇐11

In prosecution for abortion, it is not necessary that all material details of illegal transaction constituting the crime be corroborated, and it is only necessary to supply corroboration which satisfactorily tends to prove the crime and to connect the accused therewith.

3. Abortion ⇐11
Homicide ⇐235

In prosecution for abortion and murder, evidence, other than that given by man responsible for victim's condition and who accused claimed was accomplice, was sufficient to establish commission of crime and to connect accused therewith.

4. Abortion ⇐11
Homicide ⇐235

In prosecution for abortion and murder, testimony of physician who had examined victim prior to victim's visit to accused established, prima facie, that acts of accused were not necessary to preserve victim's life so as to sustain conviction.

5. Abortion ⇐9
Homicide ⇐172

In prosecution for abortion and murder, evidence that accused bargained with victim and victim's escort over charge for performing abortion before accused had examined victim to determine if victim was pregnant was admissible as bearing on question of necessity of abortion to preserve victim's life.

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Jackson Smitherman was convicted of murder in the second degree and of the commission of an abortion, and he appeals.

Affirmed.

Thomas Higgins, Jr., of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

DORAN, Justice.

[1] In an information filed in the Superior Court of Los Angeles County appellant was charged in one count with murder and in a second count with the commission of an abortion. After a plea of not guilty appellant was tried by the court sitting without a jury and found guilty on both counts as charged. The trial court found the crime charged in the first count to be murder in the second degree. Appellant's motion for a new trial was denied. At the time of the pronouncement of the judgment appellant gave oral notice of appeal; and it may therefore be assumed, in the absence of anything in the record to the contrary, that the appeal here taken is from both the judgment and the order denying the motion for a new trial, as appellant has so stated in his brief. See 8 Cal.Jur. 518, Criminal Law, § 529.

Appellant raises two points upon this appeal, namely, that there was insufficient corroboration of the testimony of an accomplice, and that there was no showing by the People that the acts of appellant, if proven, were not necessary to preserve the life of the woman with whose death appellant was charged.

[2, 3] It is contended that the accomplice was the young man who had caused the pregnancy of the young woman in question, the deceased, and who had brought the deceased to appellant. Without considering the testimony of this witness, the following facts were established by other evidence. The pregnancy of the deceased was shown by the testimony of a physician and surgeon whom deceased had visited and who had examined deceased a few hours before she had visited appellant. The visits of deceased to appellant were established by the testimony of a witness present in appellant's apartment at the time and who was not shown to be an accomplice. This witness established the use of instruments by appellant either upon the person of deceased or in relation to her. The condition of deceased's uterus and other internal organs was established by the testimony of the surgeon who performed the autopsy upon her body. This witness gave the cause of death as a generalized or acute diffused peritonitis due to a perforation of the uterus. The physician who had first examined deceased testified that at the time, which was a few hours before she visited appellant, she appeared to be normal and there was nothing of an unusual nature with respect to her physical condition, other than the fact that she was pregnant. Testimony of other witnesses tended to establish the condition of deceased after her visit to appellant and the fact that appellant made a house call upon deceased after deceased became very ill. There was testimony by a woman witness that appellant performed an abortion upon her, using the same method as was indicated in the case of deceased. "It is not necessary that all the material details of the illegal transaction constituting the crime of abortion shall be corroborated. (1 C.J. 332, sec. 112.) It is only necessary to supply corroboration which satisfactorily tends to prove the offense and to connect the defendant with the crime with which he is charged." People v. Lorraine, 28 Cal.App.2d 50, 53, 81 P.2d 1004, 1005. Evidence other than that given by an accomplice was ample in the present case to establish the crime and to connect appellant with that crime. Appellant's contention to the contrary is wholly without merit.

[4, 5] The testimony of the physician who had examined deceased prior to her visit to appellant was sufficient to establish prima facie the fact that the acts of appellant were not necessary to preserve the life of his victim; and it is unnecessary to decide here whether the burden of proof in this respect is upon the prosecution. Another circumstance bearing upon the question of the necessity of an abortion to preserve life is the evidence to the effect that appellant bargained with deceased and her escort over the charge for performing an abortion before appellant had examined deceased to determine if she were pregnant. cf. Tapley v. Abbott, 111 Cal.App. 397, 402, 295 P. 911.

The judgment and the order denying the motion for a new trial are, and each of them is affirmed.

YORK, P. J., and WHITE, J., concur.



57 Cal.App.2d 707

MEDEIROS v. COCA-COLA BOTTLING CO. OF TURLOCK, LIMITED.

Civ. No. 6664.

District Court of Appeal, Third District, California.

March 18, 1943.

1. Food ⇐25

Count alleging that plaintiff purchased a bottle of beverage which had been bottled by defendant, that defendant was negligent in permitting a cleaning brush to remain in bottle, that plaintiff drank portion of contents of bottle and that by reason thereof plaintiff became violently ill, stated a cause of action, in absence of a special demurrer.

2. Sales ⇐441(3)

Evidence that defendant, engaged in business of bottling beverage, sealed bottle with cleaning brush enclosed, that plaintiff purchased bottle and drank portion of contents, and that an analysis showed that contents contained traces of ferric and zinc phosphate from the metal on the brush sufficient to give it a bitter taste was sufficient to sustain determination that beverage was not reasonably fit for human consumption. Civ.Code, § 1735.

3. Evidence ⇐14

A court may take judicial notice that even a normal person in seeing a disgusting looking object in a bottle from which he has just drunk may and often will suffer intense nausea which may produce more serious results.

4. Damages ⇐49
Sales ⇐442(9)

Where a person seeing a disgusting looking object in a bottle from which he has just drunk suffers intense nausea which produces serious results, he may recover for injury resulting from mental shock.

5. Food ⇐25
Sales ⇐445(4)

In action for breach of warranty and for injuries resulting from drinking part of contents of beverage bottle containing cleaning brush, evidence that standard of conduct of defendant in manufacture of its products was the same as the fair average of all manufacturers of the beverage was not conclusive that brush was not left in the bottle by defendant.

6. Food ⇐25
Sales ⇐445(4)

In action for breach of warranty and for personal injuries resulting from drinking portion of contents of beverage bottle containing cleaning brush, whether evidence offered by defendant excluded possibility that brush was left in bottle by defendant, and whether defendant manufactured the questioned bottle were questions for jury.

7. Food ⇐25

A high degree of care is required of manufacturer or producer of foods and beverages to see that the same are free from deleterious substances.

8. Appeal and error ⇐877(2)

In action for breach of warranty that beverage was fit for human consumption, and for personal injuries resulting from drinking portion of contents of beverage bottle, defendant could not complain because plaintiff did not propose instructions on subject of warranty, since plaintiff was under no obligation to do so.

9. Appeal and error ⇐1170(9)

In action for breach of warranty that beverage was fit for human consumption

and for injuries resulting from drinking portion of contents of beverage bottle manufactured by defendant, defendant could not complain of conflict between instruction given at plaintiff's request that high degree of care is imposed on manufacturer of food and instruction given at defendant's request embodying the standard of ordinary care. Const. art. 6, § 4½.

10. Appeal and error ⇐1170(9)

In action for breach of warranty that beverage was fit for human consumption and for injuries resulting from drinking portion of contents of beverage bottle manufactured by defendant, alleged conflict in instructions did not justify a reversal. Civ.Code, §§ 1789, subd. 6, 3300; Const. art. 6, § 4½.

Appeal from Superior Court, Stanislaus County; Gustav B. Hjelm, Judge.

Action by John Medeiros against Coca-Cola Bottling Company of Turlock, Limited, for personal injuries and for breach of warranty. Judgment for plaintiff, and defendant appeals.

Affirmed.

Hawkins, Hawkins & Cardozo, of Modesto, for appellant.

Gregory P. Maushart, of Newman, and Thomas C. Boone, of Modesto, for respondent.

ADAMS, Presiding Justice.

Defendant appeals from a judgment in favor of plaintiff for damages in the sum of $500 sustained by reason of personal injuries resulting from drinking a bottle of Coca-Cola manufactured by defendant.

Plaintiff's complaint, which was in two counts, alleged in the first count that defendant was engaged in the business of bottling, selling and distributing Coca-Cola which it sold and distributed to various dealers for the purposes of resale to the general public; that plaintiff had purchased a bottle of Coca-Cola from a dealer in Stanislaus County, which had been bottled by defendant and sold and delivered by it to said dealer; that defendant was careless and negligent in the bottling of said Coca-Cola in that defendant had permitted to remain in said bottle a cleaning brush used by defendant in cleaning bottles, and that said bottle had been sealed by defendant with said cleaning brush enclosed and delivered in that condition to the dealer from whom plaintiff had bought it; that plaintiff "drank a portion of the contents of said bottle of Coca-Cola in which bottle the defendant permitted a cleaning brush to remain, and by reason of the plaintiff drinking a portion of the contents of said bottle as aforesaid he became violently ill and was rendered sick, sore and disabled"; also that by reason of the aforesaid facts it had been necessary for plaintiff to secure the services of a physician for which he had incurred a reasonable indebtedness of $150; and that "by reason of the premises and as a direct and proximate result of the carelessness and negligence of the defendant," plaintiff had been damaged in the sum of $7,500, no part of which had been paid by defendant.

In the second count plaintiff incorporated by reference portions of the first count and then alleged "that the defendant warrants the beverages, which it bottles, sells and distributes and particularly the drink known as Coca-Cola as being pure and wholesome, free from all impurities and fit for human consumption"; that plaintiff was unaware that the bottle of Coca-Cola delivered to him contained the said cleaning brush or other foreign substance "and all times relied upon the expressed and implied warranty of the defendant that the said bottle of Coca-Cola was pure and wholesome, free from all impurities and that it was fit for human consumption"; that by reason of leaving the cleaning brush in said Coca-Cola the contents of same became contaminated and unfit for human consumption; that plaintiff drank a portion of the bottle of Coca-Cola in which the defendant permitted the cleaning brush to remain, "and by reason of the plaintiff drinking a portion of the contents of said bottle as aforesaid, he became violently ill and was rendered sick, sore and disabled"; also, "that by reason of the premises and as a direct and proximate result of the breach of warranty by the defendant, plaintiff has been damaged in the sum of $7500.00."

Defendant filed no demurrer to said complaint, but answered denying generally the allegations thereof; and as special defenses set up that plaintiff's injuries, if any, were caused by an unavoidable accident, that plaintiff was negligent and did not use ordinary care in the purchase and consumption of the Coca-Cola, and that such negligence and want of ordinary care contributed proximately to his injury, if

any; also that defendant did not warrant to plaintiff any Coca-Cola as being pure, or wholesome, or free from all impurities, or fit for human consumption.

The case was tried before a jury, and at the close of plaintiff's testimony defendant moved for a nonsuit upon the second (warranty) count of the complaint upon the ground that plaintiff had failed to support the allegations thereof in that there was no evidence that the contents of the bottle were unfit for human consumption; and upon the first (tort) count upon the ground that it did not state a cause of action in that there was nothing to show a causal connection between the negligent leaving of the brush in the bottle, and the drinking of the Coca-Cola, and defendant's becoming ill. Defendant's motion was denied. After verdict for plaintiff, defendant moved for a new trial upon all of the statutory grounds, which motion was also denied.

On this appeal it is contended by appellant that the judgment should be reversed because the court erred in refusing to grant a nonsuit (a) as to the tort action because the complaint did not state a cause of action and the evidence was not sufficient to support a verdict, (b) as to the action for breach of warranty because the evidence was not sufficient to support a verdict. Also that the evidence was not sufficient to support a verdict, that the court gave the jury erroneous instructions, and gave conflicting instructions on material issues. We shall consider these contentions in the order in which they are presented by appellant.

[1] As to whether a nonsuit should have been granted on the first cause of action, the record shows that the only ground upon which defendant's motion was predicated was that a cause of action is not stated, it being urged that the mere fact that a person after drinking a bottle of Coca-Cola with a brush in it becomes ill is not sufficient to state a cause of action; that there must be something to show a causal connection between the negligent leaving of a brush in the bottle and drinking the Coca-Cola and becoming sick. On said motion it was not urged as to this count that the evidence was not sufficient to support a verdict.

We cannot say that said count failed to state a cause of action. Defendant did not demur to the complaint, and we note that as to the second count counsel for defendant stated to the trial court that it was not demurrable "on its face," but showed a "good cause of action"; and the allegation therein as to the effect of plaintiff's drinking the Coca-Cola was the same, to wit: That "by reason of the plaintiff drinking a portion of the contents of said bottle as aforesaid he became violently ill and was rendered sick, sore and disabled." If the allegation was sufficient in the one count, it was sufficient in the other; and had defendant desired a fuller statement it could have demurred on the ground of insufficiency. In the absence of a special demurrer the allegations are sufficient to constitute a cause of action, and the court properly denied the motion for nonsuit on that ground.

[2] As to the contention of defendant on its motion for a nonsuit under the second count, that the evidence was insufficient to support the allegation that the contents of the bottle were unfit for human consumption, that the presence of the cleaning brush in the Coca-Cola did not make it so unfit, and that there was, therefore, no breach of the implied warranty that the drink was "reasonably fit" for human consumption, it is urged that the liquid itself was not contaminated by the presence of the brush and that, though seeing the brush in the bottle (which plaintiff thought was a spider) caused a shock which made plaintiff ill, the product was nevertheless fit for human consumption and there was no breach of the implied warranty that the beverage was "reasonably fit" for the purpose for which it was required. Sec. 1735, Civ.Code. We are not impressed with this contention, nor do we believe that it can be said with reason that a beverage containing a cleaning brush or other similar foreign object or substance is "reasonably fit" for beverage purposes. An analysis of the contents of the bottle of Coca-Cola in controversy, made by defendant's own witness, showed that it contained traces of ferric and zinc phosphate from the metal on the brush, sufficient to give it a bitter taste.

In Delta Nehi Bottling Co. v. Lucas, 184 Miss. 693, 185 So. 561, a bottle of R. C. Cola purchased by plaintiff contained a metal object having the appearance of a corroded paper clip covered with a greenish substance. After drinking a portion of the contents plaintiff discovered the object and was thereupon seized with vomiting, etc. At the trial her physician disclaimed any knowledge that the foreign substance in the bottle was actually poisonous, and averred that it was the drink in the condi-

tion in which it appeared to be which caused a gastric upset and became the contributing cause of an aggravation of pyelitis to which plaintiff was subject. There was medical testimony that a normal person would sometimes become nauseated when seeing a disgusting object in a container from which he had drunk, a fact which the court said a jury would know without medical testimony. And it was there held that the evidence was sufficient to sustain the verdict of the jury in favor of plaintiff. The court also held in that case that if the conduct of the warrantor of a drink for human consumption is a substantial factor in bringing about harm to another, the fact that the warrantor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred, does not defeat liability; and that a negligent warrantor of a drink may be liable for harm to another although the physical condition of the other makes the injury greater than that which the actor as a reasonable man should have foreseen.

In Coca-Cola Bottling Co. v. Jenkins, 190 Ark. 930, 82 S.W.2d 15, where plaintiff drank part of a bottle of Coca-Cola which contained a decomposed cockroach, it was urged by defendant upon appeal that one of the instructions of the trial court was erroneous in that it assumed that the contents of the bottle were poisonous and unwholesome—a matter in controversy; but judgment for plaintiff was affirmed.

In Carbone v. California Packing Corp., 169 A. 866, 12 N.J.Misc. 209, a judgment for plaintiff was affirmed in a case where it was shown that plaintiff became ill after eating part of a can of peaches put up by defendant which contained a medicated finger bandage of gauze impregnated with some drug, though it was not shown that the portion of the contents eaten by plaintiff was itself unfit for human consumption.

In Fisher v. Washington Coca-Cola Bottling Works, 66 App.D.C. 7, 84 F.2d 261, 105 A.L.R. 1034, a bottle of Coca-Cola sold to plaintiff contained a moldy substance, spongy and soft. Plaintiff, after drinking a portion of the beverage, became ill. The Court of Appeals for the District of Columbia reversed a directed verdict for defendant, saying that the case should have been submitted to the jury; that it was not distinguishable from Chevy Chase Dairy v. Mullineaux, 63 App.D.C. 259, 71 F.2d 982, where broken glass was found in a bottle of milk, even though broken glass is harmful to the human body, while the foreign body found in the Coca-Cola was not shown to have been harmful.

In Coca-Cola Bottling Works of Evansville v. Williams, Ind.App., 37 N.E.2d 702, a bottle of Coca-Cola containing concrete was sold to plaintiff, and illness resulted from drinking same, culminating in nervous gastritis. A judgment for plaintiff was sustained though it was not shown that the concrete rendered the Coca-Cola itself unfit for human consumption.

In Sullivan v. Coca Cola Bottling Co. of Chicago, 313 Ill. 517, 40 N.E.2d 579, a bottle of Coca-Cola sold to plaintiff contained the metallic base of an automobile electric light bulb, and after drinking a portion of the bottle plaintiff became ill. There was no evidence that the metal had actually contaminated the Coca-Cola, but the case was held to be one for the jury.

We also note that though in Reese v. Smith, 9 Cal.2d 324, 70 P.2d 933, it was held that the presence of maggots on sausage did not prove that the sausage itself was filthy, decomposed and unfit for human consumption, and that maggots themselves are not poisonous, that in Klein v. Duchess Sandwich Co., Ltd., 14 Cal.2d 272, 282, 93 P.2d 799, the court said that it should at once be apparent that food which is covered with maggots is not wholesome nor fit for human consumption, and that if plaintiff partook of a sandwich so infested and became ill, there was abundant authority for the affirmation of a judgment for damages in such case either on the theory of negligence or on that of implied warranty under section 1735 of the Civil Code.

Plaintiff testified that on taking the Coca-Cola he found it to have a bitter taste, and that on examining it he saw something in it which he thought to be a bug or a spider; that he "got kind of nervous" thinking he had swallowed a part of "that dirty bug"; that later he vomited and had pain in his stomach; that he vomited for over a week, and whenever he thought of how the bottle looked he would get upset and vomit. His attending physician found that he had a recurrence of a pre-existing ulcer, and testified that if a man receives a sufficient shock to cause him to vomit it might cause a recurrence of an ulcer; that in his opinion plaintiff received a nervous shock which started vomiting, and caused an irritation which probably lighted up an old ulcer. It is true that he did say that the liquid itself which plaintiff drank had nothing to do

with the condition that developed in plaintiff's stomach, but that his idea was that seeing the brush in there and the shock made plaintiff ill.

[3, 4] Defendant's contention seems to be that however noisome and disgusting a foreign object found in a beverage may be or appear, the manufacturer of such object cannot be held liable for negligence in permitting such object to be in his product unless the contents of the bottle are themselves rendered unfit for human consumption; and that regardless of the effect of the finding of such object in a bottle from which he has drunk, a party cannot recover damages for sickness resulting therefrom, unless he is actually poisoned or otherwise injuriously affected by the drink itself. We think that a court may well take judicial notice that even a normal person in seeing a disgusting looking object in a bottle from which he has just drunk may and often will suffer intense nausea which may produce more serious results. Also one may recover for injury resulting from mental shock in such cases. In Dryden v. Continental Baking Co., 11 Cal. 2d 33, 77 P.2d 833, plaintiff ate bread manufactured by defendant, which bread contained glass. The court said that even were plaintiff's injuries confined to nervous shock, the right to recover for subsequent disturbances of the nervous system is settled. Also see Taylor v. Pole, 16 Cal.2d 668, 671, 107 P.2d 614, and Cook v. Maier, 33 Cal.App.2d 581, 584, 92 P.2d 434.

[5] In support of its contention that the evidence does not support the verdict of the jury, appellant urges that it introduced evidence that the standard of conduct of defendant in the manufacture of Coca-Cola was the same as the fair average of all manufacturers of the drink, that evidence offered excluded the possibility that the brush was left in the bottle by defendant, that there is no direct evidence that defendant bottled the questioned Coca-Cola. Without reviewing the evidence on these points it is sufficient to say that evidence that the standard of conduct of defendant in the manufacture of its product is the same as the fair average of all manufacturers of the drink is not conclusive.

[6] There are numerous cases holding that the unexplained presence of a foreign object or substance in bottled or packaged goods is a sufficient basis for an inference of negligence on the manufacturer's part to send the case to the jury. Linker v. Quaker Oats Co., D.C., 11 F.Supp. 794; 105 A.L.R. 1039, note; Rozumailski v. Philadelphia Coca-Cola Bottling Co., 296 Pa. 114, 145 A. 700; Dryden v. Continental Baking Co., 11 Cal.2d 33, 38, 77 P.2d 833, supra. And as to whether the evidence offered by defendant excluded the possibility that the brush was left in the bottle by defendant, and whether defendant manufactured the questioned bottle, these questions were for the jury, and we cannot say that there was not sufficient evidence to justify their verdict.

[7] It is further argued that defendant could not have foreseen that the leaving of the brush in the bottle would produce the effects upon plaintiff shown here to have resulted, because the injury claimed by plaintiff is not the natural and probable consequence of the wrongful act; and it is urged that a high degree of caution was not imposed upon defendant as producer. But there is substantial authority for holding that a higher degree of care is required of the producer of foods and beverages than is usually made applicable in other charges of negligence. Dryden v. Continental Baking Co., 11 Cal.2d 33, 38, 77 P.2d 833; Bissonette v. National Biscuit Co., 2 Cir., 100 F.2d 1003; Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N.E. 557; Rozumailski v. Philadelphia Coca-Cola Bottling Co., 296 Pa. 114, 145 A. 700.

[8, 9] Appellant's complaint about the instructions appears to be that those given at plaintiff's request deal solely with the facts of the case in relation to negligence; that the court erroneously instructed, at plaintiff's request, that a high degree of care is imposed upon a manufacturer of food to see that same is free from deleterious substances, as it contends defendant was obliged to use only ordinary care; that instructions given at plaintiff's request on the measure of damages were faulty, and that there were conflicting instructions. No complaint is made that the court refused to give any of the instructions requested by defendant, and we believe that the instructions proposed by defendant and given by the court were extremely favorable to defendant. No reasonable complaint can be made that plaintiff did not propose instructions on the subject of warranty, as he was under no obligation to do so. The instruction regarding the degree of care imposed upon a manufacturer of food is consistent with cases hereinbefore cited, especially

Dryden v. Continental Baking Co., supra; and furthermore the court gave, at defendant's request, an instruction embodying the standard of ordinary care. Since something more than ordinary care is demanded of a manufacturer of food, defendant is in no position to complain of conflict in this respect. On the measure of damages the court, at defendant's request, gave instructions embodying the provisions of subdivision (6) of section 1789 of the Civil Code on measure of damages on breach of warranty, and section 3300 of the Civil Code on breach of obligation arising from contract. It also gave, at defendant's request, instructions on unavoidable accident, and contributory negligence, though there was no evidence of the latter and only the negative testimony of inability to explain how the cleaning brush got into the bottle, to support the former.

[10] In so far as other alleged conflicts in instructions are concerned, we cannot say that there was any error that resulted in a miscarriage of justice or that justifies a reversal, in view of section 4½ of article VI of the Constitution. The judgment and the order denying a new trial are affirmed.

SCHOTTKY, J. pro tem., and THOMPSON, J., concurred.



57 Cal.App.2d 844

In re CASE'S GUARDIANSHIP.
RUNGIE v. CASE.
Civ. 13955.

District Court of Appeal, Second District, Division 2, California.

March 29, 1943.

Hearing Denied May 27, 1943.

1. Judgment ⇐646

An order denying petition for removal of guardian was not "res judicata" as to subsequent removal petition where 17 months elapsed between the hearings, since conditions may have changed in intervening time.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

2. Guardian and ward ⇐25

In guardianship proceeding, court may always consider changed conditions to end that it may make orders which will prove to be for welfare of the minor, and such a change may justify court in making different orders on successive petitions.

3. Guardian and ward ⇐25

On petition for removal of guardian, court is not bound by any judgment previously rendered except as to facts which have remained unchanged since former hearing.

4. Judgment ⇐951(1)

In guardianship proceeding, one seeking to establish defense of res judicata has burden of showing that no substantial change in conditions has occurred since entry of former judgment.

5. Guardian and ward ⇐10

In contest between a parent and another for guardianship of child, the determining factor is present fitness of parent for custody of child, and if he is competent to discharge duties of guardianship, he is entitled to be appointed in preference to any other person. Probate Code, § 1407.

6. Guardian and ward ⇐25

In proceeding by father for removal of maternal grandmother as guardian of child, findings that grandmother was financially unable to care for child, that father was a fit and proper person to have custody and that it was for best interests of child to be with father, justified termination of the guardianship. Probate Code, § 1407.

7. Guardian and ward ⇐8, 25

When appointment of guardian for minor of tender years is necessary, superior court has duty to make appointment, but when it appears that guardianship is no longer necessary, court must remove guardian. Probate Code, § 1580, subd. 8.

8. Guardian and ward ⇐25

Where child's father was found to be able to care for child and to be a fit and proper person to have custody, maternal grandmother could not be retained as guardian, as against desires of father, notwithstanding father's failure to visit child immediately following mother's death and failure to contribute to child's support

when unable to do so. Probate Code, §§ 1407, 1580, subd. 8.

9. Parent and child ⇐2(3)

A parent should not be deprived of privilege of supporting and directing education of child in absence of proof of a crass abandonment. Civ.Code, § 197.

10. Guardian and ward ⇐25

The fact that child's father may have been in a naval prison at the time maternal grandmother was appointed child's guardian would not prevent subsequent termination of guardianship in order that father might have custody of child, if father was then a fit and proper person to have custody. Probate Code, §§ 1407, 1580, subd. 8.

11. Parent and child ⇐2(3)

Serving a term in prison is not per se cause for depriving a parent of custody of his child. Civ.Code, § 197.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Proceeding in the matter of the guardianship of the person and estate of Louis H. J. Case, a minor, wherein Howard L. Case sought to have Clara Rungie removed as guardian of the minor. From an order removing the guardian and from an order denying a new trial, the guardian appeals.

Order removing the guardian affirmed, and the appeal from the order denying a new trial dismissed.

See, also, Cal.App., 128 P.2d 544.

William Bronsten, of Los Angeles, for appellant.

C. E. Christopher, of Alhambra, for respondent.

MOORE, Presiding Justice.

This is an appeal from an order removing a guardian and directing that the custody of the minor be restored to its father, and from an order denying a motion for a new trial in the matter.

The minor herein Louis Case was born in 1935. His mother died soon after his birth. Thereupon his maternal grandmother took the orphan into her custody and later on October 1, 1937, qualified as his guardian. She held that office until her removal by the judgment now before us. At the time of such appointment petitioner, the father of Louis, was serving the colors in the Navy from which he later retired. On January 2, 1940, he caused a citation to be issued to the guardian to show cause why she should not be removed. The matter finally came on for hearing on February 27, 1941. On June 3, 1941, an order was made denying the contestant's petition for the removal of the guardian. On the 25th day of June, 1942, the father filed a second petition for the removal of the guardian upon which citation was issued to the guardian to show cause on the 17th day of July, 1942.

After a hearing on such petition the court made findings which have established facts pertinent to the issues raised by the contest: Petitioner resides in Los Angeles County; in all respects he is able to care and provide for the minor and to give him the sustenance and care due an infant from a parent; the child has no estate; the father desires to have the boy with him and to bestow upon him his support and parental affection. Petitioner is a fit and proper person to have the care, custody and control of his son, and is qualified to direct the moral and spiritual training of the child. It is no longer necessary to have a guardian. Although the grandmother has had the custody of the minor since his birth she is not financially able to provide for the child. While she has sought charity from the Masonic Order within the past two years, she has refused offers of money from petitioner. Moreover, the husband of the guardian is not related to the child and there is substantial evidence that his conduct as to the use of profanity and alcohol in the presence of Louis does not indicate a wholesome environment for the development of a boy of seven. For good reasons, therefore, the court concluded that the welfare of the minor will best be served by terminating the guardianship and restoring the child to his father.

[1-3] The first point raised by appellant is that the order of the court of June 3, 1941, denying the petition for the removal of the guardian is res judicata as to the petition upon which the present order was based. This cannot be so for the reason that 17 months elapsed between the hearings on the first and second citations. To apply the doctrine of res judicata, as contended by appellant, would be a defeat of the court's duty to consider such circumstances as may have occurred after the

first order. In the conduct of guardianship proceedings it is proper for the court always to consider changed conditions to the end that it may make such orders with respect to a guardianship as will prove to be for the welfare of the minor. A material change in the mode of life, habits or behavior of petitioner in the period elapsing between the hearings of two successive petitions may justify the court in making new and different orders with reference to the guardianship. In re Snowball, 156 Cal. 240, 242, 104 P. 444. Upon a petition for the removal of a guardian the court is not bound by any judgment rendered at a previous hearing except as to the facts which have remained unchanged since the former hearing.

[4] In a guardianship proceeding one who seeks to establish his defense of res judicata has the burden of showing that no substantial change in conditions has occurred since the entry of the former judgment. Such proof might have been made by exhibiting the evidence taken at the trial in June, 1941. Walsh v. Harris, 10 Cal. 391. Such attempt by appellant would have been in vain for the reason that the court found, and the evidence proved, a change in the status and capabilities of respondent.

[5, 6] The determining factor in such a hearing is the present fitness of the parent for the custody of his own child. In re Green, 192 Cal. 714, 719, 221 P. 903. In a contest between a parent and another for the guardianship of a child of the former, if the parent is competent to discharge the duties of guardianship he is entitled to be appointed in preference to any other person. § 1407 of Prob.Code. The findings that a maternal grandmother as the guardian was unable financially to care for the minor, that the father is a fit and proper person to have the custody, and that it is for the best interest of the minor to be with his father are conclusive for the termination of the guardianship in the absence of a showing that the evidence does not support such findings.

[7] When the appointment of a guardian for a minor of tender years is found to be necessary, such appointment is a duty of the Superior Court. When it appears to the court that a guardianship is no longer necessary for such ward the court must thereupon remove the guardian. § 1580, subd. 8, Prob.Code. Inasmuch as a natural parent has a superior right to the custody of his child when possessed of such character as to make him a fit custodian thereof, the reason for the guardianship of the minor ceases and its continuance is improper. In re Santos' Estate, 185 Cal. 127, 132, 195 P. 1055.

[8, 9] Since the father is competent and has therefore the preferential right to have the custody of his child, even though he were impecunious, the court is powerless to maintain the grandmother as guardian of his person. In re Mathews' Estate, 174 Cal. 679, 683, 164 P. 8; In re Schwartz, 171 Cal. 633, 634, 154 P. 304. The minor has no property. His grandmother qualified as guardian while his father was in the Navy. The father's failure to visit Louis immediately following the decease of the boy's mother does not necessarily evince an abandonment. A parent does not forfeit the right of custody of his child merely because of his failure to contribute to its support at a time when he was unable to do so. In re Green, supra. Since his return to civil life petitioner has engaged in useful toil, has gained the respect of his neighbors and earns sufficient to maintain a comfortable home. He has remarried and the wife gladly welcomes the child to her heart. Not only does the judgment determine petitioner's rights but both the natural and civil law fixes his responsibility. While he may enjoy the filial affection, society and services of his son, § 197 Civ. Code, he owes the continuous duty of furnishing him support, and directing his education. These are privileges of which no parent should be deprived in the absence of proof of a crass abandonment. In re Schwartz, supra.

[10, 11] Appellant contends that she was denied the privilege of cross examining petitioner for the purpose of showing that petitioner was in a naval prison at the time that the maternal grandmother was appointed guardian of the minor. Upon a trial of the character and fitness of the father to have the custody of his child, a misdeed which may have occurred many years prior to the hearing is too remote to prove present unworthiness. Serving a term in prison is not per se cause for depriving a parent of the custody of his child. The commission of mala prohibita which may result in penal servitude is not conclusive proof of vicious character. But even though petitioner had in 1935 served a prison term for an

act involving moral turpitude, the court's determination on a subsequent hearing in 1942 that the father is now a fit and proper person to have custody of his child supplants the earlier finding of his unfitness for such responsibility. Guardianship of McCoy, 46 Cal.App.2d 494, 116 P.2d 103.

The judgment is affirmed. The appeal from the order denying a new trial is dismissed.

W. J. WOOD and McCOMB, JJ., concurred.



57 Cal.App.2d 973

ABRAHAM LEHR, Inc., v. CORTEZ.

Civ. 13699.

District Court of Appeal, Second District, Division 3, California.

April 6, 1943.

Hearing Denied June 3, 1943.

1. Master and servant ⇐14½

An employment agency could not maintain action for commission which had accrued under employment agency contract with motion picture cameraman where controversy had not been referred to State Labor Commissioner, notwithstanding termination of the contract, since the action presented a "controversy" arising under private employment agency act requiring reference of controversy to State Labor Commissioner before appeal may be made to court for relief. St.1937, pp. 230–240, §§ 1550–1649, 1647.

See Words and Phrases, Permanent Edition, for all other definitions of "Controversy".

2. Master and servant ⇐14½

Under private employment agency statute requiring reference of controversy arising under the act to State Labor Commissioner before appeal may be made to Superior Court for relief, termination of employment agency contract does not put an end to the requirement that matters in controversy be first referred to the Labor Commissioner. St.1937, pp. 230–240, §§ 1550–1649, 1647.

3. Master and servant ⇐14½

An action by employment agency against motion picture cameraman for damages based on theory that employment agency contract was no longer operative did not present a "controversy" arising under private employment agency act requiring reference of controversy arising under act to State Labor Commissioner before appeal may be made to court for relief. St.1937, pp. 230–240, §§ 1550–1649, 1647.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action for breach of contract by Abraham Lehr, Inc., against Stanley Cortez. From a judgment dismissing plaintiff's amended complaint, plaintiff appeals.

Reversed with directions.

Loeb & Loeb and Norman Newmark, all of Los Angeles, for appellant.

Sam Wolf and Leo Shapiro, both of Los Angeles, for respondent.

BISHOP, Justice pro tem.

It was error to enter a judgment dismissing plaintiff's amended complaint, even though it appeared that plaintiff's cause of action arose in connection with an employment agency contract and it did not appear that plaintiff had referred its controversy with the defendant to the State Labor Commissioner before appealing to the superior court for relief.

The contention of the defendant in support of the judgment is that this action was prematurely brought because there had been no prior compliance with the first sentence of section 1647, Labor Code, St. 1937, p. 240, which reads: "In all cases of controversy arising under this chapter the parties involved shall refer the matters in dispute to the Labor Commissioner, who shall hear and determine the same, subject to appeal within ten days after determination, to the superior court where the same shall be heard de novo." The chapter referred to is a codification, with quite a few changes, of an act regulating private employment agencies, (Stats. 1913, p. 515, Act 2349, Deering's General Laws 1931), and consists of sections 1550 to 1649, inclusive, of the Labor Code, St.1937, pp. 230–240. Section 1647, Labor Code, was, with some minor modifications, formerly a part of section 19 of the act referred to. The

problem thus presented for our decision is whether the amended complaint stated any cause of action *not* presenting a "controversy arising under this chapter," for if there was one such cause, the trial court should not have denied the plaintiff all relief.

The amended complaint is divided into three counts, but upon examination only two causes of action are discovered; the third count is but a restatement of the two causes of action already separately stated, one in each of the first two counts. These first two counts contain certain elements in common. It appears, in each, that the plaintiff corporation was licensed to engage in the business of conducting a motion picture employment agency, and that the defendant was a motion picture cameraman. In April, 1941, the plaintiff and the defendant entered into a written contract whereby the former was to be the latter's "sole and personal representative * * * for a period of seven years." It was "to assist defendant in negotiating for the procuring of employment." The defendant in turn agreed to pay the plaintiff ten per cent of all compensation earned by the defendant during the term of the contract. Then it is alleged that the plaintiff has duly performed all the conditions on its part to be performed.

At this point counts one and two set out on separate paths, each developing its own cause of action. In the first count the fact appears that in June and August of 1941 the defendant earned and received a total of $3,800. The first count then concludes with the statement that in November the defendant "wrongfully and without cause discharged plaintiff from its said employment" and has failed to pay the $380 which had accrued under the contract.

The second cause of action also sets up the discharge, made wrongfully and without cause, and continues with the allegations that the defendant's reasonably expected earnings during the balance of the contract's life would have been not less than $120,000, so that his discharge of the plaintiff damaged the latter in the sum of $12,000.

The boundary line of the field described by the words "all cases of controversy arising under this chapter" has not been completely surveyed, but two monuments have been erected: The cases of Collier & Wallis, Ltd. v. Astor, 1937, 9 Cal.2d 202, 70 P.2d 171, and Friedlander v. Stanley Productions, Inc., 1938, 24 Cal.App.2d 677, 76 P.2d 145. An examination of the file of the first of these cases reveals that the plaintiff there, just as in the first cause of action here, was suing to recover an unpaid portion of ten per cent of compensation that had been received by the defendant and which ten per cent, the plaintiff contended, was due it under an employment agency contract. The Supreme Court held that the action was prematurely brought and could not be maintained, solely because there had been no reference of the matters in dispute to the Commissioner of Labor as then required by section 19 of the act regulating private employment agencies.

The second case we cited, that of Friedlander v. Stanley Productions, Inc., 1938, 24 Cal.App.2d 677, 76 P.2d 145, also had to do with an employment agency contract, and the defendant contended that plaintiff's failure to refer the controversy to the Labor Commissioner before instituting the action was fatal to its maintenance. The action, it should be noted, was not to recover a sum allegedly due under the contract, but was one seeking a declaratory judgment that the contract had been cancelled by the plaintiff for cause. The contention that it was prematurely brought, because not first referred, was held to be unsound (the Supreme Court denying a hearing) and of the Collier & Wallis, Ltd. case the court said (page 679 of 24 Cal. App.2d, page 146 of 76 P.2d): "That case is not in point for the reason that it was tried and decided upon the assumption by all parties that the contract of employment was still in force and effect, and it does not appear that the nonexistence of the contract or its termination was involved in any way." Later, referring to the contract involved in its own case, the Friedlander opinion stated: "If the contract had been terminated, then the arbitration provision was inoperative." "A case more nearly in point," the opinion continued, "is that of Hanes v. Coffee, 212 Cal. 777, 300 P. 963."

In the case of Hanes v. Coffee, the plaintiff sought and obtained a judgment quieting its title to property that had been leased to the defendant for the drilling of oil, the basis of his recovery being that the defendant's failure to commence operations within two years lost him his interest in the property. The Supreme Court disposed of the defense that the lease contained a provision for arbitration "should the parties hereto not agree as to any ques-

tion of fact affecting the rights of the parties hereto," by making this statement, quoted in the Friedlander opinion at page 680 of 24 Cal.App.2d page 146 of 76 P.2d: "'Conceding that this provision would be enforceable under our statutes, we do not think that it is applicable to the present controversy, in which the lessor contends that, by reason of failure of the lessee to commence operations within the specified period, the lease never became operative, or, if it did, is now terminated. The provision clearly does not contemplate that this question shall be submitted to arbitration, since, if the allegations of plaintiff's complaint are sustained, the result is that the lease, including the arbitration provision, is wholly inoperative, and the lessee can claim no rights thereunder.'" A similar conclusion was reached in Johnson v. Atkins, 1942, 53 Cal.App.2d 430, at page 434, 127 P.2d 1027, at page 1030, where the Hanes and Friedlander cases were cited in support of the conclusion: "the frustration of the purpose of the contract left nothing to arbitrate under it."

[1, 2] We conclude from these cases, first, that our first cause of action, identical with that found in the Collier & Wallis, Ltd. case, presented a controversy "arising under this chapter," and that an action upon it may not be maintained because the matters in dispute have not been referred to the Labor Commissioner. Were the necessity for the reference contractual, a termination of the contract might be said to end the necessity, but as it arises from statute, even the termination of the contract does not put an end to the requirement that matters in controversy be first referred to the Labor Commissioner.

[3] Secondly, we conclude that an action for damages, based on the theory that the contract is no longer operative, does not present a controversy arising under sections 1550–1649 of the Labor Code. If the contention were that by a term of plaintiff's contract the questions involved had first to be arbitrated, the cases already referred to justify the conclusion that under the facts of the second cause of action, the contract is at an end, as an operative contract, and the arbitration provision would also be ended. By analogy, it appears from the Friedlander case that if the contract is no longer operative, the problems that arise as a consequence do not constitute controversies covered by section 1647, Labor Code. That the contract is no longer operative, that it is at an end for all purposes save as a basis for plaintiff's action for damages, seems clearly to be the theory and effect of plaintiff's second, and in part his third, cause of action. This quotation, made in Sobelman v. Maier, 1927, 203 Cal. 1, 9, 262 P. 1087, 1090, from an earlier case, reappears in King Features Syndicate v. K M T R Corporation, 1938, 29 Cal.App.2d 247, beginning at page 248, 84 P.2d 322: "'"One who has been injured by a breach of contract has an election to pursue any of three remedies. He may treat the contract as rescinded and may recover upon a quantum meruit so far as he has performed; or he may keep the contract alive, for the benefit of both parties, being at all times ready and able to perform; or, third, he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized if he had not been prevented from performing." * * * Upon the election * * * the rights of the parties are to be regarded as then culminating, and the contractual relation ceases to exist, except for the purpose of maintaining the action for the recovery of damages.'" This further quotation follows from Alderson v. Houston, 1908, 154 Cal. 1, 12, 96 P. 884, 888: "'* * * Upon the election to treat the renunciation, whether by declaration or by acts and conduct, as a breach of the contract, the rights of the parties are to be regarded as then culminating, and the contractual relation ceases to exist, except for the purpose of maintaining the action for the recovery of damages. * * *'" See, also, Atkinson v. District Bond Co., 1935, 5 Cal.App.2d 738, 743, 43 P.2d 867 and Big Boy Drilling Corp., Ltd. v. Etheridge, 1941, 44 Cal.App.2d 114, 117, 111 P.2d 953.

In neither of the first two cases cited by us was the scope of the words "cases of controversy arising under this chapter" expressly considered. Should those words be given an interpretation limiting them to controversies respecting the relative rights and duties of employment agencies and those with whom they deal, as imposed by the provisions of Act 2349, supra, or now by sections 1550 to 1649 of the Labor Code, our conclusion respecting plaintiff's second cause of action would be fortified; nowhere in those sections do we find the subject matter of a principal's wrongful dis-

charge of his employing agent referred to directly or indirectly.

The judgment of dismissal is therefore reversed, with directions to the trial court to overrule the demurrer as to plaintiff's second and third causes of action.

DESMOND, P. J., and SHINN, J., concur.

Hearing denied; SHENK and CURTIS, JJ., dissenting.



57 Cal.App.2d 888

RILCOFF v. RILCOFF.

Civ. 3054.

District Court of Appeal, Fourth District, California.

March 29, 1943.

1. Divorce ⇐218

A judgment dismissing divorce action for failure to file an amendment within time limited terminated any need of wife for suit money, and part of judgment discharging all previous orders which had been made became effective as of the date of such judgment as respects any suit money that would otherwise have accrued under prior order therefor.

2. Divorce ⇐285

Where bill of exceptions on appeal from judgment of dismissal contained copies of notices of motions for additional attorney's fees and for an order staying proceedings, but contained nothing to show that such motions were ever made or submitted and it was stipulated and certified by trial judge that bill of exceptions correctly set forth all the proceedings, and specifications of error did not contain ground that court erred in entering judgment of dismissal without passing upon such motions, contention that court did err was not presented and could not be sustained.

3. Divorce ⇐223

The matter of additional attorney's fees for wife in divorce action is one within discretion of trial court, and, where wife had not filed amendment of complaint within time limited, denial of motion for stay of proceedings until defendant had complied with prior order for suit money and denial of motion for additional attorney's fee by means of judgment of dismissal was proper.

4. Divorce ⇐217

In divorce action, that wife was not employed at time order for suit money was entered, and that she was employed at time modification of order was made, sustained modification relieving defendant of payment of $75 per month for support and maintenance.

Appeal from Superior Court, Kern County: William L. Bradshaw, Judge.

Action for divorce by Mary Rilcoff against Nicolii N. Rilcoff. From a judgment dismissing the action for failure to file an amended complaint within time allowed and from an order modifying prior order for suit money, the plaintiff appeals.

Affirmed.

Barry Sullivan, of Los Angeles, for appellant.

Claflin & Chain, of Bakersfield, for respondent.

BARNARD, Presiding Justice.

The plaintiff filed this action for divorce in Los Angeles County. After an order to show cause and a hearing thereon the court, on September 19, 1941, entered an order requiring the defendant to pay to the plaintiff for her support $75 a month commencing September 20, 1941, and also $25 for costs and $250 for attorney's fees, payable forthwith.

On September 22, 1941, the defendant filed a demurrer to the complaint with notice of a motion for a change of venue to Kern County, being the county of his residence. This motion was heard and granted on September 29, 1941. The papers were filed in the Superior Court of Kern County on October 8, 1941. On October 14, 1941, the demurrer to the complaint was sustained with ten days allowed to the plaintiff in which to amend. Notice of this order was served on the plaintiff on October 21, 1941.

In the meantime, and on October 10, 1941, the defendant gave notice that he would move for an order modifying the order made on September 19, 1941. On October 14, 1941, the plaintiff filed notice of a motion for additional attorney's fees in resisting the defendant's motion for modification, and also filed notice of a motion for

an order staying all further proceedings in the action until the defendant had fully complied with the prior order for suit money. On November 5, 1941, the court made an order granting the defendant's motion to modify the order of September 19, 1941, by striking therefrom the provision for the payment to the plaintiff of $75 per month for her support and maintenance. This order does not mention the two motions of which the plaintiff had given notice, and there is nothing in the record before us to indicate that any such motions were ever made or submitted.

The plaintiff failed to file an amended complaint within the time allowed and on November 14, 1941, the court dismissed the action on that ground, with a provision that all orders previously made therein "are hereby dismissed and discharged." The plaintiff has appealed from the judgment of dismissal and also from the order of November 5, 1941, modifying the previous order for support and maintenance during pendency of the action. The appeal is based upon a clerk's transcript and a printed bill of exceptions.

Neither in her statement of questions presented nor in her opening brief has the appellant contended that the demurrer to her complaint was improperly sustained, although this is incidentally suggested in her closing brief. The only points urged in connection with the appeal from the judgment of dismissal are that the court had no authority, in dismissing the action, to order the discharge of all orders theretofore made, and that the court erred in entering a judgment of dismissal without passing upon her motion for additional attorney's fees and her motion for an order staying the proceedings.

[1] The order for suit money entered on September 19, 1941, was made pursuant to an order to show cause why money should not be furnished to the appellant to enable her to maintain the action and for her support during the pendency of the action. The entry of the judgment of dismissal brought to an end any possible need for such funds as of the date of the entry of that order and judgment. The provision thereof which discharged all previous orders which had been made did not purport to be retroactive, was effective as of the date of that order and judgment, and it seems clear that the court had authority to enter the same. No attempt was made to discharge any obligations which had already accrued, and nothing is here presented which indicates any error in connection with this judgment of dismissal.

[2, 3] The contention that the court erred in entering the judgment of dismissal without passing upon two motions made by the appellant cannot be sustained. Not only is this point not included in either the exceptions or specifications of error set forth in the bill of exceptions, but the appellant has failed to present a record which discloses any such a situation. The bill of exceptions contains copies of notices of motions for additional attorney's fees and for an order staying the proceedings, but contains nothing to show that these motions were ever made or submitted and it is both stipulated and certified by the trial judge that the bill of exceptions correctly sets forth all of the proceedings which took place. In any event, the matter of additional attorney's fees was one within the discretion of the court and a motion to stay the proceedings for the reason given, if one had been made, would have been peculiarly subject to the principles enunciated in the case of MacDonald v. Superior Court, 40 Cal.App.2d 517, 104 P.2d 1071, under the facts insofar as they are disclosed by the record before us. No good reason appears why the court should have kept the action alive after the appellant had, in effect, abandoned it.

[4] With respect to the appeal from the order of November 5, 1941, it is argued that the evidence is insufficient to justify the modification of the order made on September 19, 1941, in that no change in the circumstances of the parties is shown to have taken place between those dates. This matter is of small importance since the action was dismissed nine days after the order of modification was made. However, it is set forth in an affidavit used at the hearing on September 19, 1941, that the appellant was not employed. In another affidavit used in connection with the application for a modification of the previous order it is set forth that the appellant was then employed. That fact might indicate a considerable change in circumstances and is sufficient, insofar as here appears, to support the order made. No error is disclosed by the record before us.

The judgment and the order appealed from are both affirmed.

MARKS and GRIFFIN, JJ., concurred.

58 Cal.App.2d 1

BROMBERG v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

Civ. 13723.

District Court of Appeal, Second District, Division 1, California.

April 7, 1943.

Hearing Denied June 3, 1943.

1. Banks and banking ⇐150

Payment of an overdraft by bank amounts to a loan to depositor, and for that reason the amount thereof may be recovered from the depositor.

2. Banks and banking ⇐150

An action by bank to recover amount of overdraft from depositor is based upon implied promise which arises from the drawing of a check and honoring of the same by bank.

3. Banks and banking ⇐136

Statute giving banker general lien dependent on possession of all property in his hands belonging to customer for balance due from such customer is intended to operate automatically in those cases to which applicable, and, where right is exercised, the validity of the action of the bank in that regard may be challenged in action by customer for recovery of money or property appropriated. Civ. Code, § 3054.

4. Banks and banking ⇐136

Banker, having exercised his right of lien under statute giving him general lien dependent on possession and all property in his hands belonging to customer for balance due from such customer, is not in a position in which he needs to set it out as a counterclaim and ask for affirmative relief, but is only required to defend against recovery sought by customer. Civ. Code, § 3054.

5. Banks and banking ⇐136

An "indebtedness" due bank, within meaning of statute giving banker general lien dependent on possession of property belonging to customer for balance due such customer, may consist of overdraft of depositor. Civ.Code, § 3054.

See Words and Phrases, Permanent Edition, for all other definitions of "Indebtedness".

6. Banks and banking ⇐136

A banker, in exercise of right of lien under statute granting him lien dependent on possession of property belonging to customer for balance due from such customer, may appropriate money or property in his possession belonging to customer in extinguishment of any matured indebtedness of customer to the bank. Civ.Code, § 3054.

7. Banks and banking ⇐134(1)

Relationship between depositor and banker being that of "creditor and debtor", whenever a debt of depositor becomes due, the bank has right of set-off to extent of any debt it then holds against depositor as against the debt it owes depositor by reason of the deposit. Civ.Code, § 3054.

See Words and Phrases, Permanent Edition, for all other definitions of "Creditor and Debtor".

8. Banks and banking ⇐134(1)

Debt due from bank to depositor on account of deposit and indebtedness of depositor to bank are "cross-demands", such that, if either should sue the other on such demand, the other might plead the cross-demand as a counterclaim, and consequently the two demands are deemed compensated so far as they equal each other.

See Words and Phrases, Permanent Edition, for all other definitions of "Cross-Demand".

9. Judgment ⇐181

In action by depositor against bank to recover moneys allegedly converted from special savings account by reason of charges against such account with credits made to commercial account of depositor for purpose of meeting overdraft in such commercial account, summary judgment was properly granted for defendant in view of fact that bank was fully within rights when it withdrew sums of money from special savings account and credited them against indebtedness arising from overdraft, regardless of whether or not special savings account was opened on condition that withdrawals could not be made except by depositor and only by his written demand and actual presentation of passbook. Code Civ.Proc. § 437c; Civ.Code, § 3054.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Irving Bromberg against the Bank of America National Trust & Savings Association and another to recover moneys, claimed to have been wrongfully withdrawn from savings account. Judgment for defendants, and plaintiff appeals.

Affirmed.

Samuel Reisman and Laurence B. Martin, both of Los Angeles, for appellant.

Louis Ferrari, of San Francisco, and Edmund Nelson and G. L. Berrey, both of Los Angeles, for respondents.

YORK, Presiding Justice.

This is an appeal by the plaintiff from a judgment of dismissal entered pursuant to defendants' motion for a summary judgment under section 437c of the Code of Civil Procedure. It is here contended that (1) "there were triable issues of fact raised and joined by the amended complaint and the affidavit of the plaintiff in opposition to said motion for summary judgment, and that the court committed *reversible* error in granting said motion on behalf of defendants"; (2) the said judgment of dismissal herein is contrary to the law as set forth in the Bank Act (Deering's Gen. Laws 1937, Act 652).

The original complaint was in seven counts: The first for the balance of a bank account, to-wit, $15,377.41; the second, third, fourth, fifth and sixth causes of action were for money had and received, for conversion, misappropriation and embezzlement, and the seventh cause of action stated, in effect, that appellant maintained two commercial checking accounts and a special savings account with respondent bank; that a clerk in appellant's employ received for deposit in the commercial accounts sums of money aggregating approximately $13,000 which said clerk embezzled, and appellant being unaware of such thefts drew checks on said commercial accounts thereby creating overdrafts.

The respondent bank from time to time charged the special savings account in order to take care of the overdrafts. Appellant brought the instant action to recover the amounts thus withdrawn from the special savings account.

Respondents' demurrer to the complaint was sustained, whereupon appellant filed his amended complaint in practically the same language as the original but omitting the seventh cause of action. Respondents answered and some time later made their motion for summary judgment pursuant to the provisions of section 437c of the Code of Civil Procedure, on the ground that the "action has no merit." Said motion was granted and judgment of dismissal of the action followed.

In passing upon a summary judgment of dismissal under the provisions of section 437c of the Code of Civil Procedure, the Supreme Court in Walsh v. Walsh, 18 Cal. 2d 439, 441, 116 P.2d 62, 64, stated: "The controlling question to be determined upon this appeal is whether or not the trial court abused its discretion by entry of the summary judgment in response to defendant's motion therefor. This remedy, available since 1933 to plaintiffs in actions commenced in the superior court, was extended in like terms of limitation to defendants in 1939 by amendment of the summary judgment statute. The relevant provision is section 437c of the Code of Civil Procedure (as amended by Stats.1939, ch. 331, § 1), which so far as here material reads as follows: 'In superior courts * * * when an answer is filed in an action to recover upon a debt * * * if it is claimed that * * * the action has no merit, on motion * * * supported by affidavit * * * the complaint may be dismissed and judgment may be entered, in the discretion of the court unless the other party, by affidavit or affidavits shall show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact.' Thus, in passing upon a motion for summary judgment, the primary duty of the trial court is to decide whether there is an issue of fact to be tried. If it finds one, it is then powerless to proceed further, but must allow such issue to be tried by a jury unless a jury trial is waived. By an unbroken line of decisions in this state since the date of the original enactment of section 437c, the principle has become well established that issue finding rather than issue determination is the pivot upon which the summary judgment law turns. Security-First National Bank v. Cryer, 39 Cal.App.2d 757, 104 P.2d 66; McComsey v. Leaf, 36 Cal.App.2d 132, 97 P.2d 242; Kelly v. Liddicoat, 35 Cal.App. 2d 559, 96 P.2d 186; Shea v. Leonis, 29 Cal.App.2d 184, 84 P.2d 277; Bank of America v. Casady, 15 Cal.App.2d 163, 59 P.2d 444. As was said in Shea v. Leonis, supra, 29 Cal.App.2d at page 187, 84 P.2d at page 279: 'A motion for summary judgment is not a trial upon the merits. It is merely to determine whether there is an issue to be tried.' The same thought was

expressed in Bank of America v. Casady, supra, 15 Cal.App.2d at page 168, 59 P.2d at page 446: 'If an issue of fact is raised, then a summary judgment is improper, and the case must proceed to trial. Krieger v. Dennie, 123 Cal.App.Supp. 777, 780, 10 P.2d 820.' In McComsey v. Leaf, supra, the court by an extensive review of leading authorities from other states wherein provision had been made for the award of summary relief, gives striking demonstration of the universal practice to permit this expedited procedure only where it is perfectly plain that there is no substantial issue to be tried. Illustrative of this view is the following quotation from Dwan v. Massarene, 199 App.Div. 872, 192 N.Y.S. 577, 582, a well-considered and widely cited New York case which limits itself strictly to a discussion of the summary judgment rules: 'The court is not authorized to try the issue, but is to determine whether there is an issue to be tried. If there is, it must be tried by a jury.' "

By the instant action appellant seeks to recover money which he deposited with respondent bank in a special savings account upon the express condition that no money be withdrawn therefrom by anyone except himself and then only upon his written demand and the actual presentation of the passbook. The amended complaint alleges that respondents "withdrew, converted, embezzled, misappropriated and misapplied to their own use and benefit" the sum and amount of $13,000 out of said special savings account, without his knowledge or consent, without his authorization and without presentation of the said passbook; then follow allegations of demand upon and refusal of the bank to pay.

The answer denies categorically the allegations of the amended complaint, admits demand for repayment, alleges the bank had paid to appellant or upon his order "all of the money ever deposited" with defendant bank except a certain sum remaining on deposit to appellant's credit and which he has never demanded; and as a separate defense alleges that in consideration of the bank becoming appellant's depositary appellant agreed within ten days after receiving a statement of his account that he would give to the bank notice of any improper charge against or incorrectness in the account; that such statements were rendered by the bank but appellant never gave notice of any objection to any charge against his accounts until long after the expiration of said ten day period.

In support of respondents' motion for summary judgment, the affidavit of M. J. Peters, chief clerk of Washington-Vermont Branch of respondent bank, avers that appellant maintained three accounts at said branch: (1) Special Savings Account No. 48; (2) an ordinary checking account in the name of Irving Bromberg; (3) a commercial checking account in the name of Irving Bromberg Company which was solely owned by said Irving Bromberg; that on March 30, 1940, appellant permitted an overdraft of $4,199.15 in the commercial account and an overdraft of $4,104.65 in the checking account and said affiant caused a charge to be made against the special savings account in the amount of $10,000 and credited $5,000 thereof to the Irving Bromberg account and $5,000 to the Irving Bromberg Company account to cover said overdrafts; that on April 29, 1940, appellant was overdrawn in his Irving Bromberg Company account in the sum of $2,880.90 and affiant on April 30, 1940 caused a charge to be made against the special savings account No. 48 in the amount of $3,000 and credited it to the said Irving Bromberg Company account. Attached to said affidavit were transcripts of the three accounts.

The affidavit of T. H. Holmes, assistant manager of said branch bank, reiterates the averments re withdrawals and credits of the various sums of money and in addition avers that a deposit of $2,460.94 remains in said special savings account subject to appellant's demand.

Appellant's affidavit in opposition to the motion does not deny the averments of the supporting affidavits, but alleges that the special savings account No. 48 was opened by him with respondent bank upon the express terms and conditions that no moneys were to be withdrawn therefrom by anyone except himself and then only upon his written demand and the actual presentation of the pass-book issued by the bank with respect to said account. He further avers that he was not informed until July 12, 1940 of the withdrawal by the bank of the sum of $13,000 from his special savings account No. 48 and that such withdrawals were made entirely without any authority or permission from him and entirely without his knowledge and in direct violation of the terms of the agreement entered into between him and the bank at the time he opened said account; that he had no arrangement with the bank for the extension

of credit, had not borrowed any moneys from the bank and at no time prior to the commencement of the instant action had he ever been indebted to the bank; that the sums withdrawn from his special savings account on March 30 and April 30, 1940, were wrongfully withdrawn, converted, embezzled, misappropriated and misapplied by the said respondent bank and its employees, to their own use and benefit and entirely without the consent or knowledge of affiant.

So far as can be ascertained from the pleadings or appellant's affidavit in opposition to the motion, the agreement between him and the respondent bank was the usual savings account contract, i. e., the money deposited therein could not be withdrawn by anyone except the depositor, upon his written demand and presentation of the pass-book. If there were additional terms in the instant case, appellant has failed to state them.

[1, 2] Appellant does not deny that overdrafts existed in his commercial accounts and according to the general view, "the payment of an overdraft by a bank amounts to a loan to the depositor; for that reason the amount thereof may be recovered from the depositor. * * * An action to recover the amount of the overdraft from the depositor is based upon the implied promise which arises from the drawing of the check and the honoring of the same by the bank." 7 Am.Jur. 442, sec. 609.

Under the provisions of section 3054 of the Civil Code, "A banker has a general lien, dependent on possession, upon all property in his hands belonging to a customer, for the balance due to him from such customer in the course of the business."

[3, 4] "No formal procedure is pointed out or required for the exercise by a banker of the right of lien vested in him by this section of the code, but its provisions were obviously intended to operate automatically in those cases to which it is applicable, and where the right is exercised, the validity of the action of the bank in that regard may be challenged in an action instituted by the customer for the recovery of the money or property so appropriated. The banker in such case, having already exercised his right of lien, is not in a position in which he needs to set up the right as a counterclaim and ask for affirmative relief. All that is required of the banker, therefore, is to defend against recovery. Melander v. Western Nat. Bank, 21 Cal.App. 462, 132 P. 265. To hold that the right of a bank to apply the property of a customer in its hands is dependent upon the consent of the customer would, it has been said, destroy the right given by the statute. First Nat. Bank v. Coplen, 39 Cal.App. 619, 179 P. 708.

[5] "The right of the bank to the general lien authorized by section 3054 of the Civil Code is not to be tested by the character in which the customer becomes indebted to it, but solely by the fact that he is indebted to it in a balance due to it and accruing in the course of business. * * * *an indebtedness due the bank within the meaning of the code section may consist of overdrafts of the depositor.* Melander v. Western Nat. Bank, supra." (Emphasis added.) 4 Cal.Jur. 268, 269.

In the Melander case, supra, 21 Cal.App. at page 466, 132 P. at page 267, the question for determination was stated as follows: "May the deposit of a depositor be appropriated by a bank, in the exercise of its right of lien, to the extinguishment of an obligation to which the depositor has bound himself merely as a guarantor?" The court decided the question in favor of the bank, and in the course of its discussion stated at page 467 of 21 Cal.App., at page 267 of 132 P.:

[6] "It is, of course, not disputed that it is settled law that a banker may in the exercise of the right of lien vested in him appropriate the money or property in his possession belonging to a customer in the extinguishment of any matured indebtedness of the customer to the bank. Section 3054 Civ.Code, supra; John Marble Company v. Merchants' National Bank of Los Angeles, 15 Cal.App. 347, 115 P. 59; McKean v. German-American Savings Bank, 118 Cal. [334], 340, 50 P. 656; 2 Bolles on Modern Law of Banking, p. 740; 1 Morse on Banks and Banking, § 324, et seq.; Zane on Banks and Banking, § 140. * * *

"In Morse on Banks and Banking the rule is thus stated: 'When payment upon an overdraft, a discount, an acceptance, or other species of advance or loan by the bank to him (the customer) creates an indebtedness on his part, all the funds which the bank has or obtains to his credit may be applied upon such indebtedness until such indebtedness is fully discharged, and without any request or direction from him.'"

[7, 8] "Since the relation between a depositor and the bank is that of creditor and

debtor, whenever a debt of the depositor becomes due it follows that the bank has the right of setoff to the extent of any debt it then holds against the depositor as against the debt it owes the depositor by reason of the deposit. The debt due from the bank to the depositor on account of the deposit, and the indebtedness of the depositor to the bank are cross-demands, such that if either should sue the other on such demand the other might plead the cross-demand as a counter-claim, consequently, the two demands are deemed compensated so far as they equal each other. Arnold v. San Ramon Valley Bank, 184 Cal. 632, 194 P. 1012, 13 A.L.R. 320; Pendleton v. Hellman Com.Tr. & Savings Bank, 58 Cal.App. 448, 208 P. 702. The bank may in the exercise of the right to enforce its lien appropriate the money in its possession belonging to a customer in the extinguishment of the customer's matured indebtedness. (Citing numerous authorities.)" 4 Cal.Jur. 273.

In re Bank of San Pedro, 11 Cal.2d 313, 315, 79 P.2d 1057, there was presented for determination the question: "whether or not a depositor in the savings department of a state bank in liquidation may set-off his deposit against a loan in the commercial department of said bank." Appellant (superintendent of banks) urged that the bank was organized into departments; that petitioner owed the commercial department and that it was the savings department that owed petitioner, and therefore there could be no set-off because of lack of mutuality. It was there held that mutuality is not always controlling. "In the instant case it was not controlling. The day before the Bank of San Pedro was taken over by the appellant, if either the petitioner had sued the bank, or the bank had sued the petitioner, it is clear that the other could have set-off his or its claim. * * * The insolvency of the Bank of San Pedro did not affect the right of set-off existing in either party."

[9] Under the rules of law above enunciated, respondent bank was fully within its rights when it withdrew the sums of money from appellant's special savings account and credited them against appellant's indebtedness due the bank, to-wit, overdrafts in appellant's commercial accounts.

There was, therefore, no abuse of discretion on the part of the trial court in granting respondent's motion for a summary judgment and dismissing the action because no issue of fact was raised by the affidavits in support of and in opposition to said motion.

We are not called upon to determine whether appellant would be entitled to a judgment against respondent bank for the amount of interest he may have lost by reason of respondent's withdrawal of sums in excess of the actual amounts due it because of the overdrafts.

For the reasons stated, the judgment appealed from is affirmed.

DORAN, J., concurred.

WHITE, Justice (concurring).

Appellant strongly relies upon the case of American Surety Company v. Bank of Italy, 63 Cal.App. 149, 218 P. 466, 468, but that case holds, as we have herein pointed out, that it is settled law expressly provided by section 3054 of the Civil Code that a banker has a lien upon, and therefore possesses the right to appropriate, any money or property in his possession belonging to a customer to the extinguishment of any matured indebtedness of such customer to the bank, subject, of course, to the provisions "that such property or money so deposited has not been charged, with the knowledge of the bank, with the subserviance of a special burden or purpose, or does not constitute a trust fund, of which the banker had notice." In the same case is is also stated (page 159 of 63 Cal.App., page 470 of 218 P.) that while "a depositor may establish an account in a bank under a special designation or earmarked as a particular account, and yet, in the absence of an agreement with or instructions to the banker that the account so earmarked is a special deposit or is to be used for a specific purpose, the moneys deposited therein are to be regarded as belonging to the general account of the depositor and may be so treated by the bank." In the instant case no contention is made by appellant that the funds in his special savings account or any of his accounts come within any of the exceptions to the general rule concerning a banker's lien upon money or property in his possession belonging to a customer. Therefore, no triable issue of fact was presented, and the motion made under the provisions of section 437c of the Code of Civil Procedure was properly granted.

CROWN FINANCE CORPORATION v. McCOLGAN, Franchise Tax Commissioner.

WASHINGTON FINANCE CO. v. SAME.

Civ. 13915, 13916.

District Court of Appeal, Second District, Division 2, California

March 29, 1943.

Hearing Granted May 27, 1943.

1. Taxation ⇐376(1), 386(1)

Evidence supported finding that so-called finance companies were not "financial corporations" within the Bank and Corporation Franchise Tax Act, and hence were only liable for rate of franchise tax applicable to ordinary business corporations. Gen.Laws 1937, Act 8488, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Financial Corporation".

2. Appeal and error ⇐989

Where affirmative findings of trial court are attacked as being unsupported by evidence the only duty of appellate court is to inquire whether there was evidence of a substantial nature to support the judgment.

3. Appeal and error ⇐1008(1)

An appellate court will not supplant a trial court's findings with its own conclusions.

4. Taxation ⇐12

"Moneyed capital," within federal statute prohibiting greater state tax on national bank shares than tax on competitive moneyed capital in hands of individuals, means capital employed in business of making loans on collateral, discounting negotiable paper and dealing in securities after the fashion of banks in order to make profits, thereby competing with moneyed capital invested in national banks. 12 U.S.C.A. § 548, subd. 1(b).

See Words and Phrases, Permanent Edition, for all other definitions of "Moneyed Capital".

5. Taxation ⇐12

The purpose of 12 U.S.C.A. § 548, subd. 1(b, c), is to prevent the fostering of unequal competition with business of national banks by aid of discriminatory taxation in favor of other corporations or of persons making investments like those of national banks. 12 U.S.C.A. § 548, subd. 1(b, c).

6. Taxation ⇐12

The inhibition against discriminating against national banks by taxation under federal statute is not directed solely against capital invested in state banks or against competing capital employed in private banking, but also applies wherever capital substantial in amount compared with capitalization of national banks is employed in same sort of transactions as those in which national banks engage and in the same locality in which they do business. 12 U.S.C.A. § 548, subd. 1(b, c).

7. Taxation ⇐12

Unless taxpayer's money is employed in competition with and in the same manner as that followed by national banks there is no transgression of 12 U.S.C.A. § 548, subd. 1(b, c), by the state's imposing greater tax on national banks than on ordinary business corporations. 12 U.S.C.A. § 548, subd. 1(b, c).

8. Taxation ⇐12

Where capital is not so employed as to come into general and substantial competition with business of national banks, it is within discretion of state to tax it at a different rate from that levied on capital of such banks. 12 U.S.C.A. § 548, subd. 1(b, c).

9. Taxation ⇐12

One who claims that an unjust advantage over national banks has been granted to moneyed capital of domestic corporation must satisfactorily establish that during tax year moneys of national banks were in fact employed in substantial amount in the very business of such domestic corporation. 12 U.S.C.A. § 548, subd. 1(b, c).

10. Taxation ⇐12, 376(1), 386(1)

Domestic corporations engaged in business of purchasing conditional sales contracts from neighborhood retail furniture, furnishings, and clothing stores, without recourse in many cases, were not in competition with national banks, and were not "financial corporations" subject to franchise tax rates levied on such banks. 12 U.S.C.A. § 548 subd. 1(b, c); Gen.Laws 1937, Act 8488, § 1.

Appeals from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Actions by the Crown Finance Corporation and by the Washington Finance

Company against Charles J. McColgan, as franchise tax commissioner, etc., for franchise taxes paid under protest. From judgments for plaintiffs, defendant appeals.

Affirmed.

Earl Warren, Atty. Gen., H. H. Linney, Asst. Atty. Gen., and Valentine Brookes, Deputy Atty. Gen., for appellant.

Benjamin, Lieberman & Elmore, of Los Angeles, for respondent.

MOORE, Presiding Justice.

The above entitled actions were consolidated for the purposes of trial. Judgment having been entered in each case in favor of the plaintiff, the appeals have been consolidated for the purpose of decision here. Inasmuch as there are only slight variances between the facts of each case we here present in outline the story of the Crown Finance Corporation hereafter referred to as "Crown," as explanatory of the reasons which induce our decisions in both causes. The plaintiff Washington Finance Company will be referred to as "Washington."

Plaintiff having been assessed at the rate of 4 per cent of its net income as its franchise tax for the years 1937, 1938, 1939, and 1940, defendant served notice at appropriate times to plaintiff advising that defendant deemed and designated plaintiff to be within the category of "national banking associations and other banks and corporations" and that pursuant to the Bank and Corporation Franchise Tax Act, (Statutes 1929, p. 19, as amended, section 1, Deering's Gen.Laws 1937, Act 8488) that he would require an additional 4 per cent of said net income, same being the difference between the tax on national banking associations and the tax on ordinary business corporations. Having protested such additional levies, plaintiff under protest paid the extra taxes levied for each of the four years named and thereafter instituted this action to recover the amounts so paid. The findings of the court were that plaintiff was not in substantial competition with national banking associations or banks and thereupon decided that plaintiff was not taxable as a financial corporation but as an ordinary business corporation and adjudged it to be entitled to the moneys paid by plaintiff under protest in settlement of the additional taxes so levied; that the business of Crown was solely and exclusively that of purchasing conditional sales contracts and accounts from neighborhood retail dealers; that its business was at all times limited to that one activity; that substantially all of such conditional sales contracts and accounts were for the sale of furniture, furnishings, and clothing by neighborhood retail dealers; that plaintiff is not now and never was a financial corporation or engaged in business in substantial competition with national banking associations or banks; that plaintiff was and is taxable only as an ordinary corporation at the rate of 4 per cent of its annual net income; that the amount paid under protest is in excess of such 4 per cent.

In view of the attacks made upon the judgment we are to determine (1) whether the evidence supports the findings, and (2) whether a corporation engaged in the business of purchasing conditional sales contracts from neighborhood retail stores dealing in furniture, furnishings and clothing is an ordinary business corporation and subject to a tax of only 4 per cent of its net income or is a "financial corporation" and subject to the rates levied upon national banks.

[1] (1) Evidence in support of the findings was that the contracts purchased by Crown were from dealers who had sold to the consumers; that the acquisition of a contract was determined upon the financial responsibility of the purchasers of the merchandise; that Crown's policy had been progressively toward purchasing such contracts without recourse until 1941 when 100 per cent of its contracts were without recourse on the dealers in which event the title of the personalty described in the contract became the property of Crown and it suffered all losses from failures to collect; that the average term of the contracts was six months for clothing and 24 months on household furniture and beauty shop equipment. While the average amount of investments in such contracts was from $900,000 to $1,000,000 annually Crown's own capital was $500,000 and all sums invested in the business besides its capital was borrowed.

The facts with reference to the Washington Finance Company discloses two slight material variances in its methods from those followed by Crown, to-wit: it purchased contracts from household furniture dealers only and, instead of diminishing the number of its contracts purchased with recourse, it increased the percentage of its

contracts with recourse, until the year 1941, at which time 85 per cent of the contracts acquired by it were with recourse. But it had no reserve as the bank has as hereinafter will appear. Washington's average annual investments in such contracts do not exceed $325,000.

To prove that Crown's business did not conflict with that of national banks, testimony was taken with reference to methods of the Bank of America National Trust and Savings Association, one of the leading national banks of this state. The evidence shows that in 1937 and 1938 this bank purchased no conditional sales contracts from dealers; that in 1939 it commenced to buy contracts on a discount basis but always with recourse on the seller. Moreover the bank maintained a reserve of from 20 to 40 per cent as an additional guaranty of performance by the dealer. The proof was that such transactions of the bank were in the nature of an advance to the dealer or a direct loan to the consumer and that the methods of doing business by the finance companies and the bank were not similar. The bank would make loans to its patrons to enable them to buy furniture but would take no furniture as security. From 10 to 20 per cent of its personal loans were loans on furniture or household goods. It makes personal loans in the amount of from three to five million dollars a month which is about one fifth of its installment business, the balance being on the purchase of conditional sales contracts on automobiles. As a further measure of safety the bank always maintains a reserve against the paper discounted. That is, it advances to the dealer from 60 per cent to 80 per cent of the face value of the contract, while the balance is held by the bank as a protection against the dealer. It buys no such paper without such reserve and the dealer's guaranty. The bank has nothing to say about the dealer's extension of credit to his patron but holds the dealer responsible for the payment of the contract. The bank never repossesses from a delinquent if the dealer is competent to fulfill his obligation. In short the bank merely conducts loans on such contracts as security in that department of the bank designated "Installment Credit Loan Department." The percentage of loans on furniture contracts made by such department of the bank was less than 6 per cent of all types of loans on conditional sales contracts. The testimony of the bank official was that the business done by Crown and Washington was "not similar" to that done by the bank from which and from a comparison of the methods pursued by the bank and the plaintiffs the court justifiably found that there was no competition between plaintiffs and the national banks of the community of Los Angeles County.

[2, 3] In view of such evidentiary support the findings cannot be disturbed on appeal. Our only duty when affirmative findings are attacked as being unsupported by the evidence is to inquire whether there was evidence of a substantial nature to support the judgment. Webster v. Board of Dental Examiners, 17 Cal.2d 534, 539, 110 P.2d 992. Neither will an appellate court supplant the trial court's findings with its own conclusions. Ibid; Hamilton v. Pacific Electric Railway Co., 12 Cal.2d 598, 603, 86 P.2d 829. In view of the testimony it may reasonably be determined that the character of business done by plaintiffs would not be accepted by a national bank and that the plaintiffs are therefore not its competitors. They invest their own money in the paper purchased; the bank invests its deposits. They make no loans; the banks make many. They purchase the contracts with or without recourse; the bank retains the right of recourse against every dealer. Plaintiffs rely upon the credit rating of the consumer; the bank relies upon the credit ratings and financial statements of the dealers and are guided by their ability to pay. In event of default by the consumer, plaintiffs repossess; banks require the dealers to enforce payment of the contracts held by the banks.

Because the articles of incorporation of plaintiffs contain, in the language prescribing their powers, the power to lend money, to take securities of real or personal property, to discount paper and to extend credit, it is contended that the nature of their business is thereby established. Such is not a necessary sequitur from the phraseology of the expressed powers. It is a universal practice of lawyers in preparing articles of incorporation to include every conceivable activity in which the corporation might engage. The nature of the business transacted is reflected in its current activities evidenced by the records of its proceedings and by its books of accounts or by the testimony of its officers or employees.

The inclusion of the word "Finance" in the corporate names of the plaintiffs is like-

wise of no special significance in view of the disclosures by the evidence of the actual methods and practices of the two taxpayers as above recited.

(2) Notwithstanding the finality of the judgment by reason of the positive findings and proof which support it, appellant contends that plaintiffs are "financial corporations" in contemplation of section 5219, U. S.Revised Statutes, 12 U.S.C.A. § 548, because they show no activity "other than the use of money to make money"; because their money is used to acquire contracts by the discount method to gain profits; because when their "capital is exhausted in the purchase of contracts more capital is borrowed from banks more contracts are purchased and more profit is earned." Therefore, says appellant, it is idle for them to contend that they are not financial corporations.

[4] In order fairly to appraise appellant's contention it is necessary to remember the language of the federal statute and the purpose of its enactment. Under the early holdings of the United States Supreme Court (McCulloch v. Maryland, 4 Wheat. 316, 17 U.S. 316, 4 L.Ed. 579), neither a state nor its political subdivisions could levy a tax upon the personal property of national banks. In order to overcome the disadvantage to which the law, as then announced, subjected state banks and other financial persons or corporations, the Congress enacted section 5219. By that section a state is authorized to tax the shares of national banks located within its limits by any one of four methods. The fourth method is a tax according to or measured by their net incomes subject to the restriction, viz: 1(c) that the rate of the tax levied "shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile manufacturing, and business corporations doing business within its limits." The further condition is imposed in subsection 1(b) that such tax shall not be at a greater rate than is assessed upon "moneyed Capital" in the hands of individuals coming into competition with the business of National banks: provided that evidences of indebtedness in the hands of individuals not employed in banking business and representing merely personal investments not made in competition with such business shall not be deemed moneyed capital within the meaning of this section. It is thus seen that the very statute itself specifically names a type of capital to be assessed in the hands of individuals but requires it to "come into competition" with the business of banks in order to make it subject to the same tax as banks. Also, it exempts from consideration as moneyed capital "evidences of indebtedness * * * not employed * * * in the banking * * * business * * * not made in competition with such business * * *." The term "moneyed capital" as used in the statute means capital employed by its possessor in the business of making loans on collateral, discounting negotiable paper and dealing in securities after the fashion of banks in order to make profits, thereby competing with the moneyed capital invested in national banks. Talbott v. Board of Com'rs of Silver Bow County, 139 U.S. 438, 11 S.Ct. 594, 35 L.Ed. 210.

[5-9] The purpose of the federal statute is "to prevent the fostering of unequal competition with the business of national banks by the aid of discriminatory taxation" in favor of other corporations or of persons making investments like those of national banks. First National Bank of Hartford v. City of Hartford, 273 U.S. 548, 550, 551, 47 S.Ct. 462, 465, 71 L.Ed. 767, 59 A.L.R. 1. Unless the moneyed capital invested by the domestic concern comes into substantial competition with the national banks in the same locality then there is no offending discrimination as forbidden by section 5219. The intention of the Congress so appears from the language of subsection 1(b). A fair construction of that clause indicates a legislative policy that other moneyed capital may be used by an ordinary business corporation in the purchase of conditional sales contracts although such investments are in competition with national banks. Certainly there can be no doubt that such investments by an ordinary corporation may be made without offending the federal statute where they are based upon the intrinsic value of the contracts of sale in a locality where national banks do not invest in the same type of contract or where they merely take such contracts as security in addition to the credit of the dealer against whom the bank retains the right of recourse. The inhibition against discriminating against national banks prescribed by section 5219 is not directed solely against capital invested in state banks or against competing capital employed in private banking but, also, it applies in all cases wherev-

er capital substantial in amount compared with the capitalization of national banks, is employed in the same sort of transactions as those in which national banks engage and in the same locality in which they do business. First National Bank of Hartford v. City of Hartford, supra. Unless the money of the taxpayer be employed in competition with, and in the same manner as, that followed by the national banks, there is no transgression of section 5219 by the state's imposing a greater tax upon national banks than upon ordinary business corporations. National Bank of Commerce of Seattle v. King County, 153 Wash. 351, 280 P. 16. From such it must follow that where capital is not so employed as to come into genuine and substantial competition with the business of national banks, it is within the discretion of the State to tax it at a different rate from that levied upon the capital of banks. City of Richmond v. Merchants' National Bank of Richmond, 124 Va. 522, 98 S.E. 643; First National Bank of Abberdeen v. County of Chehalis, 166 U.S. 440, 17 S.Ct. 629, 41 L.Ed. 1069; City of Richmond v. Madison Nat. B. & T. Co., 215 Ky. 262, 284 S.W. 1089. The term "other moneyed capital" embraces only that which is so employed as to compete to a substantial extent with the business of national banks. First National Bank of Guthrie Center v. Anderson, 269 U.S. 341, 46 S.Ct. 135, 70 L.Ed. 295. It is brought into such competition where it is invested in securities such as are customarily dealt in by banks in making loans or by discounting commercial paper. Mercantile National Bank v. New York, 121 U.S. 138, 7 S.Ct. 826, 30 L.Ed. 895, 901. Where one claims that an unjust advantage has been granted to the moneyed capital of a domestic corporation, he must satisfactorily establish that during the tax year, moneys of national banks were in fact employed in substantial amount in the very business of such domestic corporation. First National Bank of Shreveport v. Louisiana Tax Commission, 289 U.S. 60, 53 S. Ct. 511, 77 L.Ed. 1030, 87 A.L.R. 840.

[10] Upon the reasoning of the cited cases we are impelled to hold that the conclusions of the trial court are well grounded. Plaintiffs do not compete substantially with national banks. They invest in contracts for the sale of personal property that is not acceptable as collateral by national banks. Crown buys the contract outright. Washington advances almost the full face value of those it acquires with recourse. Both make collections from the consumer while national banks lend to the dealer and rely upon him to enforce payment of the contracts. They purchase contracts of sale from the dealer in reliance upon the financial ability of the consumer. The bank lends upon the credit of the dealer. In order to bring them into competition with banks they must advance their standards further; they must engage in a struggle for the same business. 61 Cal.Jur. 201.

Plaintiffs perform a type of service which for generations has been scorned by banks. It is only since the advent of the automobile and such expensive chattels as mining and milling machinery that banks have found at hand an enormous reservoir of business transactions from which they might drain handsome profits. They have entered into competition with "financial" corporations throughout the union and already dominate the field with respect to those investments in expensive personal property by making purchase money loans to the investors therein. But in California as shown by the evidence in this case they have stopped short of competing with business concerns which purchase title to furniture, clothing, refrigerators, etc. They will not enforce collections due dealers to whom loans are made by the banks largely upon the credit of the dealer.

Since the enactment of the Corporate Franchise Act but few appeals have been reported. Two years after the enactment of the California Bank and Corporation Franchise Tax Act its validity was determined by the Supreme Court, in 1931, in Pacific Co. Ltd. v. Johnson, 212 Cal. 148, 298 P. 489. Such decisions as are cited by appellant are readily distinguishable. Morris Plan Co. v. Johnson, 37 Cal.App.2d 621, 100 P.2d 493, is not pertinent. That company was engaged in the business of making loans under the Industrial Loan Act. Upon the evidence the trial court found that the company was directly competing with the banks and thereupon adjudged it to be subject to the same rate of taxation.

Likewise, at the trial of H. A. S. Loan Service Inc. v. McColgan, 21 Cal.2d 518, 133 P.2d 391, upon the evidence it was found that the plaintiff was not a mere agent for borrowers, as it contended, but that it was itself "in active, substantial competition with national banks operating in the same locality." Upon the trial of

State v. National Credit Co., 236 Ala. 224, 181 So. 769, cited by appellant, it was established that the two national banks in Tuscaloosa discounted installment notes taken by dealers for the unpaid portion of the purchase price of automobiles. The defendant's business was to buy and discount such purchase money notes and condition sales contracts and it acquired 80 per cent of such contracts with recourse. It was therefore adjudged to be a "financial institution," a competitor of national banks and subject to the excise tax for engaging in the business of banking in Alabama.

The findings here are amply supported by the evidence. The judgments are affirmed.

W. J. WOOD and McCOMB, JJ., concurred.



57 Cal.App.2d 959

CONSOLIDATED ROCK PRODUCTS CO. v. STATE et al.

Civ. 12439.

District Court of Appeal, First District, Division 2, California.

April 6, 1943.

1. Statutes ⇐197, 206

In construing the Motor Vehicle Transportation License Act using the words "compensation" and "hire" disjunctively, neither word should take its color from the other, since Legislature is not to be presumed to have used any word idly but the act should be construed to give effect to every word used. St.1933, p. 928, § 1(a).

See Words and Phrases, Permanent Edition, for all other definitions of "Compensation" and "Hire".

2. Automobiles ⇐78

A dealer that delivered goods to buyer in trucks owned and operated by dealer and added transportation charge to selling price of such goods at plant was engaged in "transportation of property for compensation", at least indirectly, so as to be liable for tax imposed by Motor Vehicle Transportation License Tax Act prior to its amendment in 1937. St.1933, p. 928, § 1 (a).

See Words and Phrases, Permanent Edition, for all other definitions of "Transportation of Property for Compensation".

3. Statutes ⇐219

Contemporaneous constructions by state board of equalization cannot be looked to in construing a statute that is clear.

4. Automobiles ⇐78

That Motor Vehicle Transportation License Tax Act prior to amendment in 1937 expressly defined an operator liable for the tax as one who operated a motor vehicle for compensation, either directly or indirectly, supports the conclusion that the act was intended to have a wider application than to carriers alone. St.1933, p. 928, § 1(a).

5. Statutes ⇐230

Some meaning should be attributed to amendment to statute, if possible, since Legislature is not to be assumed to have amended statute from mere caprice.

6. Automobiles ⇐78

Amount added to selling price for delivery of goods to buyer in trucks owned and operated by dealer was not a "specific charge for transportation" within 1937 amendment to Motor Vehicle Transportation License Tax Act excluding from liability for tax any person transporting his own property in his own motor vehicle unless a specific charge is made for such transportation. St.1937, p. 1920, § 1(a).

See Words and Phrases, Permanent Edition, for all other definitions of "Specific Charge for Transportation".

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by Consolidated Rock Products Company against the State of California and others to recover taxes assessed under the California Motor Vehicle Transportation License Tax Act, before and after its amendment and paid under protest. Judgment for defendants, and plaintiff appeals.

Judgment reversed with directions.

Latham & Watkins and Richard W. Lund, all of Los Angeles, for appellant.

Earl Warren, Atty. Gen., H. H. Linney, Asst. Atty. Gen., and Adrian A. Kragen, Deputy Atty. Gen., for respondents.

DOOLING, Justice pro tem.

Plaintiff is a corporation engaged in the business of selling rock, sand, gravel and ready-mixed concrete in Southern California. It owns and operates trucks in which such materials are delivered to its purchasers. It has a small cash and carry business but the materials constituting the greater part of its sales are delivered in its own trucks, and in such cases title passes to the purchasers upon delivery. Its sale prices at the plant are lower than its sale prices when materials are delivered in its trucks, the difference in price being attributable to the hauling. The territory of Southern California is divided by the rock and gravel companies into zones, and transportation charges to the various zones are established. On its smaller sales the difference between the price of materials delivered at the plant and those conveyed to the purchasers in its trucks is regulated according to these zones. On larger sales an addition is always made to the price of materials at the plant where they are conveyed to the purchasers in plaintiff's trucks. During the period from September, 1935, to June, 1938, covered by this action, plaintiff made many sales to the United States Government, the prices of which were determined by competitive bid. In making such bids plaintiff took into consideration the cost of hauling the materials in its own trucks.

Plaintiff paid under protest a tax assessed for its hauling charges on all transactions in the period mentioned in which deliveries were made to the purchasers in plaintiff's trucks, where the sales were not subject to the sales tax, i. e. sales made for resale and those made to the United States. This action was brought to recover back the tax so paid, and from a judgment for defendants plaintiff has prosecuted this appeal.

Plaintiff thus states the questions presented by it on this appeal:

"I. Was plaintiff in delivering rock, sand, gravel and ready-mixed concrete to its vendees in trucks owned and operated by it, title to the materials passing to the vendees at the point of delivery, where, though its delivered prices were in general in excess of its call-for-at-the-plant price, its quotations, bids, contracts and invoices uniformly were in terms of a single stated price for delivered materials and did not indicate in any way that any part of the price represented a charge for delivering the materials, engaged in 'transportation for hire or compensation' under the California Motor Vehicle Transportation License Tax Act for the period from September 1, 1935 to June 30, 1937?

"II. Was the plaintiff under such circumstances 'making a specific charge for such transportation' under said Act as amended on July 1, 1937, for the period from July 1, 1937 to June 30, 1938?"

Prior to July 1, 1937, the Motor Vehicle Transportation License Tax Act, Stats.1933 p. 928, Deering's Gen.Laws, Supp.1933, Act 5130d, imposed a tax of 3 per cent of the gross receipts from the operation of motor vehicles by "operators" and in section 1(a) defined the term as follows: "The word 'operator' shall include all persons, firms, associations and corporations who operate motor vehicles upon any public highway in this State and thereby engage in the transportation of persons or property for hire or compensation, either directly or indirectly."

Specifically the question here presented is whether a merchant transporting his own goods for delivery to a buyer is engaged in "the transportation of * * * property for hire or compensation, either directly or indirectly," where he adds a charge for such transportation to the selling price of the goods.

The use of the qualifying adverb "indirectly" gives the definition a very sweeping character, and were the question a completely novel one we would have no hesitation in holding that in such transaction the merchant was transporting property for compensation, at least indirectly. True he is not making a transportation charge as such (i. e. directly), but the result is no different than if he were, since the charge is added to the selling price of the goods and is thereby collected as effectively, although indirectly. There is nothing in the decided cases which leads us to change this view.

Plaintiff argues, despite the sweeping character of the definition, that the construction of the section should be controlled by certain decisions from other jurisdictions and by the decision of the third division of the District Court of Appeal in Hughson Con. Milk Co. v. State Board of Equalization, 23 Cal.App.2d 281, 73 P.2d 290. Turning our attention to the Hugh-

son case, it is admitted by plaintiff that it is distinguishable on its facts. In that case the plaintiff operated a plant for the processing of milk products. It maintained a number of trucks for collecting milk from producing dairymen and paid the dairymen a lower price for milk collected by its trucks than for milk delivered by dairymen to its plant. An attempt was made to collect a tax under this statute upon its savings in the price paid for milk when collected in its own trucks. In the Hughson case the court correctly pointed out that while the plaintiff made a saving in the price paid for milk hauled in its own trucks, it received nothing from any one by way of hire or compensation, either directly or indirectly. This is emphasized at pages 287, 288 of 23 Cal.App.2d, at page 293 of 73 P.2d where the court said:

"The appellants concede that no one pays anything directly to the plaintiff as compensation for operating its trucks, but argues that its compensation comes indirectly, due to the fact that it saves the cost of hauling when it goes into the country and picks up and hauls to its own plant the milk it there processes, and that this is compensation indirectly. The cost of the operation of the trucks is all carried into the overhead operations of the company, and there is not a word in the record indicating that it has gained any monetary advantage by its manner of conducting its business. * * * We may add here that the record shows that the plaintiff paid the same price for the milk collected, irrespective of the distance traveled by the trucks in collecting the same.

"The first case relied upon by the appellants to sustain their contention is that of Smith v. New Way Lumber Co., Tex.Civ.App., 84 S.W.2d 1104. An examination of that case discloses its inapplicability to the question here presented. The lumber company maintained its own trucks, and made delivery to the purchasers of lumber, using its own trucks to do so, but in selling its lumber and delivering the same it charged a different price for lumber delivered at its lumberyards and lumber delivered to the purchaser by its own fleet of trucks. Thus, on the face of the record it shows that the lumber company was receiving a compensation for the delivery of the lumber to purchasers away from its lumberyards. Further comment on this case is unnecessary."

It appears from this quotation that the court in the Hughson case not only recognized clearly that the question before it was entirely different from the question presented in the case here on appeal, but in the Texas case not distinguishable from the one now before us it found "on the face of the record * * * that the lumber company was receiving a compensation for the delivery of lumber to purchasers away from its lumberyards." While there is some language in the Hughson case that tends to support plaintiff's argument here, in view of the issue before the court in that case we regard it as dictum not binding us.

The question here presented came squarely before the Supreme Court of Texas on error to the Court of Civil Appeals in New Way Lumber Co. v. Smith, 128 Tex. 173, 96 S.W.2d 282, 283 (the same case in which the opinion discussed in the above quotation from the Hughson case was rendered by the Court of Civil Appeals). In that case the definition referred to persons owning or operating motor vehicles "used in transporting property for compensation or hire over any public highway." That court said at page 287, of 96 S.W.2d: "Under the facts stated here the carrying of lumber owned by the company in its own trucks does not exempt it from the provisions of this law. This is not a case * * * where the price of the goods delivered is the same as those undelivered. On the contrary, it is clearly a case where the price of the lumber includes a direct charge for the delivery thereof. The carrying charge is based directly on the distance traveled and the weight of the truck. Since the company receives compensation for the delivery of the lumber, it clearly appears that the trucks used come under the definition of a 'contract carrier,' and are subject to the provisions of article 911b."

In that case, as in the one here, a charge for hauling, as noted in the quotation from Hughson Con. Milk Co. v. State Board of Equalization, supra, was added to the selling price of the goods.

While the question before us was expressly reserved in Re Bush, 6 Cal.2d 43, 56 P.2d 511, as not necessary to the decision of the question then before the Supreme Court, the court in that case did say at page 55 of 6 Cal.2d, at page 516 of 56 P.2d that "the title of the act hereinbefore quoted is sufficiently broad, in our opinion, to cover even the transportation of one's own property upon the highway if compensation is received therefor." The title is not as broad as the definition of operator above

quoted in that it omits the qualification "either directly or indirectly" and reads: "An Act imposing a license fee or tax for the transportation of persons or property for hire or compensation" etc.

Plaintiff also relies upon the following cases from other jurisdictions: Kroger G. & B. Co. v. City of Cynthiana, 240 Ky. 701, 42 S.W.2d 904; Murphy v. Standard Oil Co. of Indiana, 49 S.D. 197, 207 N.W. 92; City of Sioux Falls v. Collins, 43 S.D. 311, 178 N.W. 950; State v. Manhattan Oil Co., 199 Iowa 1213, 203 N.W. 301; People v. Montgomery, 92 Colo. 201, 19 P.2d 205. The first three of these cases were discussed and distinguished in the intermediate court's opinion in Smith v. New Way Lumber Co., Tex.Civ.App., 84 S.W.2d 1104, at page 1107. As pointed out in that opinion these three cases dealt with the very different situation where nothing was added to the price of the goods when delivered by the seller. This is equally true of State v. Manhattan Oil Co., supra, the statement of facts in that case showing "that in making its sales the defendant company delivers the products without any specific delivery charge"; and in People v. Montgomery, supra, 92 Colo. at page 206, 19 P.2d at page 206, the court said: "Nor does it appear that Montgomery charged or received either directly or indirectly any identifiable or specific amount to cover the cost of transportation."

Some of these cases do state that "hauling for hire" contemplates hauling another person's property and not one's own. Granting that those words standing alone should be so construed, our act is much broader covering as it does "transportation of * * * property for hire or compensation, either directly or indirectly."

[1] There is no more reason why the noun "compensation," which is a broader term, should take its color from the noun "hire" than there is that "hire" should take its color from "compensation." The Legislature is not to be presumed to have used any word idly and a statute should be construed to give effect to every word used. 23 Cal.Jur. 758.

[2] We are satisfied that one who transports goods for sale and adds the transportation charge to his selling price is transporting those goods for compensation, at least indirectly.

[3] Plaintiff makes some point of contemporaneous construction by the State Board of Equalization. Where a statute is clear, as we think this one, contemporaneous construction cannot be looked to. Montgomery v. Board of Administration, 34 Cal.App.2d 514, 93 P.2d 1046, 94 P.2d 610; Morris Plan Co. v. Johnson, 37 Cal. App.2d 621, 100 P.2d 493.

[4] Finally plaintiff cites an isolated sentence by Keesling and Traynor (now Mr. Justice Traynor) from an article on "The Scope and Nature of the California Income Tax," 24 Cal.L.Rev. 493, in which the statement appears that by the act in question the Legislature imposed "a gross receipts tax on contract truck operators to equalize the tax on common carrier highway transportation companies." No great weight can be attached to a general statement in an article on another subject, which obviously was not intended to be definitive. The same comment equally applies to plaintiff's citation to Stockwell Studies in California State Taxation, 1910-1935, page 106. Were any further comment necessary it has been supplied by our Supreme Court in Re Bush, supra, 6 Cal.2d at page 49, 56 P.2d at page 513: "Compensation for transportation service of either common or private contract carrier is direct compensation, and the very fact that the act expressly defines an operator as one who operates a motor vehicle for compensation, either directly or *indirectly*, supports the conclusion that the act was intended to have a wider application than to carriers alone."

The suggestion that the contracts with the United States resulted from competitive bidding is answered by the fact that in making such bids plaintiff always took into account the cost of hauling.

We are satisfied that for the period prior to July 1, 1937, the tax was properly collected.

In 1937, section 1(a) of this statute was radically amended. Stats.1937, p. 1919; Deering's Gen.Laws, 1937, Act 5130d. As so amended the definition was changed to read:

"The term 'operator' shall include all persons engaging in the transportation of persons or property for hire or compensation * * * upon any public highway in this State, either directly or indirectly, but shall not mean nor include the following:

"(1) Any person transporting his own property in his own motor vehicle; pro-

vided, however, that any such person making a specific charge for such transportation shall be deemed to be an 'operator' hereunder."

Plaintiff in this case being a "person transporting his own property in his own motor vehicle" is expressly excluded from this definition of the term "operator," unless it can be said that in collecting a greater price for delivered goods it is "making a *specific* charge for such transportation."

Plaintiff's position is that a "specific charge" in this amendment means a charge specified to be for the transportation of the goods transported, and does not include an addition to the selling price. Defendants' position is that a "specific charge" means no more than an identifiable charge, and hence is as broad as the section before its amendment, since if "specific charge" is to be given this meaning it adds nothing to the meaning of the words "compensation * * * indirectly" as they have been construed above.

[5] Some meaning should be attributed to the amendment if possible, since the Legislature is not to be assumed to have amended the statute from mere caprice. Loew's, Inc., v. Byram, 11 Cal.2d 746, 82 P. 2d 1; In re Estate of Todd, 17 Cal.2d 270, 109 P.2d 913. Clear meaning can only be given to the amendment in this case by the acceptance of the construction suggested by plaintiff.

Further support for this construction, if any be necessary, is found in the statutory history of the amendment. Two bills were introduced at the 1937 session to amend the statute in question, S.B. 773 and S.B. 953. By S.B. 773 as originally introduced section 1(a) would have read: "The word 'operator' shall include all persons * * * who operate motor vehicles upon any highway in this State and engage in the business of transporting persons or property for hire or compensation, either directly or indirectly, and shall exclude all persons * * * hauling their own products, goods, wares or merchandise either directly or indirectly."

This definition would have had the result of confining the tax to public and private contract carriers and would have specifically excluded all merchants making deliveries in their own motor vehicles.

S.B. 953 as originally introduced made no substantial change in section 1(a). This section in S.B. 953 was later amended to exclude in the definition "any person * * * who makes no specific charge or receives no differential in price for the delivery of his property * * *."

As so amended the definition would clearly have included the transportation of plaintiff's products since plaintiff receives therefor "a differential in price." It also shows that at that stage the Legislature recognized a distinction between the words "specific charge" and "differential in price."

Finally both acts were amended to the language of the definition as finally adopted and the words "differential in price" were eliminated.

At this point when both bills came before the Senate the Senate Journal, 52d Sess., p. 3170, shows the following statement by Senator De Lap, the author of S.B. 773:

"Senate Bill No. 773, as amended by the Assembly on May 21st, and 26th, is now written into Senate Bill No. 953.

"As amended, the farmer, the merchant, and the cooperative associations are excluded from the Transportation License Tax Act when they are transporting their own goods in their own vehicles, even though a differential in price exists between the farm, or the merchant's place of business, and the point of delivery.

"However, in the case of a merchant who wishes to add a specific charge for transportation, the 3 per cent transportation tax would apply to such charges."

[6] If the words "specific charge" were otherwise ambiguous this legislative history clearly indicates their true meaning as intended by the Legislature. Sato v. Hall, 191 Cal. 510, 519, 217 P. 520. We conclude that for the period after July 1, 1937, the tax was illegally collected from plaintiff.

The judgment is reversed with directions to the trial court to amend its findings in accordance with this opinion and to enter judgment thereon for defendants as to the taxes collected for transactions occurring prior to July 1, 1937, and for plaintiff for those collected for transactions since that date.

NOURSE, P. J., and SPENCE, J., concurred.

MARX v. McKINNEY et al.
Civ. 13777.

District Court of Appeal, Second District, Division 1, California.
April 12, 1943.
Rehearing Denied May 11, 1943.
Hearing Granted June 11, 1943.

1. Appeal and error ⇐103, 106, 870(2, 5)

Neither an order denying motion for leave to file an amended answer and cross-complaint, nor an order denying motion for a continuance is appealable, and such orders may be reviewed only on an appeal from the final judgment. Code Civ.Proc. § 963.

2. Creditors' suit ⇐44

Where after assignment of conditional sales contracts to secure indebtedness assignor assigned $3,036 out of any moneys due him from first assignee, the second assignment was in the nature of a second lien upon the collateral, and second assignee who had obtained judgment against assignor and had execution levied was required to show that at time of levy there was money due assignor. Code Civ.Proc. § 720.

3. Creditors' suit ⇐46

In action in nature of creditor's suit, evidence failed to show that there was money due to judgment debtor at time of levy of execution. Code Civ.Proc. § 720.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action in nature of a creditor's suit by Mrs. Betty Marx against Fred P. Glick, etc., and others. From a judgment for plaintiff in the sum of $3,036 and interest, and from an order denying motion for leave to file an amended answer and cross-complaint and from an order denying motion for continuance, the named defendant appeals.

Judgment reversed and cause remanded for new trial and attempted appeals from orders dismissed.

Ben Gould, of Los Angeles, for appellant.

J. F. Rosen and H. Wolpin, both of Los Angeles, for respondent.

DORAN, Justice.

[1] The defendant Fred P. Glick herein appeals from a judgment rendered against him in the sum of $3,036 and interest in an action in the nature of a creditor's suit, as provided by Section 720 of the Code of Civil Procedure. Appellant has also attempted to appeal from an order denying his motion for leave to file an amended answer and cross-complaint and from an order denying his motion for a continuance. Such orders are not appealable and may be reached only through an appeal from the final judgment. (See sec. 963, Code Civ.Proc.) A motion made by appellant for a new trial was denied by the court below.

The complaint herein is in two counts, the first based upon the assignment of a chose in action, and the second upon appellant's denial of a debt allegedly due defendant R. L. McKinney, a judgment debtor of plaintiff and respondent. The assignment set up in the first count of the complaint was of the chose in action on which the judgment set up in the second count was allegedly obtained. On the trial of the action herein plaintiff and respondent failed to offer any proof as to either the assignment or the judgment in question. Allegations in the complaint as to the same were denied in appellant's answer and the existence of neither assignment nor judgment was stipulated at the trial. The trial court, however, made affirmative findings as to both the assignment and judgment; and appellant contends that such findings are not supported by the evidence.

After appellant had taken this appeal the respondent made an application to this court for leave to take additional evidence here for the purpose of supplying the defect in proof. Respondent's application was denied; and, as an examination of the record reveals that other findings made by the trial court were based upon insufficient evidence, as hereinafter noted, formal proof of the assignment and judgment sought by respondent would not result in an affirmance of the judgment from which this appeal is taken, and the cause must be remanded for a new trial.

Sometime prior to the present controversy, Welded Products Company, Inc., a California corporation, had manufactured, sold and delivered to defendant R. L. McKinney a certain number of cleaning machines. These machines were in turn sold by Mc-

Kinney to various purchasers under conditional sales contracts, which contracts were then assigned by McKinney to the Welded Products Company, Inc., as collateral security for the amounts due that corporation from McKinney for the machines in question. Appellant Glick, doing business under the firm name and style of Fabriform Steel Products Company, is the successor to Welded Products Company, Inc.; and on May 1, 1938, appellant and defendant McKinney entered into a written agreement whereby the total amount of McKinney's indebtedness to the company as of May 1, 1938, was established and settled at the sum of $4,600. This agreement also set the total of conditional sales contracts held as security for payments due the company at $13,762.89, which sum under the terms of the agreement was to be held as security for the payment of the $4,600 due the company from McKinney; and on payment thereof the company was to release and pay over the balance of the said collateral security. The company was given the right to repossess any of the cleaning machines upon the default of any purchaser under any of the conditional sales contracts. The agreement mentioned was entered into for the purpose of settling various disputes between McKinney and the company over the computation by the company of the amount owing from McKinney.

Prior to the making of this last agreement between McKinney and appellant, and on September 11, 1937, defendant McKinney had assigned to one George Karp, respondent's alleged assignor, the sum of $3,036 out of moneys due McKinney from the conditional sales contracts held as security by Welded Products Company, Inc. The company was given notice of this assignment. McKinney had entered into this transaction with Karp for the purpose of effecting the purchase by McKinney of a machine shop owned by Karp. In addition, McKinney gave Karp a note and chattel mortgage for the machine shop. The note being unpaid at maturity, respondent, as assignee of the note and mortgage in question, instituted an action against McKinney in the Superior Court of Los Angeles County and recovered judgment. Thereafter execution was issued and the writ served upon appellant as an alleged debtor of McKinney, to which writ appellant replied that he was not indebted. Whereupon the present action was instituted, after supplementary proceedings.

There was no reference of the matter in the court below for determination of the facts by a referee nor was there any accounting. Evidence as to the existence of a balance in favor of McKinney in the hands of appellant was adduced largely, if not wholly by the oral testimony of defendant McKinney, who, it appears from his testimony, kept no records of the transactions and never at any time had any accurate knowledge of the amounts that may have been due him from time to time. The following excerpt from the record reveals McKinney's testimony as to a balance due him.

"Q. In other words, Mr. McKinney, by May 1, 1938, by the agreement of May 1, 1938, you and Fabriform Steel had come to a definite understanding wherein they had set aside $4,600 for two assignors, to whom you had made assignments theretofore? A. That is correct.

"Q. And admitting a further sum of thirteen thousand some odd held in reserve for you as of that date; is that correct? A. No, sir; that is not correct.

"Q. You mean the $4,600— A. Is a part of the $13,000; not $4,600 and then $13,000.

"Q. In other words, then, after Karp and the State Board of Equalization had been paid the $4,600, they then would be holding for you a sum in excess of $9,000? A. That is correct.

"Q. Mr. McKinney, at the time that this contract of May 1, 1938, was entered into had Fabriform Steel already received their moneys in connection with the contracts? A. Yes, they received practically every dollar owing them January 1, 1937, by selling the contracts to the C. I. T.

"Q. So they had already received their money at the time the contract was entered into? A. Mr. Nichols told me there was between $4,000 and $5,000 cash there, which I testified to before, but that he couldn't give me any of it and wouldn't give me any of it unless I set it up to take care of any liability they had in these assignments I had made. They considered that something chargeable to me and I thought they were in their rights in doing that, and that is why I accepted it. According to the records there is $9,192 to account for instead of $50,000 or $60,000 or $70,000.

"Q. In other words, those are the reserves to the accounts? A. Reserves, contracts and everything.

"The Court: His point now is, instead of starting with the larger figure of $50,000 and disposing of all the items there involved, there was this admitted balance of nine thousand some odd dollars? A. There were repossessions, six or seven changes of ownership by repossession, by sales, and the amount of those balances changed. In one instance they would decrease and another increase. If we were going to try to check those up here it would take weeks.

"The Court: They are already included in the $9,000 figure? A. Yes. We finished it up in April of 1938, the end of April, 1938, but we had been trying to get together on that for three or four months. There were many pages of figures and many scratch pads used and everything else to arrive at that figure.

"The Court: And did any of that $9,000 plus ever come back to you? A. Yes, I received some of that $9,162, as I testified to here yesterday or the day before, on the Cabrillo Cleaners. I got $1,700. And I believe from the Fabriform Steel I got approximately $700 in cash and $651 in work they did for me, making approximately $3,000 of that money I received.

"Q. Now, as to the remaining $6,000, of course you haven't had that? A. I haven't had an accounting."

It should also be pointed out that the terms of the agreement of May 1, 1938, do not indicate that the agreement was for the purpose of setting aside the sum of $4,600 for the claims of McKinney's assignees, as stated in the question put to McKinney by counsel, above quoted. As that agreement is drawn, it appears to be solely for the purpose of arriving at a settlement of McKinney's indebtedness to appellant. The terms of the agreement referred to above disclose that on May 1, 1938, defendant McKinney was still indebted to the company in the sum of $4,600 with several contracts still to be collected. At the time of the levy of execution appellant's books showed a debit balance against McKinney of approximately $700. The trial court found that at the time appellant was served with the writ of execution, on or about June 20, 1940, appellant was indebted to R. L. McKinney in a sum in excess of $3,036.

It appears from the remarks made by the court at the conclusion of the trial that the court took the position that after the assignment to Karp, appellant's predecessor and appellant were holding the fund in question to protect Karp and were not justified in paying it out or expending it otherwise; and that upon levy of execution appellant was therefore not justified in replying that he was not indebted, since he was under obligation to preserve the fund for Karp's protection. The court stated: "* * * one holding money that way isn't warranted in dealing with those trust funds to the disadvantage of the creditor who is secured. * * * All I know is there was a judgment and when he attempted to collect the judgment Fabriform said, 'I am sorry; we haven't that which we were holding to protect Karp. We paid it out otherwise.'"

[2, 3] The trial court apparently overlooked the fact that the fund in question was being held by appellant as security for himself and not for the primary purpose of protecting Karp. Karp was only entitled to security from the fund after McKinney's debts to appellant had been satisfied. In other words, McKinney's assignment to Karp was in the nature of a second lien upon the security in question; and Karp could only have recourse thereto after appellant's claims had been fully satisfied. In order to hold appellant liable in the present action it was incumbent upon respondent to show that at the time of the levy there was money due McKinney from appellant over and above the claims against McKinney in connection with the transactions concerning the manufacture and sale of the cleaning machines. The testimony of McKinney quoted above appears to relate largely to May 1, 1938, and before; and since it appears from the terms of the agreement of May 1, 1938, that all the conditional sales contracts in question were not completed at that time and that the transactions between McKinney and appellant or appellant's predecessor were not then fully complete, McKinney's testimony could furnish little if any basis upon which to find that on June 20, 1940, appellant was indebted to McKinney in a sum in excess of $3,036. The status as between McKinney and appellant on May 1, 1938, is no indication of what it might have been on June 20, 1940. There was no evidence that appellant had wrongfully paid out funds to which respondent or respondent's as-

signor was entitled. The judgment of the trial court appears to have been based solely on a theory that the obligation to pay Karp or his assignee the sum of $3,036 accrued at the time of the assignment to Karp of an interest in the conditional sales contracts in this amount. Evidence of the status of the parties at the time of the levy of execution was lacking, except for some evidence that appellant's books showed at that time a debit balance against defendant McKinney. In the light of the nature of the transactions between McKinney and appellant as revealed by the evidence the court's finding of indebtedness on the part of appellant at the time of the levy of execution is not sufficiently sustained; and appellant's motion for a new trial should have been granted in order to afford an opportunity to present more fully the facts as to the status of the parties at the time of the levy.

For the foregoing reasons the judgment is reversed and the cause remanded for a new trial. The attempted appeals from the orders are dismissed.

YORK, P. J., and WHITE, J., concur.



BROWN et al. v. GEORGE PEPPERDINE FOUNDATION et al.

Civ. 13860.

District Court of Appeal, Second District, Division 1, California.

April 7, 1943.

Hearing Granted June 3, 1943.

1. Appeal and error ⇐854(6)

Where order granting plaintiffs a new trial did not specify insufficiency of the evidence to sustain verdict for defendants as one of the grounds therefor, such ground was not available on appeal.

2. Trial ⇐295(1)

Appellate courts will examine instructions as a whole and if, when taken as a whole, the instructions form a fair presentation of the law applicable, judgment will not be reversed for individual inconsistencies, errors or conflicts in instructions.

3. Appeal and error ⇐1064(1)

Where plaintiffs tried case on one factual theory and defendants urged an entirely different claimed factual situation and jury was clearly admonished that before certain instructions were applicable, jury must decide which version of the facts was true, asserted inconsistencies and conflicts in the instructions were not prejudicial.

4. Landlord and tenant ⇐169(8)

In action against landlord for injuries sustained by minor guest from a fall down an apartment house elevator shaft, where automatic elevator equipment and locking device were of the best and were inspected weekly, evidence sustained verdict for landlord on issues whether guest pulled the outer door open and dropped out of sight after the door closed or whether guest entered and put the cage in motion, stopped it between floors, and stepped into the shaft.

Appeal from Superior Court, Los Angeles County; Georgia P. Bullock, Judge.

Action by Carol Ann Brown, by her guardian ad litem, Minnie Lee Brown, and another against George Pepperdine Foundation and others for injuries sustained by minor plaintiff when she fell down an elevator shaft in a structure owned and operated by named defendant. During trial the action was dismissed as to defendant John Burke and judgment was for remaining defendants. From an order granting plaintiffs' motion for new trial, named defendant appeals.

Reversed with direction.

Parker & Stanbury, Harry D. Parker, Raymond C. Stanbury, and White McGee, Jr., all of Los Angeles, for appellant.

W. I. Gilbert, Jr., of Los Angeles, for respondents.

YORK, Presiding Justice.

The instant action is predicated upon injuries sustained by the minor, Carol Ann Brown, when she fell down an elevator shaft in the St. George Apartments in Hollywood. The structure was owned and operated by the George Pepperdine Foundation, and the elevator was serviced by the Oliver & Williams Company, a copart-

nership, which was in the business of elevator maintenance. During the trial the action was dismissed as to defendant John Burke, the manager of said apartment house, and the jury brought in a verdict in favor of the two remaining defendants, George Pepperdine Foundation and Oliver & Williams Company. Thereafter the court granted plaintiffs' motion for a new trial, and George Pepperdine Foundation alone appeals from the order granting said motion.

[1] The order appealed from did not specify insufficiency of the evidence to sustain the verdict as one of the grounds therefor, and it is conceded that such ground is therefore not available on this appeal. However, respondents state in their brief that they "will justify the order granting a new trial upon the sole ground of errors at law occurring during the trial"; such errors occurring exclusively in the instructions.

The record reveals that the respondents, mother and daughter, were guests at the St. George Apartments, occupying an apartment on the third floor thereof; that Mrs. Brown and her brother left the apartment and, as they were on their way to the elevator (which was self-operating), the child Carol Ann skipped ahead of them. On direct examination Mrs. Brown said she saw Carol Ann push the button of the elevator and pull the outer door open; that the door closed and the child dropped out of sight. When Mrs. Brown reached the elevator door she pushed the button and the elevator came down from the fourth floor. She asked the occupants to hold the elevator on the third floor while she ran down the stairs to the ground floor where she was present when Mr. Burke, the manager, rescued the child from the bottom of the shaft. On cross-examination, Mrs. Brown stated she could not say that she saw the child fall directly into the shaft, but that she saw her body lean forward and disappear. Said witness also testified that at the time she pressed the button to bring the elevator to the third floor she tried to pull the outer door open but was unable to do so.

It was defendants' contention that the accident did not and could not occur in the manner alleged by plaintiffs; that the locking devices were as nearly foolproof as they could be made and that they were found in proper working order immediately after the accident. It was further contended that even if the facts were as plaintiffs asserted, there was no negligence on the part of either defendant. The elevator equipment and locking device were of the best and were inspected weekly by a concern specializing in elevator inspection and maintenance. The facts with regard to the construction of the elevator and its appurtenances were not in dispute. Defendants' theory as to how the child got into the shaft was that she entered the elevator cage and put it in motion; that when it was between floors, she stopped the cage by either pressing the button or by pulling back the cage door; that when the elevator cage was in a certain position between floors, and the cage door was either fully or partly pulled back, there was a small space through which a child of the weight and size of Carol Ann could step or maneuver herself into the elevator shaft and that she fell down the shaft in this way.

[2] Although respondents urge in support of the order granting the motion for new trial that certain instructions were prejudicially contradictory and the entire charge was otherwise confusing and misleading, they also concede that "It is a familiar rule governing appellate courts that they will examine instructions to the jury as a whole. If, when taken as a whole, the instructions form a fair presentation of the law applicable to the case, the judgment will not be reversed for individual inconsistencies, errors or conflicts."

[3] An examination of the entire charge in the instant case shows that the jury was fully and fairly instructed on all issues. There are some slight inconsistencies and conflicts, but none that amount to prejudicial error. As heretofore indicated, plaintiffs tried the case on one factual theory while defendants urged that the accident could not have occurred as charged by plaintiffs and urged an entirely different claimed factual situation. The jury was clearly admonished that before certain of the instructions were applicable, the jury must decide which version of the facts was true. When the controverted factual situation is taken into consideration, we are impressed that the asserted inconsistencies and conflicts in the instructions were dissipated by the court's admonition as to the applicability of instructions in connection with which other instructions might appear to be in conflict and that such conflicting or inconsistent instructions were to be applied only in the

event the jury found that the accident occurred in such a manner as to justify the application of particular instructions.

[4] Our examination of the evidence discloses that the verdict of the jury was sound and the record as a whole fails to reveal any miscarriage of justice. It was therefore error to grant the motion for a new trial.

For the reasons stated, the order is reversed and the trial court is directed to enter judgment for defendants pursuant to the verdict of the jury.

DORAN and WHITE, JJ., concur.



57 Cal.App.2d 935

In re RESER'S GUARDIANSHIP.

SMITH v. PATERSON.

Civ. 12222.

District Court of Appeal, First District, Division 2, California.

April 1, 1943.

Hearing Denied May 27, 1943.

1. Appeal and error ⇐655(2)

An order striking proposed bill of exceptions on attempted appeal was not erroneous because notice of motion to strike was not accompanied by points and authorities as required by court rule. Rules of District Courts of Appeal, rule 19, § 1.

2. Insane persons ⇐71

In guardianship proceeding trial court did not err in striking out proposed bill of exceptions on attempted appeal from a prior order confirming a sale of realty rather than giving leave to amend since order confirming sale of realty in guardianship proceedings is not an "appealable order." Probate Code, § 1630.

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

3. Courts ⇐202(5)

The statutory provision allowing an appeal from a special order made after final judgment has no application to probate proceedings. Probate Code, §§ 1240, 1630.

4. Courts ⇐202(5)

Even if superior court, sitting in probate, acted in excess of its jurisdiction, a nonappealable order of court would not thereby be made appealable. Probate Code, § 1630.

5. Insane persons ⇐71

Where order of superior court sitting in probate confirming sale of realty in guardianship proceeding was not appealable, reviewing court would not have jurisdiction to entertain an appeal, and hence superior court properly ordered proposed bill of exceptions on attempted appeal from the order stricken out. Probate Code, § 1630.

Appeal from Superior Court, San Benito County; Maurice T. Dooling, Jr., Judge.

Proceeding in the matter of the guardianship of the person and estate of Phylecta Rita Reser, an incompetent person, wherein Lida Reser Smith was the guardian of the person and D. M. Paterson was the guardian of the estate of the incompetent. From an order striking out a proposed bill of exceptions on an attempted appeal from a prior order confirming a sale of real property, Lida Reser Smith, individually, and as guardian of the person of the incompetent appeals.

Affirmed.

Alfred Nelson, of Oakland, for appellant.

Arthur B. Dunne, Elden C. Friel, and Dunne & Dunne, all of San Francisco, and Randal F. Dickey, of Alameda, for respondent.

NOURSE, Presiding Justice.

Appellant is the guardian of the person of Phylecta Rita Reser, an incompetent. Respondent is guardian of said incompetent's estate. The appeal is prosecuted from an order striking out appellant's proposed bill of exceptions on an attempted appeal from a prior order confirming a sale of real property.

[1] The first point raised by appellant is that the trial court erred in making the order because respondent's notice of motion to strike out the proposed bill of exceptions was not accompanied by points and authorities as required by rule XIX, section 1. The point is not well taken. The record does not show that no points or authorities were filed. Though it does not show affirmatively that they were filed, the record

does not purport to be complete and is not certified as a complete record. But in any event the point is not sound. A failure to comply with the rule relating to points and authorities may justify a denial of the motion (Butterfield v. Butterfield, Cal.App., 29 P.2d 231; Id., 1 Cal.2d 227, 34 P.2d 145), but we have found no case holding that it is error for the trial court to make an order, otherwise proper, merely because the moving party failed to comply with the rule.

[2] The second point raised by appellant is that the trial court erred in striking out the proposed bill rather than giving leave to amend. The order was proper for a reason not discussed by appellant in her brief. She proposed a bill of exceptions on an attempted appeal from an order confirming a sale of real property. In guardianship proceedings that is not an appealable order. Section 1630 of the Probate Code provides: "An appeal may be taken to the supreme court from an order granting or revoking letters of guardianship; settling an account of a guardian; instructing or directing a guardian; or refusing to make any order heretofore mentioned in this section."

[3, 4] In Re Morro's Estate and Guardianship, 36 Cal.App.2d 623, 627, 98 P.2d 552, it was held that this section was exclusive and that an appeal would not lie from an order not mentioned in the section. The same rule has been uniformly followed in the construction of section 1240 of the Probate Code relating to appeals in probate matters. See 11A Cal.Jur. p. 204. In the Morro case the court said (page 627 of 36 Cal.App.2d, page 554 of 98 P.2d): "The jurisdiction of an appellate court in probate matters extends only to such orders and judgments as are made appealable by the Probate Code. Estate of Walkerly, 94 Cal. 352, 29 P. 719. The provision that an appeal may be taken from a special order made after final judgment has no application to probate proceedings. In re Estate of Allen, 175 Cal. 356, 165 P. 1011. Even if the court acted in excess of its jurisdiction, a question we find unnecessary to determine, the nonappealable order of the court was not thereby made appealable. In re Seymour's Estate, 15 Cal.App. 287, 114 P. 1023."

[5] If the order confirming the sale was not an appealable order the reviewing court would not have jurisdiction to entertain the appeal. Hence the filing of the proposed bill of exceptions in aid of such an appeal was an idle act, and the trial court was not in error when it ordered the proposed bill stricken out.

The order is affirmed with costs to respondent.

SPENCE, J., concurred.

Hearing denied; CARTER, J., dissenting.



KRUZIE et al. v. SANDERS et al.

Civ. 3053.

District Court of Appeal, Fourth District, California.

April 15, 1943.

Rehearing Denied May 14, 1943.

Hearing Granted June 10, 1943.

1. Trial ⇐142

A nonsuit may be granted only when there is no substantial evidence which would support a verdict for plaintiff after giving plaintiff's evidence all the weight to which it is entitled, and drawing every reasonable inference which may fairly support plaintiff's case, and disregarding all conflicts in the evidence.

2. Automobiles ⇐181(2)

Where a trip is not solely for the pleasure of the parties and is not an exchange of social amenities, but is on the business of the driver in the prosecution of which the rider renders or is to render a substantial assistance to the driver, a "consideration" flows from the rider to the driver which amounts to "compensation" for the ride and makes the rider a "passenger" and not a "guest". Vehicle Code, § 403, St.1935, p. 154.

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration", "Compensation", "Passenger" and "Guest".

3. Automobiles ⇐245(24)

In action for injury to occupant of automobile whether occupant was a pas-

senger or a guest was for jury. Vehicle Code, § 403, St.1935, p. 154.

4. Automobiles ⇐181(2)

That compensation to be given for ride by automobile occupant was small and that the services were not actually rendered because the accident rendered personal performance impossible, could not affect the issue whether occupant was a passenger or a guest. Vehicle Code, § 403, St.1935, p. 154.

5. Automobiles ⇐181(1)

The operator of an automobile is liable for damages resulting to a passenger from operator's negligence.

6. Automobiles ⇐242(2)

Where automobile was in exclusive control of operator and while being driven between 55 and 60 miles an hour on oil road with a high crowning center, which was wet and slippery, suddenly skidded off road and into a palm tree and injured occupant of automobile, the doctrine of "res ipsa loquitur" applied.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

7. Negligence ⇐121(2)

The doctrine of "res ipsa loquitur" does not give a plaintiff an absolute right of recovery, but raises an inference of negligence which must be met by the adverse party.

8. Automobiles ⇐245(24)

Where doctrine of res ipsa loquitur applied to automobile accident and evidence tended to show that plaintiff was a passenger in automobile involved, it was error to grant defendants a nonsuit.

Appeal from Superior Court, Fresno County; H. S. Shaffer, Judge.

Action by Margaret Kruzie and Harry Kruzie against Mabel Sanders and Frank Sanders for injuries to Margaret Kruzie as result of automobile accident. From a judgment of nonsuit, the plaintiffs appeal.

Reversed.

Thomas F. Lopez, of Fresno, for appellants.

Hoge, Pelton & Gunther, of San Francisco, Chester O. Hansen, of Fresno, and A. Dal Thomson, of San Francisco, for respondents.

MARKS, Justice.

This is an appeal from a judgment entered after a motion for nonsuit had been granted.

Plaintiffs are husband and wife, as are defendants. They lived in the city of Coalinga and were friendly neighbors. Frank Sanders was the owner of the automobile involved in the accident out of which this case grew. It was being driven by his wife with his consent.

Defendants seek to support the judgment in their favor on two grounds: First, that Mrs. Kruzie was a guest in the automobile at the time of the accident and that if any carelessness was shown on the part of Mrs. Sanders it was only ordinary negligence so that no recovery could be had under the guest statute (Sec. 403, Vehicle Code, St.1935, p. 154); and, second, if Mrs. Kruzie was found to be a passenger there was no evidence of negligence on the part of Mrs. Sanders that would support a judgment in favor of plaintiffs.

[1] It is thoroughly settled in this state that the trial court may grant a nonsuit only when, disregarding all conflicts in the evidence, and giving the plaintiffs' evidence all of the weight to which it is entitled, and drawing every reasonable inference from the evidence which may fairly support the case of plaintiffs, the result reached is a lack of any substantial evidence which would support a verdict in their favor. Berger v. Lane, 190 Cal. 443, 213 P. 45; Hall v. Barber Door Co., 218 Cal. 412, 23 P.2d 279; Engstrom v. Auburn Automobile Sales Corp., 11 Cal.2d 64, 77 P.2d 1059. For this reason we will summarize only the evidence favorable to plaintiffs.

The following evidence bears on the status of Mrs. Kruzie in the automobile at the time of the accident:

"Q. Just tell us what she said? A. She asked me to go to Fresno with her and do her Christmas shopping, and I told her I would if I could get away. I was working at the time and it was uncertain as to whether I could go or not. And she wanted to go on Wednesday, so I called her on Wednesday and told her that I couldn't go because that was my lodge night, and I had to go to lodge, and she said that is all right. 'I have a party on Thursday, so we will go Friday.' And Friday I thought that she had gone. I didn't see her until Sunday * * *.

"Q. Go ahead. A. There was quite a lot of conversation about me getting off and coming over to Fresno with her. She said, 'I have to go over there. There is the setting I have to take over and put in a mounting. I want you to help me with it.'

"Q. Will you go right ahead? A. Well, I told her that I didn't see how I could get off. I tried—and I had refused to go the other times, and I just didn't want to come over to Fresno, and she said 'Well, I have a lot of other things I want you to do, too, Margery, and I want you to come with me.' * * *

"Q. Was there anything else said there by Mrs. Sanders or you about this trip that you recall? A. I recall of asking her why we couldn't postpone it and go another day, and she said, 'No, Margery, I have to go tomorrow. If I don't take this stone over, I can't get my mounting tomorrow, and I want you over there to help me pick out that mounting.'

"Q. Now you refer to some other shopping. I interrupted you once. Was there anything said about what the other shopping was? A. Yes. I had three or four girls employed in the restaurant, and I knew their sizes and different things, and she wanted me to help her with the buying of Christmas presents for them. * * *

"Q. You weren't doing any shopping? A. No, I wasn't. My Christmas shopping was all bought.

"Q. Already bought? A. Bought.

"Q. And the only purpose you came over was to advise Mrs. Sanders on Christmas presents that she was buying for people? A. I came over to assist her in any way I could.

"Q. Yes. And you didn't have any mission that brought you to Fresno at all? A. No."

The present guest statute was first carefully considered in Crawford v. Foster, 110 Cal.App. 81, 293 P. 841, 842, where it was said: "We think the meaning of the language used is that a guest is one who is invited, either directly or by implication, to enjoy the hospitality of a driver of a car; who accepts such hospitality; and who takes a ride either for his own pleasure or on his own business, without making any return to or conferring any benefit upon the driver of the car, other than the mere pleasure of his company. * * *"

[2] The foregoing definition is still approved by the courts of California and has been applied in many cases. Whether a person riding with the driver of the car is a guest as defined in the statute, or a passenger depends on the factual situation of each case. The conclusion to be drawn from the many cases dealing with the subject, in which the rider has been held to be a passenger and not a guest, may be stated, as applicable to the facts, here as follows: Where the trip is not solely for the pleasure of the parties and is not an exchange of social amenities, but is on the business of the driver in the prosecution of which the rider renders or is to render substantial assistance to the driver, a consideration flows from the rider to the driver which amounts to compensation for the ride and makes the rider a passenger and not a guest. See, Walker v. Adamson, 9 Cal.2d 287, 70 P.2d 914; Druzanich v. Criley, 19 Cal.2d 439, 122 P.2d 53; Haney v. Takakura, 2 Cal.App.2d 1, 37 P.2d 170, 38 P.2d 160; Boyson v. Porter, 10 Cal.App.2d 431, 52 P.2d 582; Lerma v. Flores, 16 Cal.App.2d 128, 60 P.2d 546; Duclos v. Tashjian, 32 Cal.App.2d 444, 90 P.2d 140; Carey v. City of Oakland, 44 Cal.App.2d 503, 112 P.2d 714; Bummer v. Liberty Laundry Co., 48 Cal.App.2d 648, 120 P.2d 672; Whittemore v. Lockheed Aircraft Corp., 51 Cal.App.2d 605, 125 P.2d 531.

Here we find that Mrs. Kruzie had no business of her own to transact in Fresno; that making the trip required readjustment in employment in the place where she worked; that she was reluctant to leave her work but finally yielded to the repeated and insistent urging of Mrs. Sanders and made the trip solely for the purpose of aiding Mrs. Sanders. It is evident that Mrs. Sanders regarded the presence of Mrs. Kruzie in Fresno as important to her,—so important that she postponed the trip until Mrs. Kruzie could go; that she wanted the advice and assistance of Mrs. Kruzie in selecting a setting for a ring which was to be a Christmas gift, as well as special information which Mrs. Kruzie possessed concerning other persons; that Mrs. Sanders desired to use this information in selecting presents for them.

[3] This evidence presented a question of fact as to a substantial benefit to be bestowed on Mrs. Sanders by Mrs. Kruzie that should not have been decided on a motion for nonsuit as the reasonable

inference might have been drawn from it that such benefit made Mrs. Kruzie a passenger and not a guest.

Carey v. City of Oakland, supra [44 Cal.App.2d 503, 112 P.2d 717], is a case in which the plaintiff rode in an ambulance to render assistance in caring for an injured passenger. The court held that this was compensation for the ride that made her a passenger and not a guest. The court summarized some of the other cases to the same effect as follows: "Some of the California cases which may be cited as illustrative of the application of the principle that a person is not a guest within the meaning of said law who accepts a ride with the understanding that he is to perform some service beneficial to the driver or his principal, are Lerma v. Flores, 16 Cal.App.2d 128, 60 P.2d 546, wherein the plaintiff accepted a ride for the purpose of assisting and guiding the driver along the highway, and advising him, at the latter's request, as to the condition of the roads over which the driver was about to travel; Haney v. Takakura, 2 Cal.App.2d 1, 37 P.2d 170, 38 P.2d 160, wherein the plaintiff accompanied the driver to assist in marketing the latter's produce; and Yates v. J. H. Krumlinde & Co., 22 Cal. App.2d 387, 71 P.2d 298, in which the plaintiff claimed that he was taken along by the driver for the purpose of helping him unload the truck on which he rode."

[4] That the compensation to be given for the ride was small and that the services were not actually rendered because the accident rendered personal performance impossible cannot affect the issue. In Lerma v. Flores, supra [16 Cal.App.2d 128, 60 P.2d 547], it was said: "The consideration may be any benefit conferred or any detriment suffered (Civ.Code, § 1605), and the law will not enter into an inquiry as to its adequacy. Whelan v. Swain, 132 Cal. 389, 64 P. 560; Rusconi v. California Fruit Exchange, 100 Cal.App. 750, 754, 281 P. 84; Seth v. Lew Hing, 125 Cal.App. 729, 14 P.2d 537, 15 P.2d 190; Marsh v. Lott, 8 Cal.App. 384, 389, 97 P. 163; Williston, Contracts (2d Ed.), § 115. Moreover where the consideration agreed has been accepted, the acceptance constitutes a waiver of any claim of inadequacy (Nicholson v. Tarpey, 70 Cal. 608, 12 P. 778); and the rule applies to the acceptance of services bargained for even though valueless in fact. Peters v. Binnard, 219 Cal. 141, 25 P.2d 834."

[5] If Mrs. Kruzie was a passenger and not a guest at the time of the accident, defendants would be liable for damages resulting from the negligence of Mrs. Sanders in operating the automobile.

The accident happened on December 16, 1940, on Kearney Boulevard, a short distance west of the City of Fresno. Kearney Boulevard is an oiled road with a high crowning center. It was wet and slippery at the time of the accident.

[6] Mrs. Sanders was driving east on Kearney Boulevard at a speed of between 55 and 60 miles an hour. Suddenly the automobile skidded off the road and into a palm tree along its side, injuring Mrs. Kruzie.

As was said in Druzanich v. Criley, supra [19 Cal.2d 439, 122 P.2d 56]: "Under the circumstances here presented, viz., the instrumentality being in the exclusive control of said respondent; the accident being such that in the ordinary course of things it would not have happened if the respondent driver had used proper care; and the injury having occurred without voluntary action on the part of appellant, the res ipsa loquitur doctrine must be held to have been applicable."

[7, 8] While the doctrine of res ipsa loquitur does not give a plaintiff an absolute right of recovery, it raises an inference of negligence which must be met by the adverse party. In a case such as this, where the res ipsa loquitur rule is applicable, an order granting a nonsuit is error where the injured plaintiff is a passenger and not a guest.

As there is evidence in the record and reasonable inferences to be drawn from it that would support a verdict for plaintiffs, the trial court erred in granting the motion for nonsuit.

The judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

57 Cal.App.2d 937

COCHRANE v. COCHRANE.

Civ. 12346.

District Court of Appeal, First District, Division 2, California.

April 1, 1943.

1. Divorce ⇐263, 311

Execution will issue for enforcement of instalment decrees for alimony or child support under statute authorizing execution at any time within five years after entry of judgment, in view of statute providing that order for payment of sum of money made by court may be enforced by execution in same manner as if it were a judgment. Code Civ.Proc. §§ 681, 1007.

2. Divorce ⇐311

Under statute providing for execution for enforcement of judgment at any time within five years after entry thereof, execution will issue for instalments for child support accruing under decree of divorce falling due within five-year period even though decree was entered over five years before. Code Civ.Proc. §§ 681, 1007.

3. Divorce ⇐311

Execution for unpaid instalments for child support under decree of divorce accruing over five years before issuance of execution could only issue under statute relating to enforcement of judgment after lapse of five years, by leave of court and after due notice to judgment debtor accompanied by affidavits. Code Civ.Proc. § 685.

4. Divorce ⇐311

Even if as to unpaid instalments for child support under decree of divorce, execution within five-year period could issue under statute authorizing enforcement of judgment within five years after entry thereof by writ of execution, the issuance of the execution might be denied upon a sufficient showing. Code Civ.Proc. § 681.

5. Divorce ⇐311

Upon proof that instalments under decree of divorce awarding custody of child with provision for child support had accrued within five years and had not been paid, plaintiff "prima facie" established right to execution under statute authorizing enforcement of judgment within five years by writ of execution, and burden was on defendant to establish facts showing that writ should not issue. Code Civ.Proc. § 681.

See Words and Phrases, Permanent Edition, for all other definitions of "Prima Facie".

6. Divorce ⇐311

Upon showing by plaintiff in divorce action awarded custody of child with provision for child support that part of unpaid instalments was not barred under statute authorizing enforcement of judgment within five years by writ of execution, plaintiff was entitled to order for execution as matter of right unless defendant established that some contingency had arisen because of which right to exact alimony no longer existed. Code Civ.Proc. § 681.

SPENCE, J., dissenting.

Appeal from Superior Court, Santa Clara County; Robert R. Syer, Judge.

Divorce action by Jean Mathilda Cochrane against Amory W. Cochrane. Decree of divorce and from an order denying a writ of execution to satisfy certain unpaid installments under award for custody for minor child, plaintiff appeals.

Reversed.

Jean M. Blum, of San Jose, for appellant.

Percy O'Connor and S. F. Holstein, both of San Jose, for respondent.

DOOLING, Justice pro tem.

This is an appeal from an order denying a motion for a writ of execution to satisfy certain unpaid instalments accruing under a decree of divorce which awarded the custody of a minor child to plaintiff with provision that defendant should pay $35 per month for his support. The greater part of the unpaid support money is for instalments accruing more than five years before the date of the motion. The balance is referable to instalments accruing less than five years before the motion was made.

The appeal is on a typewritten transcript properly certified pursuant to section 953a, Code of Civil Procedure. The transcript contains an affidavit of plaintiff in support of the motion and no counter-showing by defendant. The plaintiff's affidavit sets out the failure to pay certain accrued instal-

ments in whole or in part, specifying the dates of their accrual under the terms of the decree and that plaintiff has frequently demanded their payment.

[1-3] Execution will issue in a proper case for the enforcement of instalment decrees for alimony or support under section 681, Code of Civil Procedure, pursuant to section 1007, Code of Civil Procedure, which provides: "Whenever an order for the payment of a sum of money is made by a court pursuant to the provisions of this code, it may be enforced by execution in the same manner as if it were a judgment" (Van Cleave v. Bucher, 79 Cal. 600, 602, 603, 21 P. 954; Shields v. Shields, 55 Cal.App.2d 579, 130 P.2d 982); and, even though the decree was entered over five years before, execution will issue under section 681 for instalments falling due within the five-year period. Gaston v. Gaston, 114 Cal. 542, 547, 46 P. 609, 55 Am.St.Rep. 86. As to instalments accruing over five years before the issuance of execution the writ can only issue under section 685, Code of Civil Procedure. Shields v. Shields, 55 Cal.App.2d 579, 130 P.2d 982.

It is clear that under the recent decisions of the Supreme Court (Butcher v. Brouwer, 21 Cal.2d 354, 132 P.2d 205; Beccuti v. Colombo Baking Co., 21 Cal.2d 360, 132 P.2d 207; Hatch v. Calkins, 21 Cal.2d 364, 132 P.2d 210) no sufficient showing of diligence was made to justify the issuance of execution under section 685 as to those instalments which fell due more than five years before the motion for issuance of execution was made, and so far as such instalments are concerned, the order of the trial court was plainly correct.

[4, 5] The instalments falling due within five years of the date of the motion present a different question. For their satisfaction plaintiff was entitled to execution under section 681. The courts have held that even as to such instalments the issuance of execution may be denied upon a sufficient showing. Parker v. Parker, 203 Cal. 787, 266 P. 283; Shields v. Superior Court, 138 Cal.App. 151, 31 P.2d 1045. However, in each of those cases the defendant made a strong counter-showing which was held to establish that it would be inequitable in those cases to allow execution to issue. Here defendant, according to the record on appeal, made no counter-showing. Upon proof that the instalments had accrued within five years and had not been paid, plaintiff prima facie established her right to execution, and the burden was on defendant to establish facts showing that the writ should not issue. This is readily apparent when we recall that the only reason why execution for instalments of alimony not barred under section 681, Code of Civil Procedure, does not issue from the clerk as a matter of course is that in the nature of such decrees subsequent events may make it inequitable longer to enforce them or the instalments may have been paid, and for that reason the defendant should be given notice and an opportunity to make a legal showing before execution issues. The following from 1 Freeman on Executions, 3d Ed., 309, 310 clearly points this out:

"In suits for divorce, a wife is often awarded alimony not payable in one gross sum, but at stated and frequently recurring periods, and the question has arisen whether the payment of such sums may be enforced by scire facias as well as by attachment for contempt. In such a case, it seems clear that execution cannot issue as a matter of course, for it may be that some contingency has arisen under which she has no longer any right to exact alimony, or it may have been paid as directed in the decree. Some notice ought to be given the party claimed to be in default before any writ is issued against his person or property. The proceeding by scire facias is well adapted to giving the requisite notice, and there seems to be no doubt that it is an appropriate and perhaps the exclusive proceeding in such cases."

[6] The writ of scire facias is abolished by section 802, Code of Civil Procedure, and the proceeding by motion for an order that execution issue has taken its place, but the principles applicable to the one would seem to be equally applicable to the other. Upon a showing by plaintiff that a part of the judgment is not barred under section 681, Code of Civil Procedure, and remains unpaid, she is entitled to an order for execution as a matter of right unless the defendant establishes "that some contingency has arisen under which she has no longer any right to exact alimony." Absent such showing execution should issue for such instalments as fall under section 681. The court therefore erred in denying execution for the instalments which fell due within

five years of the date of the motion. Cf. Atkinson v. Atkinson, 35 Cal.App.2d 705, 96 P.2d 824.

The order appealed from is reversed.

NOURSE, P. J., concurred.

SPENCE, Justice (dissenting).

I dissent. The decree of divorce was entered in 1925 and an award of $35 per month was made therein solely for the support of the minor child of the parties. The child attained his majority on April 2, 1940, which was over fifteen years after the entry of the decree. It was not until December, 1940, that plaintiff made her motion for execution to issue for the alleged unpaid instalments. Plaintiff alleged in her affidavit that "defendant has failed to pay to the plaintiff * * * any monies from May 1931 to April 1934 being a period of 35 months and amounting to the sum of $1,225.00. That from April 1934 to January 1937 defendant paid plaintiff * * * the sum of $25.00 per month being $10.00 per month less than ordered in said decrees being in arrears during the above said dates in the amount of $330.00." There was no allegation showing any diligence on the part of plaintiff in attempting to enforce the decree at any prior time during the period of alleged delinquency which, according to plaintiff's allegations, amounted to almost ten years. Upon the showing made, the trial court denied the motion for execution and it is apparent from the trial court's opinion that the denial was based, at least in part, on the failure of plaintiff to take "timely action."

The questions presented on this appeal are: (1) Was the enforcement of the decree by execution at the time the motion was made a matter of right or a matter which rested in the discretion of the trial court? (2) If enforcement of the decree by execution was a matter which rested in the discretion of the trial court, does it appear upon the record before us that the trial court abused its discretion in denying the motion for execution to issue?

As to the first question, it seems clear that the enforcement of the decree by execution, both as to instalments which accrued within five years prior to the making of the motion as well as those which accrued more than five years prior to the making of the motion, was not a matter of right but was a matter which rested in the discretion of the trial court. Parker v. Parker, 203 Cal. 787, 266 P. 283; Shields v. Superior Court, 138 Cal.App. 151, 31 P.2d 1045. This is recognized in Atkinson v. Atkinson, 35 Cal.App.2d 705, at page 707, 96 P.2d 824, which is the only case which has been called to our attention involving a so-called continuing judgment in which an order denying enforcement by execution has been reversed. But the peculiar circumstances shown by the record in that case justified the holding that the trial court had abused its discretion in denying the motion. It is also recognized in Shields v. Shields, 55 Cal. App.2d 579, 130 P.2d 982, in which case an order granting execution was affirmed.

As to the second question, there appears to be no authority directly in point. However, the recent decisions of the Supreme Court, involving ordinary money judgments, clearly indicate that when enforcement by execution rests in the discretion of the trial court, the one seeking the issuance of execution should be required to make a showing of reasonable diligence in the enforcement of the decree. Beccuti v. Colombo Baking Co., 21 Cal.2d 360, 132 P.2d 207; Butcher v. Brouwer, 21 Cal.2d 354, 132 P.2d 205; Hatch v. Calkins, 21 Cal.2d 364, 132 P.2d 210. I believe this is the sound rule to apply in cases involving so-called continuing judgments, for if the rule were otherwise, it would encourage attempts to enforce by execution many ancient alimony decrees at times when no such enforcement should be permitted. It is no unjust burden upon the one seeking the issuance of execution fifteen years after the entry of a decree and almost ten years after alleged delinquencies commenced to require the making of a showing of reasonable diligence; and when no such showing is made, I believe that the trial court is entirely justified in denying the motion for the issuance of execution.

I am of the opinion that the record before us fails to show that the trial court abused its discretion and that the order denying the issuance of execution should be affirmed.

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SECOND SERIES

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PUCKETT v. PUCKETT.

L. A. 17839.

Supreme Court of California.

April 12, 1943.

1. Divorce ⇐297, 302, 303(1), 308, 309

Where there is no agreement or stipulation of parties in divorce action, the court may during pendency of action, or at final hearing, or at any time thereafter during the minority of any children of marriage, make an order for custody and maintenance or support of children as may be proper and may at any time vacate or modify the same. Civ.Code, § 138.

2. Divorce ⇐297

Divorced parents may contract with each other with respect to custody and support of their minor children. Civ.Code, § 159.

3. Divorce ⇐297

Children are not bound by contract between parents regarding custody and support of children, and such contracts may not so far as children are concerned abridge court's power in appropriate proceedings to provide for support of children by their parents, or for their custody. Civ.Code, §§ 138, 159.

4. Divorce ⇐297

A decree of divorce providing for custody and support of minor child may be modified as circumstances require, even though it is based on agreement or stipulation of parties. Civ.Code, §§ 138, 159.

5. Divorce ⇐245(1)

Generally, a provision for payment of alimony to wife in divorce decree granted to wife for offense of her husband may be modified by court under appropriate circumstances. Civ.Code, § 139.

6. Husband and wife ⇐278(1)

A husband and wife may contract with each other regarding support of each other and their property rights. Civ.Code, §§ 158, 159.

7. Divorce ⇐254

A divorce decree adjusting property rights is not subject to modification regardless of whether it is based on agreement of parties. Civ.Code, §§ 158, 159.

8. Divorce ⇐254

Where there is property settlement agreement providing as part thereof for periodical payments to be made to wife by husband and agreement is approved by court, and payments ordered by divorce decree to be paid pursuant to agreement, the order will not be subsequently modified, except by consent of parties. Civ.Code, §§ 158, 159.

9. Divorce ⇐245(1), 297

Where no provision for permanent alimony is made in divorce decree or provision therein made is limited as to time, or the occurrence of certain events, and court does not reserve the power, it may not subsequently modify the decree to grant permanent alimony or alter the limitation imposed, but a different rule prevails with respect to support of minor children.

10. Divorce ⇐249(2), 254

Where agreement recited that parties desired to effect a complete settlement of their property rights, that except as provided in the agreement neither should have any claim against the other in respect to property rights, and that the agreement should be in full satisfaction of all rights to support and maintenance, the monthly payments provided for constituted an inseparable part of a "property settlement" agreement which could not be modified although approved by divorce decree. Civ. Code, §§ 158, 159.

See Words and Phrases, Permanent Edition, for all other definitions of "Property Settlement".

11. Divorce ⇐236, 249(2)

The presence of provision that monthly payments were for support and maintenance of wife and child did not necessarily indicate that agreement provided for alimony rather than property settlement.

12. Divorce ⇐236, 249(2)

An agreement must be taken as a whole in determining whether it provides for alimony or constitutes property settlement.

13. Divorce ⇐285

Record did not disclose that exclusion of evidence offered by husband in support of motion to modify divorce decree requiring monthly payments was error, where transcript of proceedings at hearing on the motion was not presented.

14. Divorce ⇐297

Amount which divorce decree ordered to be paid for support of minor child could not be reduced where it was part of property settlement. Civ.Code, §§ 138, 139, 158, 159.

15. Divorce ⇐297

Even though amount payable for child's support is fixed by property settlement approved by divorce decree, court may grant an increase if the child's welfare requires it. Civ.Code §§ 138, 139, 158, 159.

16. Divorce ⇐222

Order, denying husband's motion for modification of divorce decree by reducing the monthly payments, properly awarded to wife attorney's fees incurred in resisting the motion.

EDMONDS and TRAYNOR, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by Ynez H. Puckett against T. Lyell Puckett, wherein divorce was granted plaintiff. From an order denying defendant's motion to reduce monthly allowance, defendant appeals.

Affirmed.

For prior opinion of District Court of Appeals, see 127 P.2d 54.

Parker & Irwin and Don S. Irwin, both of Los Angeles, for appellant.

Leonard Comegys, of Los Angeles, for respondent.

CARTER, Justice.

On March 23, 1933, plaintiff, Ynez H. Puckett, was awarded an interlocutory decree of divorce from her husband, T. Lyell Puckett, on the ground of extreme cruelty, and on March 26, 1934, a final decree was entered. They have one minor child.

After the commencement of the divorce action, and on March 16, 1933, an instrument designated as a property settlement agreement was entered into by the parties. It was therein provided that the parties were husband and wife and had a minor child; that they had acquired and owned property; that they desire to "effect a complete settlement of the property rights between them, including the right of maintenance and support for the wife, and of the minor child of the parties hereto, attorneys' fees and costs in any action which now pends, or which may hereafter pend between said parties by reason of the marital relation, and it is * * * agreed * * *, except as in this instrument provided, that neither the wife nor the husband shall have any * * * interest * * * in any property, * * * whether the same be community and/or separate property and which is either now owned, or which may hereafter be acquired, by either of the parties hereto, and which heretofore has been, or may hereafter be, acquired, and without reference as to whether said property might be community property or separate property of either party hereto, and that the wife shall have no community, dower or other * * * interest in * * * any such property, or in * * * any property of the husband by reason of or in any way arising out of the marriage relation between the parties hereto, or because of any rights or provisions of law arising out of or affecting the same except as in this instrument provided, whether the parties hereto continue to live together as husband and wife, or separately, or are divorced; that the husband shall have no * * * interest * * * of any kind whatsoever by virtue of the marriage relation of the parties, or any rights or provisions of law arising out of or affecting the same, in * * * any property now owned by the wife as her separate estate or hereafter acquired by her in any manner or capacity whatso-

ever except as in this instrument provided, and each of the parties hereto do hereby * * * transfer * * * each to the other every and all rights, titles, claims and estates of any and every kind necessary or proper to accomplish the purposes and intentions herein set forth or consistent therewith. All of the provisions hereof shall be interpreted in accordance with the intention herein expressed, and to accomplish the purpose thereof * * *"; that each of the parties are represented by counsel, and each is fully advised of the financial status of the other; that it is agreed that the provisions in the agreement "are in full satisfaction of any and all rights and obligations of any and every kind which each or either of said parties might otherwise have towards the other, and each of the parties does hereby relinquish and surrender all rights of support, maintenance, assistance and inheritance of every kind from the other except as in this instrument set forth and provided, and in and to the property of the other, and in and to any property affected by the marriage relation or that may or might be termed community property, or in which dower or other marital rights might exist or that shall be hereafter acquired by either of the parties hereto, except as in this agreement expressly set forth * * *"; that the personal effects of each shall belong to the one having the same; that the wife shall have the custody of the minor child, subject to the husband's right of visitation and the right to supervise the education of the child and approval of schools to be attended; that the child shall not be removed from California; that the husband shall pay $5,000 to the wife upon the execution of the agreement, and within three months provide her with a new automobile upon delivery to him of the one she had; that the wife is to have a described parcel of real property, and household furniture; that "For the support and maintenance of the wife, and for the support and maintenance of the minor child of the parties, the husband agrees to pay to the wife * * * ($250.00) * * * per month, the first payment thereunder to be made April 1st, 1933, and a like payment to be made on the first day of each succeeding month thereafter.

"From and out of the said sum of * * * ($250.00) * * * per month reserved to be paid as aforesaid the wife promises and agrees that she will, without further demand upon the husband, support, educate and maintain the said minor child during her minority.

"It is * * * agreed that the said sum of * * * ($250.00) * * * shall continue to be paid for such time as the wife shall be married to the husband, and/or for such time as the wife shall not be married to any other person * * * except the husband herein. In the event, however, that at some future time the wife shall procure a decree of divorce from the husband, and thereafter shall marry some person other than T. Lyell Puckett, then and in that event all obligation or liability of the husband for the support and maintenance of the wife shall cease and determine and all payments herein reserved to be made for the support and maintenance of the wife shall abate, provided, however, that should the wife at some future time marry a person other than the husband herein, then and in that event the husband shall pay to the wife such sum for the support and maintenance of the minor child as shall be mutually agreed upon between the parties hereto, or if the said parties cannot agree upon the sum for such support and maintenance of said minor child, then the husband shall pay to the wife for the support and maintenance of such minor child such sum of money per month as shall be determined by a court of competent jurisdiction after notice to the husband. It is the purpose and intent of the parties, and of this agreement, that the husband shall support the wife for so long a period of time as she shall be the wife of the husband herein, or having procured a divorce, shall remain unmarried. In the event that the wife shall marry a person other than the husband, then all right to support and maintenance for the wife shall cease and determine immediately and no further obligation shall attach to the husband by the terms of this agreement by operation of law or otherwise * * *"; that the husband shall have all of the rest of the property owned by the parties, community or separate, which property is then described, there being listed nine parcels of real property, various items of personal property including securities and the business conducted by the husband; that the husband shall pay the wife's attorney fees; that the "payments and transfers to the wife of the monies, properties and things to be paid and transferred to her pursuant to the terms hereof are in full

satisfaction of any payment for any and all claims and/or rights of the wife to support and maintenance either by way of alimony or otherwise and for costs and attorneys' fees * * * she hereby waives and relinquishes any and all rights which she now has or which she may hereafter acquire to claim from the husband the payment of any monies or things for support and/or maintenance either by way of alimony or otherwise. * * *"

The interlocutory decree gave custody of the child to plaintiff and also stated:

"It further appearing to the court that the plaintiff and defendant, * * * entered into an agreement in writing which has been offered and received in evidence as Plaintiff's Exhibit 'A', and which agreement bears date March 16, 1933, and which agreement is for the purpose of settling the property rights between the parties;

"Now, therefore, it is further ordered, adjudged and decreed that said agreement of March 16, 1933, be and the same is hereby approved as to form and contents.

"It is further ordered, adjudged and decreed that in view of the said agreement of March 16, 1933, that the defendant * * * shall pay to the plaintiff as and for the support and maintenance of the plaintiff and the minor child of said parties, * * * the sum of * * * ($250.00) * * * per month, the first payment to be made on or before April 1, 1933, and subsequent payments to be made thereafter at the rate of * * * ($250.00) * * * per month on the 1st day of each and every succeeding month commencing with May 1, 1933, provided that in the event the plaintiff should remarry any person other than the defendant, * * * then and in that event all payment reserved herein to be made by the defendant, * * * for the support and maintenance of the plaintiff shall immediately cease and determine, and thereafter the said defendant, * * * shall pay to the plaintiff for the support and maintenance of the minor child * * * such sums as shall be mutually agreed upon by the plaintiff and defendant, or if the said plaintiff and defendant cannot mutually agree upon a sum to be paid for the support and maintenance of the said minor child, then and in that event the defendant, * * * shall pay to the plaintiff as and for the support and maintenance of the minor child, * * * such sum of money as shall be fixed, determined and ordered by this, or any, court of competent jurisdiction."

The final decree of divorce provided that wherein the interlocutory decree makes any provision for alimony or custody of children or property of the parties it is made final and binding on the parties.

On August 1, 1940, plaintiff noticed a motion to modify the divorce decree to permit her to take the minor child to Arizona to attend the state university there. Defendant opposed the motion and requested that because of his changed financial circumstances the $250 monthly allowance be reduced to $150. Plaintiff's motion was granted on August 15, 1940. On that date defendant noticed a motion to reduce the monthly allowance of $250 to $150 on the ground of his diminished financial circumstances. In plaintiff's affidavit in opposition to that motion she stated, in effect, that the property settlement agreement was the result of a compromise between the parties as to their claims as to the amount of the community property. She asserted in her complaint that there was community property of the value of $200,000; defendant did not file an answer but plaintiff claims he asserted in the negotiations that said property was worth not in excess of $99,000; that the sum of $250 per month to be paid was a property settlement and not alimony. Defendant's motion was denied and he appeals from the order of denial.

[1-4] Certain principles are well established with reference to whether a trial court will modify a divorce decree in certain particulars, otherwise than by a motion under section 473 of the Code of Civil Procedure. Where there is no agreement or stipulation of the parties in the divorce action the court may, during the pendency of the action, or at any final hearing or at any time thereafter during the minority of any children of the marriage, make an order for the custody, care, maintenance or support of such children as may be proper, and may at any time vacate or modify the same. Civ.Code, sec. 138. The parents may contract with each other with respect to the custody and support of their minor children. Civ.Code, sec. 159; Sargent v. Sargent, 106 Cal. 541, 39 P. 931; Tiffany & Co. v. Spreckels, 202 Cal. 778, 262 P. 742; Anderson v. Anderson, 56 Cal. App. 87, 204 P. 426; Van der Vliet v. Van der Vliet, 200 Cal. 721, 254 P. 945; Black v. Black, 149 Cal. 224, 86 P. 505; McCoy

v. McCoy, 38 Cal.App.2d 637, 102 P.2d 384; Karlslyst v. Frazier, 213 Cal. 377, 2 P.2d 362. But inasmuch as the children's welfare is the factor of paramount concern, the children are not bound by the contract, and the law vests in the court power to provide for the custody and control of minor children. No such contract may, insofar as the children are concerned, abridge the power of the court in appropriate proceedings to provide for the support of the children by their parents or for their custody. Hence, a decree of divorce providing for the custody and support of a minor child may be modified as circumstances require, even though it is based upon an agreement or stipulation of the parties. Civ.Code, sec. 138; Avila v. Leonardo, 53 Cal.App.2d 602, 128 P.2d 43; Lewis v. Lewis, 174 Cal. 336, 163 P. 42; Wilson v. Wilson, 45 Cal. 399; Parkhurst v. Parkhurst, 118 Cal. 18, 50 P. 9; Black v. Black, supra; Van der Vliet v. Van der Vliet, supra; Anderson v. Anderson, supra; Tiffany & Co. v. Spreckels, supra; Russell v. Russell, 20 Cal.App. 457, 129 P. 467; D'Arcy v. D'Arcy, 89 Cal.App. 86, 264 P. 497; Rolleri v. Rolleri, 33 Cal.App. 233, 164 P. 817; Adams v. Adams, 2 Cal. App.2d 173, 37 P.2d 729; Karlslyst v. Frazier, supra; Chiarodit v. Chiarodit, 218 Cal. 147, 21 P.2d 562; Rosher v. Superior Court, 9 Cal.2d 556, 71 P.2d 918; Deyoe v. Deyoe, 126 Cal.App. 558, 14 P.2d 780.

[5-8] With certain exceptions (see Long v. Long, 17 Cal.2d 409, 110 P.2d 383; Tolle v. Superior Court, 10 Cal.2d 95, 73 P.2d 607), a provision for the payment of alimony to the wife in a divorce decree, granted to the wife for the offense of the husband, may be modified by the court under appropriate circumstances. Civ.Code, sec. 139. A husband and wife may contract with each other with respect to the support of each other and their property rights. Civ.Code, secs. 158, 159. A divorce decree adjusting the property rights of the parties is not subject to modification regardless of whether or not it is based upon the agreement of the parties. Leupe v. Leupe, 21 Cal.2d 145, 130 P.2d 697; Dupont v. Dupont, 4 Cal.2d 227, 48 P.2d 677. It necessarily follows therefore, that, whatever may be the effect upon that power of modification of an agreement of the parties for alimony alone incorporated in the decree (see Civ.Code, sec. 139; Johnson v. Johnson, 104 Cal.App. 283, 285 P. 902; Ross v. Ross, 1 Cal.2d 368, 35 P.2d 316; Armstrong v. Armstrong, 132 Cal.App. 609, 23 P.2d 50; 58 A.L.R. 639; 109 A.L.R. 1068), if there is a property settlement agreement providing as a part thereof for periodical payments to be made to the wife by the husband and the agreement is approved by the court and the payments ordered by the decree to be paid pursuant to the agreement, that order will not be subsequently modified, except by the consent of the parties. Miller v. Superior Court, 9 Cal.2d 733, 72 P.2d 868; Ettlinger v. Ettlinger, 3 Cal.2d 172, 44 P.2d 540; 3 Cal.Jur. Ten-Yr.Supp., Community Property, sec. 155.

[9] In the instant case the agreement was introduced in evidence and was approved by the court. Some of its terms were embodied in the divorce decree. The requirement for monthly payments was expressly based upon the agreement and those were ordered to be made. If the divorce decree together with the agreement upon which it is based may be considered to be an adjustment of property rights only, or what is commonly referred to as a property settlement, it follows that there is in effect no provision in the divorce decree for alimony strictly defined, even though periodic payments must be made. The periodic payments are not alimony. They are a part of a property settlement. Where no provision for permanent alimony is made in a divorce decree, or the provision therein made is limited as to time, or the occurrence of certain events, and the court does not reserve the power, the court may not subsequently modify the decree to grant permanent alimony or alter the limitation imposed. Long v. Long, 17 Cal.2d 409, 110 P.2d 383; Tolle v. Superior Court, 10 Cal. 2d 95, 73 P.2d 607; McClure v. McClure, 4 Cal.2d 356, 49 P.2d 584, 100 A.L.R. 1257; Howell v. Howell, 104 Cal. 45, 37 P. 770, 43 Am.St.Rep. 70; London G. & A. Co. v. Industrial Acc. Comm., 181 Cal. 460, 184 P. 864. A different rule prevails of course with respect to the support of minor children. McClure v. McClure, supra; Harlan v. Harlan, 154 Cal. 341, 98 P. 32.

[10-12] The essential issue to be determined is whether or not the agreement was a property settlement agreement, and the monthly payments ordered by the decree in effect and essence, a phase of the property settlement rather than merely alimony. It would be better practice to have that determination clearly and concisely made by the trial court when it renders the decree

of divorce. Considerable confusion and uncertainty could be avoided in that fashion. The court could examine the agreement, the circumstances under which it was made, and the nature and value of the property as related to its division and the amount of the periodic payments giving consideration to the statutory rules on the subject. An analysis of the agreement and the divorce decrees here in question in the light of the principles applicable thereto, leads to the conclusion that the monthly payments ordered were an inseparable part of a property settlement agreement, and therefore they may not be modified. It recites that the parties desire to effect a complete settlement of their property rights, including the support of the wife and child; that except as provided in the agreement, neither shall have any claim against the other in respect to property rights; that the provisions in the agreement (and some of them divide the property) shall be in full satisfaction of all rights to support and maintenance; that the property assigned to each shall be free from any claim of the other whatsoever; the husband agreed to pay the wife $5,000 and payments of $250 per month. Although neither the value nor the character, community or separate, of the property was specified in the agreement, it would seem that the bulk of it was set over to the husband. Plaintiff alleged in her complaint and it was not denied that the property was valued at $200,000. The trial court in the interlocutory decree designated the agreement as "a property settlement agreement." In the order denying defendant's motion the court found that the divorce decree was made "pursuant to and as a part of a property settlement agreement." The presence of the provision that the monthly payments are for the support and maintenance of plaintiff and the child do not necessarily indicate alimony rather than a property settlement. The agreement must be taken as a whole. See Ettlinger v. Ettlinger, 3 Cal.2d 172, 44 P.2d 540; Hodgson v. Hodgson, 6 Cal.App.2d 496, 44 P.2d 544; Miller v. Superior Court, 9 Cal.2d 733, 72 P.2d 868; Moran v. Moran, 3 Cal.2d 342, 44 P.2d 546; Parker v. Parker, 193 Cal. 478, 225 P. 447.

[13] Defendant complains that his offer to introduce evidence establishing that the agreement and decree was for alimony and not a property settlement was improperly denied. Assuming that this evidence would have been admissible, the record before us does not indicate error. Not having before us a transcript of the proceedings at the hearing on the motion, we are not advised of the nature of the evidence offered. From all that appears, the evidence went solely to the question of defendant's changed financial condition rather than the nature of the payments ordered. His motion was made upon that ground, and the court in its order denying it stated: "The plaintiff objected to the introduction of any evidence in support of the defendant's said motion to modify the Interlocutory and Final Judgments of Divorce, said objection being made upon the ground that the defendant's said motion for modification being made upon the ground that the financial condition of the defendant had materially changed since the entry of said judgments, and that said defendant was not earning sufficient money and was not able to pay the required amounts, and that said sum of * * * ($250.00) * * * per month, or any other sum in excess of * * * ($150.00) * * *, was not necessary for the support and maintenance of the plaintiff and the minor child. * * *"

[14, 15] Insofar as the motion was predicated upon the ground that the minor child did not require the amount ordered to be paid for her support, suffice it to say that by reason of the foregoing rules, the amount could not be reduced because it was a part of a property settlement. The only contingency in the agreement contemplating a reduction was the remarriage of plaintiff, in which event the parties were to mutually agree upon an amount for the child's support. In the event of failure to so agree the court could fix the amount. That contingency has not arisen. For the reasons heretofore discussed, the amount payable for the child's support could be changed by the court at any time insofar as the child is concerned, having in mind its welfare. In brief, the payments ordered to be made are not subject to reduction, but they might be increased by the court if the child's welfare requires it, and that without regard to what the liabilities of the parties may be, and their rights inter se under the agreement.

[16] In the order denying defendant's motion, attorney's fees incurred in resisting the motion were awarded to plaintiff. Defendant objects to the allowance claiming that it cannot be made for services already performed. Suffice it to say that defendant gave notice of his motion on August 15, 1940. On September 4, 1940, prior to the

hearing on defendant's motion, plaintiff noticed a motion to be heard on September 5, 1940, requesting an allowance of counsel fees. Hearings were had on September 3, 5, 6 and 10, 1940. The order was made on September 26, 1940. See Baker v. Baker, 64 Cal.App. 778, 222 P. 863.

The order from which the appeal is taken is affirmed.

GIBSON, C. J., SHENK and CURTIS, JJ., and PETERS, Justice pro tem., concurred.

EDMONDS, Justice (dissenting).

As I read the contract which is the basis of the controversy between the parties one cannot say with certainty that Mr. Puckett agreed to pay his wife $250 per month as part of the consideration for the division of property in the manner agreed upon, or in fulfillment of his marital obligation of support. He contends that the decrees of divorce are subject to modification because, on account of business reverses, he is no longer able to pay that amount and it "is not necessary for the support and maintenance of said plaintiff and minor child * * *." And although an affidavit mentioned in his notice of motion is not shown by the record, his application for modification was made upon grounds which tendered the issue of fact as to the basis of the contract he made.

Mrs. Puckett, by way of affidavit, pleaded facts relevant upon this issue. Regardless of Mr. Puckett's income, she said, he "does have sufficient capital assets, or the ability to obtain same, so as to be well able to continue said payment," and she referred to the allegations of the divorce complaint fixing $200,000 as the value of the community property. The allegations concerning the character and value of the property held by the appellant were denied by him, the affidavit continued, and he asserted that his net worth was $99,500. As a result of negotiations, she entered into a property settlement which was approved as to form and contents by the interlocutory decree and she "further agreed not to further question or make the subject of litigation, the question of fact as to the nature and extent of the property held by the defendant, or as to whether it was the community property of the parties or the separate property of the defendant, nor to further question the facts as to the income of the defendant." Her agreement with Mr. Puckett for monthly payments of $250 "was part of the property settlement effected between the parties" and the provision of the decrees incorporating into them the requirement of the agreement "was to that extent an element and a part of the determination by the court of the property rights between the parties, and was not intended, and did not constitute an award of alimony."

The court refused to consider the application for modification upon the merits, for when the appellant called his first witness, an objection to the introduction of any evidence upon that issue was sustained. The ground assigned for this ruling was that as the provisions of the divorce decrees had been made "pursuant to and as a part of a property settlement agreement entered into between plaintiff and defendant prior to the entry of said judgments, or either of them, that this court was without power and jurisdiction to modify said judgments or either of them, as requested by the defendant." However, Mrs. Puckett's motion was granted and the appellant ordered to pay her $100 for costs and attorney's fees.

The language of the contract does not compel the conclusion that it was made in accordance with a property settlement agreement and not in fulfillment of any marital or parental obligation. True, it refers to the desire of the parties to settle their property rights, but it mentions, as among those rights, that of "maintenance and support for the wife and of the minor child." Of some significance is the provision of the contract that "all obligation or liability of the husband for the support and maintenance of the wife" shall terminate if she remarries. Ordinarily, an amount payable in monthly installments in satisfaction of property rights is not relinquished in part upon remarriage. Also, the contract specifically continues the obligation of Mr. Puckett to pay an amount to be fixed by agreement or order of court for the support and maintenance of the daughter in the event of Mrs. Puckett's remarriage, which is, to some extent, inconsistent with the purpose of a property settlement agreement resting entirely upon a division of assets. Moreover, the contract provides that the payments of money and transfers of property to the wife shall be in full satisfaction of her right to support and maintenance by way of alimony or otherwise.

Under these circumstances, it seems to me, the question concerning the character of the contract which was the basis of the divorce decrees is one of fact, and the ap-

pellant is entitled to a hearing for the purpose of presenting evidence upon that issue. At that time Mrs. Puckett should not be allowed to offer evidence supporting her position. If the court decides that the agreement to pay $250 per month was made to discharge the appellant's legal obligation to support his wife and their child, it should receive evidence as to his ability to continue making payments of that amount. For in granting a divorce, the court may compel a husband to make suitable provision for the support of his wife and the maintenance of the minor children, "having regard to the circumstances of the parties respectively; and the court may from time to time modify its orders in these respects." Sec. 139 Civ.Code. "This statutory provision enters into every decree in an action for divorce which provides for the payment by the husband of an allowance for the support of the wife, as fully as though it should be incorporated into the terms of the decree." Soule v. Soule, 4 Cal.App. 97, 100, 87 P. 205, 206. It gives the court continuing jurisdiction to modify, from time to time, the requirements concerning the payment of alimony. Leupe v. Leupe, 21 Cal.2d 145, 130 P.2d 697; see McClure v. McClure, 4 Cal.2d 356, 49 P.2d 584, 100 A.L.R. 1257; Dupont v. Dupont, 4 Cal.2d 227, 48 P.2d 677. But a finding of fact that the promise to pay the stated monthly installments was in settlement of the property interests of the parties, would make the appellant's present financial condition immaterial, for a decree based upon such a contract is not subject to modification. Miller v. Superior Court, 9 Cal.2d 733, 72 P.2d 868. However, a court is never bound by a contract of the parties, or the provisions of a decree approving it and ordering that its obligations be carried out, from making such provisions for a minor child as may seem necessary and proper. Sec. 138, Civ.Code; Rosher v. Superior Court, 9 Cal.2d 556, 71 P.2d 918.

As to that part of the order relating to attorney's fees, the motion of the appellant and that of Mrs. Puckett were heard on five days including September 10th, when they were submitted for decision. No ruling was made until September 26th, when Mr. Puckett was ordered to pay the respondent $100. At that time, Mrs. Puckett's attorney had rendered the services mentioned in the notice of motion and the court had no authority to make an order concerning payment of them. Dixon v. Dixon, 216 Cal. 443, 14 P.2d 498; Smith v. Superior Court, 89 Cal.App. 177, 264 P. 573.

Under these circumstances, in my opinion, the order should be reversed with directions to the trial court to hear and determine the appellant's motion in accordance with the rules which have been stated.

TRAYNOR, J., concurred.



21 Cal.2d 846

MURPHY et al. v. KRUMM et al.

L. A. 18481.

Supreme Court of California.

April 12, 1943.

Rehearing Denied May 10, 1943.

1. Appeal and error ⇐627(2), 773(2)

Court rule providing that if transcript of record or appellant's points and authorities be not filed within time prescribed appeal may be dismissed has force of positive law so far as rights of parties are concerned. Rules for Supreme Court and District Courts of Appeal, rule 5.

2. Appeal and error ⇐773(2)

Right of respondent, complaining of appellants' failure to file points and authorities with transcript of record, to dismissal of appeal must be determined by facts as they exist at time notice of motion is given, and such right is not destroyed by mere subsequent filing of necessary document. Rules for Supreme Court and District Courts of Appeal, rule 5.

3. Appeal and error ⇐773(3)

Where appellants' attorneys did not apply to District Court of Appeal for extensions of time, affidavit by one of such attorneys giving affiant's ill health and pressure of business during a portion of the period of default as reason for failure to file transcript of record or appellants' points and authorities within time prescribed was not adequate basis for denial of respondents' motion to dismiss appeal. Rules for Supreme Court and District Courts of Appeal, rule 5.

4. Appeal and error ⇐801(1)

Appellate courts are loath to dismiss appeals without consideration on merits, for failure to comply with rules of proce-

dure, but such rules are essential to orderly handling and dispatch of courts' business and create rights which adverse party is entitled to enforce.

5. Appeal and error ⇐773(2)

Where, following appellants' receipt of notice of delivery of transcripts to clerk of District Court of Appeal, nearly eight months elapsed before appellants paid requisite fee, and an additional week passed before appellants filed short opening brief, respondents' motion to dismiss appeal would be granted, notwithstanding affidavit of one of appellants' attorneys giving affiant's ill health and pressure of business during portion of period of default as reason for delay. Rules for Supreme Court and District Courts of Appeal, rule 5.

CARTER, J., PETERS, J. pro tem., and TRAYNOR, J., dissenting.

In Bank.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by Leland S. Murphy and others against Theodore Krumm and others. From the portions of the judgment against them, plaintiffs appeal, and from the portion of the judgment adverse to them, defendants appeal. On plaintiffs' motion to dismiss appeal of defendants.

Appeal dismissed.

For prior opinion, see 126 P.2d 908.

Ernest Clewe, of Oroville, and U. F. Lewis, of Redlands, for plaintiffs and appellants.

Theodore G. Krumm and R. Bruce Findlay, both of San Bernardino, for defendants and appellants.

CURTIS, Justice.

This is a motion by plaintiffs to dismiss the appeal of defendants because of the latter's failure to present their record on appeal within the time required by law.

The following chronology of events is material to the consideration of this motion: On June 23, 1941, the judgment in question was rendered and from the respective adverse portions thereof plaintiffs and defendants took separate appeals. On August 18, 1941, the parties stipulated that both appeals might be heard on a single transcript and "that each appellant will pay his own filing fee in the Court of Appeal." On October 3, 1941, the clerk's and reporter's transcripts were delivered to the clerk of the District Court of Appeal, Fourth District, and he gave notice of such receipt to the respective parties. On October 4, 1941, the filing fee of plaintiffs as appellants was paid and the transcripts were filed. On October 27, 1941, the parties entered into a stipulation, approved by order of said District Court of Appeal, whereby defendants were given until November 30, 1941, in which to file their opening brief, plaintiffs were allowed thirty days thereafter to answer and file their opening brief, and defendants were then to have thirty days in which to file their reply brief. No extension of time beyond November 30, 1941, for the preparation, service and filing of defendants' opening points and authorities have been granted either by order of court or by counsel for plaintiffs. On March 5, 1942, and in response to notices received during the prior two months from plaintiffs' counsel objecting to the delay in the filing of defendants' opening brief and warning that such continued course of procrastination would provoke a motion to dismiss defendants' appeal, defendants' counsel notified plaintiffs' counsel that said brief was then in the hands of the printer and would be ready on or before March 15, 1942. Plaintiffs' notice of motion to dismiss defendants' appeal was served and filed on May 18, 1942, and it specified June 9, 1942, as the day for hearing before the above-mentioned District Court of Appeal. In support of their motion to dismiss, plaintiffs on May 28, 1942, filed a certificate of the county clerk of the county wherein the action was tried. On said last-mentioned date, that is on May 28, 1942, defendants paid their filing fee, and on June 5, 1942, they filed their opening brief.

The motion to dismiss was heard by said District Court of Appeal on June 9, 1942, as calendared, and was denied by order of June 12, 1942. 126 P.2d 908. For the purpose of clarifying a misapprehension of the principles of law governing the disposition of such motion, this cause and the motion were transferred to this court in response to plaintiffs' petition for hearing filed herein.

It is argued that regardless of defendants' delay both in the payment of the fee prescribed for the undertaking of an appeal and in the filing of points and authorities as above detailed, the attendance of

these matters *prior to the hearing of the motion to dismiss* will of itself, justify a denial of the relief sought on this proceeding. While there is a line of decision in this state supportive of this proposition (Toth v. Metropolitan Life Ins. Co., 113 Cal.App. 55, 297 P. 564; North v. Evans, 114 Cal.App. 714, 300 P. 893; Snodgrass v. Hand, 125 Cal.App. 265, 13 P.2d 769; Lisle v. Ragle, 10 Cal.App.2d 758, 52 P.2d 608; Graybiel v. Consolidated Assns., Ltd., 14 Cal.App.2d 547, 58 P.2d 665; Steiner v. Davis, 21 Cal.App.2d 334, 69 P.2d 184; Hall v. Wolford, 22 Cal.App.2d 537, 71 P.2d 596; Southern Counties Thrift Co. v. Rairdon, 43 Cal.App.2d 149, 110 P.2d 679), these cases, by reason of their conflict with the plain language of rule V of the Rules for the Supreme Court and District Courts of Appeal and its uniform interpretation by this court, are of no avail here. In none of these cases was a petition for hearing made to this court.

[1, 2] Rule V of said rules of court provides as follows: "If the transcript of the record or appellant's points and authorities be not filed within the time prescribed, the appeal may be dismissed, upon notice given, either on motion of the respondent or of the court in which the appeal is pending. If the transcript, or the points and authorities, though not filed within the time prescribed, be on file at the time such *notice is given*, that fact shall be sufficient answer to the motion." (Italics ours.) That rule has the force of positive law so far as the rights of the parties are concerned. Brooks v. Union Trust, etc., Co., 146 Cal. 134, 138, 79 P. 843; Helbush v. Helbush, 209 Cal. 758, 763, 290 P. 18.

The right of the complaining party to a dismissal must be determined by the facts as they exist at the time the notice of motion is given, and it is not destroyed by the mere subsequent filing of the necessary document. Shain v. People's Lumber Co., 98 Cal. 120, 122, 32 P. 878; McCabe v. Healey, 139 Cal. 30, 32, 72 P. 359; Raisch Improvement Co. v. Arata, 193 Cal. 573, 574, 226 P. 399.

[3-5] While it thus appears that defendants have no legal grounds upon which to stand in opposing the present motion, there remains to be determined whether sufficient excuse is shown on their behalf to warrant a relaxation of the pertinent rule. Chapman v. Bank of California, 88 Cal. 419, 420, 26 P. 608; Ward v. Healy, 110 Cal. 587, 589, 42 P. 1071. Careful examination of the affidavit filed by *one* of defendants' counsel compels the conclusion that it does not furnish an adequate basis for the denial of plaintiffs' motion. Conceding for the sake of argument that such affidavit, despite its sketchy character and broad generalities, might serve to explain affiant's lack of diligence herein by reason of the pressure of his business and his ill health during a *portion* of the default period in question, there is no showing made as to why affiant's associate counsel in this matter could not have proceeded with the prosecution of defendants' appeal or at least have applied to the appellate court for necessary extensions of time within which to file defendants' points and authorities. No such protective steps were taken and no good cause has been shown for such neglect. Moreover this certainly is not a case where the delay subject of complaint is slight and has not appreciably postponed the hearing of the appeal on its merits. Chapman v. Bank of California, supra, 88 Cal. at page 421, 26 P. 608. Following defendants' receipt of notice of the delivery of the transcripts to the clerk of the above-mentioned District Court of Appeal, well-nigh eight months elapsed before they paid the requisite fee for their appeal, and an additional period of one week passed before they filed their opening brief, a document consisting of but nineteen pages and yet long tardy under the measure of the time-limiting factors involved herein. While appellate courts are loath to dismiss appeals, without consideration on the merits, for failure to comply with rules of procedure, such rules are essential to the orderly handling and dispatch of the courts' business and create rights which an adverse party is entitled to enforce. Shain v. People's Lumber Co., supra, 98 Cal. at page 122, 32 P. 878; McCabe v. Healey, supra, 139 Cal. at page 32, 72 P. 359. Under the present circumstances a failure to grant plaintiffs' motion, if not a complete abuse of discretion, would at least constitute an unwarranted disregard of the rule here in point. To uphold and respect such rule defendants' appeal must be dismissed. Hoyt v. San Francisco, etc., R. Co., 87 Cal. 610, 613, 25 P. 160, 1066.

Plaintiffs' motion is granted and defendants' appeal is dismissed.

GIBSON, C. J., and SHENK and EDMONDS, JJ., concurred.

Rehearing denied; CARTER and TRAYNOR, JJ., dissenting.

CARTER, Justice (dissenting).

I dissent. In my opinion the appellant had the right to rely upon the interpretation placed upon rule V of the Rules of the Supreme Court and District Courts of Appeal by the many decisions of the District Courts of Appeal cited in the majority opinion. True, that interpretation did not constitute a strict construction of said rule, but it had been uniformly applied by the District Courts of Appeal since the adoption of the rule. Furthermore, the appeal of this case was within the jurisdiction of the District Court of Appeal and that court should not be denied the right to decide the case on its merits if it is disposed to do so.

PETERS, Justice pro tem. (dissenting).

I dissent. I agree with the majority opinion that, as a matter of law, it is no answer to a motion to dismiss to comply with rule V after the motion is made. But there can be no doubt that the court in which the appeal is pending has the power, upon good cause, to waive the default. The appeal was within the jurisdiction of the appellate court. The discretion vested by the rule is vested in that court. The Supreme Court has the power to review the determination of the appellate court, but the question is not whether the Supreme Court would have dismissed had its power been invoked, but whether the appellate court as a matter of law, abused its power. In my opinion the showing here, while weak, was sufficient to permit the appellate court to exercise its discretion. That being so the holding of the appellate court is binding on the Supreme Court.

TRAYNOR, J., concurred.



21 Cal.2d 781

SUTTER–YUBA INV. CO. v. WASTE, County Auditor.

Sac. 5586.

Supreme Court of California.

April 7, 1943.

Rehearing Denied May 7, 1943.

1. Taxation ⇐696

The amounts payable on redemption of property were governed by section 3817 of the Political Code as it read in 1938 when the property was sold to the state for the nonpayment of the second installment of county taxes for 1937-1938. Pol.Code, § 3817.

2. Taxation ⇐711

Under the statutes an amount equivalent to taxes for unassessed years must be included in an estimate of redemption where land has been sold to state. Pol. Code, §§ 3817, 3817m.

3. Taxation ⇐324, 362, 711

Sections 3817, 3817m of the Political Code providing that county auditor shall estimate amount to be paid for redemption of property sold to state where property had not been assessed since such sale, refers to property that was legally unassessed, the property that has illegally escaped assessment being governed by sections 3660–3662 authorizing action against assessor and sureties, and section 3649 providing for assessment of taxation of property in year succeeding that in which it escaped assessment. Pol.Code, §§ 3817, 3817m, 3649, 3660–3662.

4. Taxation ⇐709(1), 710

Where property is delinquent but not deeded to any taxing unit, the auditor ascertains the delinquent taxes, penalties, interest, and costs, and the property may be redeemed upon the payment of such amounts to the county treasurer. Pol.Code, § 3817.

5. Taxation ⇐709(1)

Where property has been deeded to the state or other taxing unit and is therefore unassessed, the auditor not only ascertains the amount due on the assessment roll, but computes an amount equivalent to the taxes for the unassessed years upon a valuation of the property by the assessor under Section 3817m of the Political Code and the total of the two amounts is the sum required by Section 3817 of the Political Code to redeem the property. Pol.Code, §§ 3817, 3817m.

6. Taxation ⇐709(3)

The immunity of property deeded to a reclamation district for nonpayment of taxes does not preclude payment of taxes for unassessed years as a condition of redemption. Pol.Code, §§ 3817, 3817m.

7. Taxation ⇐696

The statute requiring the payment of unassessed taxes as a condition of redemption of property taken by state or political

subdivision for nonpayment of taxes is constitutional, as against contention that such property cannot be taxed. Pol.Code, §§ 3817, 3817m; Const.art. 13, § 1.

8. Taxation ⇐695

The provisions of the law authorizing redemption are to be regarded simply as an offer by the state to release its claims to the land sold upon the terms proposed. Pol.Code, §§ 3817, 3817m.

9. Taxation ⇐695

There is no constitutional right to redeem property that has been sold to the state for the nonpayment of taxes. Pol. Code, §§ 3817, 3817m; Const.art. 13, § 1.

10. Taxation ⇐709(3)

One cannot escape taxes by allowing his property to be deeded to a taxing unit such as a reclamation district and subsequently regain the title free of intervening taxes. Pol.Code, §§ 3817, 3817m; Const.art. 13, § 1.

11. Taxation ⇐696

A statute requiring payment of intervening taxes on redemption of land taken by state for nonpayment of taxes imposes no burden on taxing unit, which can obtain the property free of tax lien by negotiation with the county board of supervisors under provisions of Section 3791 of the Revenue and Taxation Code. Pol.Code, §§ 3817, 3817m; St.1939, p. 1342, § 3791.

CARTER and SHENK, JJ., dissenting.

In Bank.

Mandamus proceeding by Sutter-Yuba Investment Company against Helen Waste, as County Auditor, etc., to compel computation of amount necessary to redeem property from tax delinquency.

Writ denied.

For prior opinion, see 127 P.2d 25.

Rich & Weis, of Marysville, for petitioner.

Earl Warren, Atty. Gen., H. H. Linney, Asst. Atty. Gen., Adrian A. Kragen, Deputy Atty. Gen., and Joseph L. Heenan, Dist. Atty., and Arthur S. Powell, Deputy Dist. Atty., both of Marysville, for respondent.

Thomas C. Boone, of Modesto, A. L. Cowell, of Stockton, Hankins & Hankins, of San Francisco, Ronald B. Harris, of Fresno, Harry W. Horton, of El Centro, W. H. Jennings, of La Mesa, C. F. Metteer, of Sacramento, P. J. Minasian, of Oroville, and Maurice M. Myers, of Oceanside, amici curiae for petitioner.

TRAYNOR, Justice.

Assessments levied upon certain real property by Reclamation District No. 784 were not paid, and on June 15, 1932, the property was sold to the Yuba County Treasurer, as trustee for the bond fund of the district. The property was not redeemed within the time allowed by law, and on February 3, 1938, the county treasurer executed and recorded a deed thereof to himself as trustee for the district. The second installment of county taxes for 1937-1938 was then delinquent. County taxes for the years 1938, 1939, and 1940 were erroneously assessed but were subsequently cancelled, leaving only the second installment of the 1937-1938 tax as a lien against the property. The district sold its title to the property, and on October 15, 1940, delivered a deed to the petitioner, who requested respondent to prepare an estimate of the amount necessary to redeem the property from county tax delinquency. The estimate prepared by respondent included an amount representing the taxes that would have been levied during the years the property was owned by the district. Respondent refused to make an estimate representing only the second installment of the tax for 1937-1938 with penalties and interest thereon, and petitioner brought this proceeding in mandamus to compel her to do so.

Petitioner contends that since the county cannot tax the property of a reclamation district, Cal.Const., art. XIII, § 1; Revenue & Taxation Code, § 4986, St.1939, p. 1366; Laguna Beach County Water District v. Orange County, 30 Cal.App.2d 740, 87 P.2d 46; Anderson-Cottonwood Irrigation District v. Klukkert, 13 Cal.2d 191, 88 P.2d 685; Glenn-Colusa Irrigation District v. Ohrt, 31 Cal.App.2d 619, 88 P.2d 763) the purchaser of any such property who wishes to redeem the property for delinquent county taxes levied before the deed to the county treasurer cannot be required to pay as part of the amount necessary to redeem a sum equal to the taxes that would otherwise have been imposed for the years that the property was owned by the district.

[1] The amounts payable on redemption of the property are governed by Political Code section 3817 as it read in 1938 when

the property was sold to the state for the nonpayment of the second installment of county taxes for 1937-1938. Under this section the owner of the property, "his heirs, executors, administrators or other successors in interest shall, at any time after the same has been sold to the State and before the State shall have disposed of the same, have the right to redeem such real estate by paying to the county treasurer of the county wherein the real estate may be situated, the amount of taxes, penalties for delinquency, and costs due thereon at the time of such sale, and also all taxes that were a lien upon said real property at the time said taxes became delinquent; and also all unpaid taxes of every description which are a lien against the property, for each year since the sale, as shown on the delinquent assessment rolls in the then permanent custody of the county auditor; *or, if not so assessed, then upon the value of the property as fixed by the assessor under section 3817m* * * *." (Italics added.)

"The county auditor shall, on the application of the person desiring to redeem, make an estimate of the amount to be paid, and shall give him triplicate certificates of the amount, specifying the several amounts thereof, * * *." Stats.1937, p. 144.

Section 3817m, referred to in section 3817, provided: "Whenever property is being redeemed or delinquent taxes are being paid in installments on property and it does not appear on the assessment roll, the county auditor shall furnish the county assessor with a list of the years for which no assessment has been made and the assessor shall place a valuation on the property which the auditor shall use in computing the tax for the years when the property was not assessed." Stats.1937, p. 150.

[2, 3] It is thus clearly provided that an amount equivalent to taxes for the unassessed years must be included in an estimate of redemption. Virtually the only property legally unassessed that is subject to redemption is property that has been deeded to the State or other taxing units for the nonpayment of taxes and assessments. Thus, under Political Code, section 3813, property that has been sold to the state "shall be assessed each subsequent year for taxes until a deed is made to the state therefor." Nonassessment after deed to the state or other taxing unit results from the the tax exemption of government owned property under article XIII, section 1 of the California Constitution. Section 3817 refers to property that is legally unassessed; property that has illegally escaped assessment is governed by Political Code, sections 3660–3662, authorizing an action against the assessor and the sureties on his official bonds for an intentional omission of property from the assessment roll, and by Political Code, section 3649, providing for the assessment and taxation of property in the year succeeding that in which it escapes assessment.

[4, 5] In the case of property that is delinquent but not deeded to any taxing unit, the auditor ascertains the delinquent taxes, penalties, interest, and costs, and the property may be redeemed upon the payment of these amounts to the county treasurer. If the property has been deeded to the state or other taxing unit and is therefore unassessed, the auditor not only ascertains the amount due on the assessment roll, but computes an amount equivalent to the taxes for the unassessed years upon a valuation of the property by the assessor under Political Code, section 3817m. The total of the two amounts is the sum required by section 3817 to redeem the property. This procedure has governed the redemption of property in this state since 1895. Stats.1895, pp. 22, 333; now embodied in Revenue and Taxation Code, sections 4101–4113, St.1939, p. 1345 et seq. Its validity was sustained in Andreson Co. v. Los Angeles County, 55 Cal.App. 585, 203 P. 1040, holding that while the property there involved was unassessed by virtue of having been deeded to the State, the redemption charges under Political Code section 3817 included an amount representing taxes that would have been levied upon the property for the years subsequent to the date of the deed. Section 3817 makes no exception for property deeded to a reclamation district. The immunity of such property from taxation does not preclude, any more than the immunity of property deeded to the state, the imposition of such conditions to redemptions as the state deems advisable.

[6-8] The contention that the condition in question violates article XIII, section 1 of the California Constitution, ignores the distinction between the right of a taxing agency to exemption from taxation on its property and the right of a former owner or his successor in interest to redeem that property from the lien of another taxing agency. The exemption of the taxing unit does not enable the redemptioner to obtain title to the property free from the

conditions and for less than the price that the State sets. Griggs v. Hartzoke, 13 Cal. App. 429, 434, 109 P. 1104; Lachmund v. Johnson, 47 Cal.App.2d 377, 117 P.2d 920. As this court stated in Palomares Land Co. v. Los Angeles County, 146 Cal. 530, at page 533, 80 P. 931, at page 932, "the provisions of the law authorizing redemption (Pol.Code, § 3817) are to be regarded simply as an offer by the state to release its claims to the land sold upon the terms proposed." There is no constitutional right to redeem property that has been sold to the state for the nonpayment of taxes. "The right of redemption comes entirely from the statute, and it is subject to all the limitations and conditions therein imposed." Quinn v. Kenney, 47 Cal. 147.

[9-11] In the interest of returning tax delinquent property to the tax rolls, the State has enacted liberal provisions for the redemption of such property, so designed as to discourage tax avoidance. If they did not require that redemption take into account the taxes that would be imposed had the property not been deeded to the state, owners would find it advantageous to allow their property to be deeded to the state with the intention of delaying redemption as long as possible to escape the taxes that attend ownership, secure in the knowledge that the state must give them notice before disposing of the property. Pol.Code, §§ 3833–3834.25 added by St.1939, p. 1917 et seq. The right of redemption until the disposal of the property by the state serves the taxpayer's convenience but does not enable him to escape taxes for the period intervening between the deed to the state and redemption while others pay their taxes conscientiously year by year. Likewise he cannot escape such taxes by allowing his property to be deeded to any other taxing unit such as a reclamation district and subsequently regaining the title free of intervening taxes. Section 3817 forestalls any possibility that intermittent ownership would become more advantageous than continuous ownership. At the same time it imposes no burden on the taxing unit, which can obtain the property free of the tax lien by negotiation with the county board of supervisors under the provisions of section 3791 of the Revenue and Taxation Code, St.1939, p. 1342. South San Joaquin Irrigation District v. Neumiller, 2 Cal.2d 485, 42 P.2d 64.

The petition for writ of mandate is denied.

CURTIS and EDMONDS, JJ., and GRIFFIN, J., pro tem, concurred.

CARTER, Justice (dissenting).

I dissent. The effect of the construction placed upon section 3817 of the Political Code by the majority opinion is to destroy the exemption granted to irrigation and reclamation districts from assessment and taxation of property owned by such districts by section 1 of article XIII of the Constitution of California, and renders such statute unconstitutional.

The facts in the case are simple. Land which was subject to taxation by both Yuba County and Reclamation District No. 784, was sold by the district for delinquent assessments. No redemption having been made from that sale the property was deeded to the district on February 3, 1938, all right of redemption being thereby cut off. When the deed was executed the second installment of 1937-1938 county taxes was a lien upon the property and was delinquent. In 1940, petitioner purchased the property from the district. During the years 1938, 1939 and 1940, while the district was the owner of the property, county taxes *were assessed* against the property, but before petitioner's purchase of the property said taxes were cancelled by the board of supervisors because the property was not subject to taxation by the county while owned by the district, a state agency. Cal.Const., art. XIII, § 1; Anderson-Cottonwood Irr. Dist. v. Klukkert, 13 Cal.2d 191, 88 P.2d 685. The majority opinion holds that in order for petitioner to redeem the property from the delinquent county taxes which were due prior to the time the district became the owner of the property, it must pay *not only* those delinquent taxes, but also all taxes which might be said to have accrued *during the time the district was the owner.* That conclusion is based upon an interpretation of section 3817 of the Political Code dealing with redemption. Said section provides that property may be redeemed from county taxes by payment of taxes due when sold to the state "and also all taxes that were a lien upon said * * * property at the time said taxes became delinquent; and also all unpaid taxes of every description which are a lien against the property, *for each year since the sale, as shown on the delinquent assessment rolls in the then permanent custody of the county auditor; or, if not so assessed, then upon the value of the property as fixed by the assessor* under section 3817m * * *."

In my opinion that provision is not reasonably susceptible of the interpretation given it by the majority opinion for several reasons.

The taxes for the years the district was the owner of the property were not a lien upon it because, although assessed, they were *cancelled* by the board of supervisors. They are not the taxes to be computed on the value to be fixed by the assessor under the last sentence of the code provision because that sentence is operative only *if the property was not assessed*. In the instant case it *was assessed* and a tax levied thereon which became delinquent on the assessment rolls, but was later cancelled. This view is further made clear by section 3817m of the Political Code which states that the assessor shall fix the valuation upon which the tax shall be computed when property is being redeemed *only if the property does not appear on the assessment roll and no assessment has been made*. Hence, there is no requirement in section 3817 that the taxes which would have accrued while the district was the owner, but which did not accrue because of its ownership, must be paid by a redemptioner who is a purchaser from the district.

The amounts that must be paid by a redemptioner under section 3817 are taxes, not penalties or the like. They are so referred to in that section. In section 3817m the computation when no assessment has been made is of the *"tax* for the years when the property was *not assessed."* Section 3813 providing for the continuation of assessments after a deed to the state calls for the assessment of *taxes*. Therefore, the amounts payable under section 3817 are *taxes*. As no *taxes* could be assessed while the district was the owner, no taxes may be collected from the purchaser who purchased the property from the district.

The whole purpose of the constitutional exemption from taxation of state owned property will be thwarted if the construction placed upon section 3817 by the majority opinion prevails. The district never will be able to dispose of property acquired by it for delinquent assessments. It is obvious that the district does not desire to retain such property, its main concern being to put it back on the assessment rolls. If a purchaser from the district must pay county taxes for the period the district held it, it is doubtful if a purchaser will be found, and the benefits flowing to the district from the exemption will be wholly lost. The same situation would exist if property acquired by a veteran and thereafter claimed to be exempt from taxation while owned by him, Constitution, article XIII, section 1¼, were sold subject to a delinquent tax installment which accrued before he acquired title. Should the purchaser attempt to redeem the property from the delinquency, he would be forced to pay taxes which would have accrued while the title stood in the veteran's name, but which were not paid because of his constitutional exemption. Likewise, should a person convey property to the state or to one of its agencies for some specific public use upon condition that it would revert to him if and when the public ceased using it for such purpose, and it thereafter reverted to him and it became necessary for him to redeem such property from a tax delinquency which accrued prior to the conveyance to the public agency, he would be required to pay all taxes which might have accrued had the property remained in private ownership while it was owned and used by the public, notwithstanding the fact that said property was exempt from assessment or taxation and was not assessed during the time that it was owned and used by the public agency.

It is obvious that the reclamation district could have paid the second installment of 1937-1938 county taxes or redeemed the property from the delinquent tax sale which resulted from the failure to pay such installment, and in such event the purchaser from the district would not have been required to redeem. It must be conceded that had this procedure been followed neither the district nor the purchaser would have had to pay any taxes on this property while title thereto was held by the district as no redemption would have been required, and the property could not be assessed until title vested in the purchaser from the district.

It seems highly improbable that the Legislature intended that section 3817 of the Political Code should be construed as requiring the payment of taxes on property during the time that it is expressly declared by the Constitution to be exempt from taxation in order to redeem such property from a delinquent tax sale based upon an installment of taxes which had accrued prior to the time the property became exempt from taxation. It is well settled that in construing a statute the court must look at the context, and the result that would follow in order to arrive at the legislative intent. Stockton School District v. Wright,

134 Cal. 64, 66 P. 34; Marshall v. Foote, 81 Cal.App. 98, 252 P. 1075.

In the case of People v. Davenport, 13 Cal.2d 681, 91 P.2d 892, this court held that the words of a statute will not be given their literal meaning when to do so would carry its operation far beyond legislative intent and thereby make it apply to transactions not contemplated by the Legislature.

As stated by Chief Justice Stone of the Supreme Court of the United States in United States v. Katz, 271 U.S. 354, 357, 46 S.Ct. 513, 514, 70 L.Ed. 986: "All laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose." In making this statement the Chief Justice was not announcing an unorthodox or unconventional doctrine. In American Tobacco Co. v. Werckmeister, 207 U.S. 284, 293, 28 S.Ct. 72, 74, 52 L.Ed. 208, 12 Ann.Cas. 595, Mr. Justice Day said:

"But in construing a statute we are not always confined to a literal reading, and may consider its object and purpose, the things with which it is dealing, and the condition of affairs which led to its enactment, so as to effectuate rather than destroy the spirit and force of the law which the legislature intended to enact.

"It is true, and the plaintiff in error cites authorities to the proposition, that where the words of an act are clear and unambiguous they will control. But, while seeking to gain the legislative intent primarily from the language used, we must remember the objects and purposes sought to be attained."

This court has repeatedly held that statutes are to be interpreted in the light of reason and common sense and should not be given a construction which will lead to absurd consequences. Great Western Distillery Products, Inc., v. John A. Wathen Distillery Co., 10 Cal.2d 442, 74 P.2d 745; People v. Mulholland, 16 Cal.2d 62, 104 P.2d 1045; People v. Ventura Refining Co., 204 Cal. 286, 268 P. 347, 283 P. 60; Uhl v. Badaracco, 199 Cal. 270, 248 P. 917; Robbiano v. Bovet, 218 Cal. 589, 24 P.2d 466; 23 Cal.Jur. 735.

So, may it not be said that in the case at bar we should look beyond the literal terms of the statute to the purpose and object of the Legislature in enacting section 3817 of the Political Code? It is obvious that the Legislature did not intend to directly or indirectly destroy a constitutional exemption against assessment and taxation of property held by public agencies. A statute should never be so construed as to nullify a constitutional provision. Rose v. State of California, 19 Cal.2d 713, 123 P.2d 505. What it intended was to require a redemptioner to pay taxes on property redeemed where the taxes were not assessed because title was vested in the state as the result of a sale to the state for delinquent taxes. Such property is not in a strict sense exempt from taxation, but its assessment for the purpose of taxation is suspended during the time that title is held by the state as the repository of titles derived from delinquent tax sales.

In my opinion, the exemption provided for in the Constitution is of a permanent nature and if property is once exempted and no taxes are assessed against it because of such exemption, it cannot thereafter be assessed for the same period it was declared to be exempt by the Constitution. Therefore, if the property in question was exempt from taxation while the title thereto was vested in the reclamation district, it did not become subject to taxation during that period after title thereto was acquired by petitioner, and petitioner is therefore entitled to the writ prayed for.

SHENK, J., concurred.

Rehearing denied; SHENK, CARTER, and SCHAUER, JJ., dissenting.



CHILDS REAL ESTATE CO., Inc., v. SHELBURNE REALTY CO., et al.

Civ. 13951.

District Court of Appeal, Second District, Division 1, California.

April 17, 1943.

Rehearing Denied May 14, 1943.

Hearing Granted June 14, 1943.

1. Landlord and tenant ⇐205

Where lease contains a clause which merely pledges rents to secure payment thereunder, the lessor acquires only a security interest and has no more rights to the subrents than he has to the property producing them.

2. Landlord and tenant ⇐205

Where lease contains a clause which merely pledges rents to secure payment

thereunder, the lessor must actually acquire possession of the leased property by consent or other lawful procedure or must secure appointment of a receiver in order to perfect his claim to subrents.

3. Landlord and tenant ⇐205

Where lease contains provision that, in event of default in payment of rents thereunder, the income or rental of the leased property is assigned to the lessor, such provision operates to transfer to the lessor the rights of the lessee in possession to subrents rather than to pledge the subrents as additional security.

4. Landlord and tenant ⇐205

The expressed intention of the parties, as reflected by their contract in that regard, governs in determining whether lease merely pledges subrents to secure payment thereunder or operates to transfer to lessor the right of lessee in possession to subrents.

5. Landlord and tenant ⇐205

Where lease declared that rents reserved therein should be a first lien and superior to incumbrance created by lessee on leasehold and on all rents payable to lessee, such provision indicated intention of parties not merely to pledge rents as additional security, but to transfer to lessor the lessee's rights to subrentals in event default occurred in payment of rent by the lessee.

6. Landlord and tenant ⇐205

Where lease declared that rents reserved therein should be a first lien and superior to incumbrances created by lessee on all rents payable to lessee, the lessor was entitled to retain rentals which accrued prior to lessee's default but collected by the lessor from various subtenants.

7. Mortgages ⇐178

Where trust indenture under which trustee acted was made subject to conditions of lease which declared that rents reserved therein should be first lien on rents payable to lessee, agreement between lessee and trustee through which it was attempted to make rentals collected by the lessee the property of the trustee did not impair or defeat lessor's lien so long as the moneys were in lessee's possession or paid by lessee or the subtenants to the lessor.

8. Mortgages ⇐151(1)

Where lease declared that rents reserved therein should be first lien on rents payable to lessee, but lessee executed trust indenture which required lessee to make sinking fund payments, the lessor was not entitled to recover from trustee money, which represented rentals from subtenants, received by trustee from lessee while lessee was in default as to sinking fund requirements.

9. Mortgages ⇐151(1)

Where lease assigned, to lessor, rent payable to lessee, and trustee acting under trust indenture executed subject to the lease paid insurance premiums on policies insuring trustee's interest, but insurer refunded premiums unearned as of date lessor forfeited lease, the refund belonged to the trustee rather than the lessor, in absence of evidence that the money used to pay premiums came from source on which lessor had lien or to which it possessed an assignment.

10. Mortgages ⇐209

Where trustee, acting under trust indenture executed subject to lease, paid premiums on policies prior to lessor's forfeiture for lessee's default, and lessor continued the policies in force after forfeiture date promising to pay the trustee a sum equivalent to the unearned premiums, the trustee was entitled to recover such sum from the lessor.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by Childs Real Estate Company, Incorporated, against Shelburne Realty Co. (formerly the L. Harris Realty Co.) and the Bank of America National Trust & Savings Association to recover money, wherein the last-named defendant filed a cross-complaint. Judgment for plaintiff, and the Bank of America National Trust & Savings Association appeals.

Judgment modified and, as modified, affirmed.

James A. McLaughlin, of Los Angeles, for appellant.

Chase, Barnes & Chase and Lucius K. Chase, all of Los Angeles, for respondent.

WHITE, Justice.

Bank of America National Trust and Savings Association (hereinafter called the bank) appeals from a judgment awarding plaintiff $3,861.20 which was in the possession of defendant bank in the latter's ca-

pacity as trustee under a certain trust indenture securing a bond issue. The bank also appeals from that portion of the judgment denying it recovery of the sum of $3,073.31 sought to be obtained on its cross-complaint. We shall give consideration only to those portions of the pleadings and the evidence which relate to the issues which form the basis of this appeal.

By the second cause of action in plaintiff's complaint it was sought to recover $3,594.32 consisting of income collected by defendant Shelburne Realty Co. (hereinafter referred to as Shelburne) and paid to the bank prior to a certain lease forfeiture date of January 17, 1940. In the same cause of action plaintiff sought to recover refunded insurance premiums in the sum of $266.88, refunded to the bank upon policies insuring the interest of the bank as indenture trustee and which when added to the above mentioned $3,594.32, totals the amount of the judgment of $3,861.20 in favor of plaintiff and against defendant bank upon the former's complaint.

In addition to its answer, defendant bank filed a cross-complaint against plaintiff to recover rentals earned prior to the forfeiture date from the property involved, but collected by plaintiff from various subtenants of defendant Shelburne and aggregating $2,537.42. Defendant bank by its cross-complaint also sought the recovery of $537.31 representing unearned insurance premiums on policies which plaintiff continued in effect after the forfeiture date. Defendant bank had paid these insurance premiums on account of insurance on the property prior to the forfeiture. The second cause of action in defendant bank's cross-complaint alleged the payment by it of said sum of $537.31 prior to the forfeiture date of January 17, 1940, on policies taken over as of that date by plaintiff, and for which sum it was alleged plaintiff agreed to reimburse defendant bank.

Another cause of action in defendant bank's cross-complaint sought also the recovery of the heretofore referred to sum of $266.88, representing premiums on certain cancelled insurance policies, and which sum was pursuant to stipulation held by defendant bank subject to the judgment of the court upon the bank's claim to ownership thereof.

By the judgment rendered herein, defendant bank was denied recovery of the sums forming the basis of its cross-complaint and amounting to $3,074.73. The sum of $266.88, heretofore mentioned and referred to as the premiums on cancelled insurance policies, was awarded to plaintiff.

The issues presented by this appeal may be defined by the following epitome of the facts presented in chronological order. In the year 1922 the real property incident to this litigation, located at 639 South Hill Street in the business district of downtown Los Angeles, was leased to one Roy C. Bailie for a term of 99 years. Thereafter, by mesne assignments, Childs Company of Providence, of which corporation plaintiff herein, Childs Real Estate Company, Incorporated, is the successor, acquired the interest of Bailie and in November, 1924, the last mentioned corporation executed a 96-year sublease to The L. Harris Realty Co., which later changed its corporate name to Shelburne Realty Co., one of the defendants herein. It is this last mentioned lease to Shelburne upon which respondent predicates its lien rights to the moneys here in controversy. In this connection it is respondent's claim that by the terms of its sublease to Shelburne there was reserved to the former a first lien upon the leasehold estate conveyed to the latter and as well, upon all buildings and improvements erected by Shelburne, and upon all rents payable to Shelburne from such buildings and improvements; that this lien was to secure the payment by Shelburne of rents, taxes, assessments and other obligations relating to the demised premises. To sustain its claimed first and superior lien, respondent cites us to the following provisions of the sublease: "* * * and the rent reserved in this lease, all taxes and assessments, all other payments whatsoever, relative to said demised property which shall in fact be paid by lessor, but which, under the provisions hereof, are to be paid by lessee, and all damages to lessor and its lessors against which, by the terms hereof, lessee is to hold lessor and its lessors harmless, shall be and they are each and all of them declared to be *a first lien and superior to an incumbrance created by lessee,* and upon the leasehold or estate hereby granted to lessee, upon all buildings and improvements upon said premises erected by lessee, *and upon all rents, from all of such buildings and improvements situated on said premises during said term and payable to lessee.*" (Emphasis supplied.)

The sublease from respondent to Shelburne contained the further provision that the lessee should insure the buildings and improvements upon the premises under policies of insurance payable to a trustee, and in that clause appears the following language: "* * * should the lessee be in default hereunder, for any reason, and this lease be terminated by lessor by reason of the same, or should lessee undertake or commence work as herein provided and then thereafter neglect, fail or refuse to complete the same, and the lessor terminates this lease by reason of such neglect, failure or refusal, then all such monies in the hands of the Trustee should be paid to lessor, who may apply the same to such work or hold the same as liquidated damages."

As of July 1, 1925, defendant Shelburne (then known as The L. Harris Realty Co.) executed a trust indenture under which one of appellant's predecessor banks was designated as trustee. The trust indenture followed the customary form of such instruments and many of its provisions are not material to a disposition of this appeal. It hypothecated the entire leasehold interest of Shelburne, and after describing the property, it contained the following: "Together with any and all buildings, improvements and appurtenances now standing or at any time hereafter constructed or placed upon said land or any part thereof, and all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; it being understood however, that the conveyance made herein of said leasehold estate, as well as the conveyance made herein of any and all buildings, improvements and appurtenances, in connection with said leasehold estate and premises, *is made subject to the terms, limitations and conditions of the Childs lease hereinbefore referred to.*"

In it was also contained a covenant by Shelburne; "The corporation covenants and agrees that from time to time the same are executed it will assign to and deposit with the trustee for the further security of the bonds issued or to be issued hereunder each and every lease now existing or which is hereafter made by the corporation covering the whole or any part of the property described in the granting clause of this indenture, and which is for a term of one (1) year or more, and none of said leases shall be canceled or changed without the written consent of the trustee; but notwithstanding such assignment the corporation may continue to collect all rents, issues and profits thereof until and unless an event of default occur as elsewhere provided in this indenture."

Each of the bonds issued under said trust indenture contained a reference thereto for a description of the properties mortgaged, the nature and extent of the security, the rights of the holders of said bonds under the same, and the terms and conditions under which said bonds were issued and secured.

The above mentioned bonded indebtedness was created by Shelburne to assist it in financing construction of an 8-story, class A, reinforced concrete building on the leased property. It appears that the building was completed in 1927 at a cost approximating $600,000 and that $400,000 of such cost was made available from the proceeds of the bond issue while the balance was supplied by Shelburne.

On December 1, 1939, rent in the sum of $3,000 due on that date was unpaid and there were also certain rentals totaling $6,000 that had been deferred by agreement between respondent and Shelburne, and which also became due on November 30, 1939. On December 5, 1939, taxes in the sum of $7,629.39 became delinquent by reason of Shelburne's default in the payment of same. Under the terms of Shelburne's sublease, thirty days notice of default was required to be served by respondent upon the defaulting tenant, and pursuant to the terms of a modification of the sublease, a similar notice was required to be served on appellant bank. Such notice of default was served on both Shelburne and the bank on December 15, 1939, accompanied by a demand for payment of said sums.

On January 1, 1940, Shelburne again defaulted in the payment of $3,000 in rental due on that date, and on the 10th and 11th of January a demand for payment of such last mentioned unpaid rental was served on Shelburne and appellant bank.

Shelburne failed to remedy said defaults within the required thirty days after notice thereof, and notice of termination of the Shelburne lease was served by plaintiff on Shelburne and defendant bank on January 17, 1940, upon which date respondent, pursuant to such termination of

the sublease, took possession of the premises.

It appears also that Shelburne had defaulted in payment of interest on its bond issue on January 1, 1933, and in its sinking fund requirements under the trust indenture on June 1, 1932. It is indicated by the record that there was outstanding and unpaid in face amount of the bonds some $301,000.

Prior to January 17, 1940, rentals due from Shelburne's subtenants had been collected by Shelburne pursuant to an instrument bearing date of September 16, 1933, whereby appellant designated Shelburne as the former's agent to collect all rents and income from subtenants of Shelburne. This document provided that moneys so collected should be deposited with appellant bank in an account under the name of "Shelburne Realty Co., Agent". The execution of this instrument by appellant was evidently influenced by the fact that Shelburne had defaulted under its trust indenture, under which appellant was trustee. Under the arrangement just referred to, Shelburne was authorized to draw checks against the agency account to pay necessary charges and expenses in connection with the operation and maintenance of the property and building thereon, provided that the approval of appellant should be required on any check exceeding $200. On November 30, 1939, the date of Shelburne's default under its sublease, the balance in this account was $540.55, and subsequently additional rentals were collected and deposited by Shelburne in the account so that when plaintiff terminated the sublease and took possession of the premises on January 17, 1940, there was in the account a balance of $3,594.32.

When respondent terminated the Shelburne sublease and took possession of the premises on January 17, 1940, there was also due from certain of Shelburne's subtenants unpaid rentals in an aggregate amount of $747.84, which was collected by respondent after termination of the Shelburne sublease and after respondent took possession of the premises. Also on the date when plaintiff took possession there was unpaid the sum of $1,809.58, on account of certain percentage rentals due Shelburne from one of the subtenants for the month of December, 1939, and from the first to the seventeenth of January, 1940. This amount was also collected and received by respondent on July 19, 1940, after termination of the Shelburne sublease and after respondent took possession of the premises. Except for the sum of $50, made up of the balance due from one subtenant as rental for the month of November, 1939, all of the last mentioned amounts represented rentals which accrued and became due after Shelburne's default on November 30, 1939, under its sublease, and the major part thereof accrued after service by respondent on December 15, 1939, of notice of such default.

[1-4] As we view it, the main question presented may be thus framed. Under the terms of its lease to defendant Shelburne, was respondent entitled to take the rentals paid by subtenants of the lessee prior to the time that the lessor entered upon or had the right to take possession of the real estate from which such rentals accrued? We understand the rule in this state, as declared by our Supreme Court in Kinnison v. Guaranty Liquidating Corp., 18 Cal.2d 256, 261, 115 P.2d 450, to be that where the lease contains a clause which merely pledges the rents to secure the payment thereunder, the lessor acquires only a security interest and has no more rights to the subrents than he has to the property producing them. In such a case the lessor must actually acquire possession of the leased property by consent or other lawful procedure or must secure the appointment of a receiver in order to perfect his claim to the rents. However, the agreement between the parties, either by the terms thereof or by a separate instrument, may provide that in the event of default in the payment of rents under the lease, the income or rental of the leased property is assigned to the lessor. Such a provision operates to transfer to the lessor the rights of the lessee in possession to the rents rather than pledging the rents as additional security. And it is the expressed intention of the parties, as reflected by their contract in that regard, that governs.

In the case at bar appellant contends that the provisions in respondent's lease, relied upon as conferring a lien upon rentals from subtenants of Shelburne, are invalid as to rentals accruing or collected prior to the time that respondent was clothed with the right to possession of the premises on January 17, 1940, while respondent contends that immediately upon default in the payment of rentals by Shelburne under the Childs lease, an equitable lien was

created upon all subtenant rentals collected by Shelburne and deposited to the credit of the trustee bank.

[5] Upon the authority of Kinnison v. Guaranty Liquidating Corp., supra, we are persuaded that the creation of such lien depends upon the terms of the Childs lease in that regard. We have heretofore set forth the pertinent portions of that lease. We are impressed that the language in the lease which declared that the rents reserved therein "shall be and they are each and all of them declared to be a first lien and superior to an incumbrance created by lessee, upon the leasehold or estate hereby granted to lessee, upon all buildings and improvements upon said demised premises erected by lessee, and upon all rents, from all of such buildings and improvements situated on said premises during said terms and payable to lessee" indicates an expressed intention of the parties to the Childs lease not merely to pledge the rents as additional security but to transfer to the lessor the lessee Shelburne's rights to the subrentals in the event default occurred in the payment of rents by Shelburne under the Childs lease. To us the language appears to be direct and explicit in conferring upon the lessor Childs Company more than a security interest in the subrentals and gives to it an absolute assignment to subrentals upon the happening of a default.

[6] From what we have just said, it follows that the item of $2,537.42, collected by respondent from various subtenants, was rightfully retained by it pursuant to its lien, and judgment in favor of respondent for such amount was correct.

[7] We can not see how the fact that the rentals accrued prior to default changes the obligations of the parties. When the lessee Shelburne defaulted in the payment of his rents, the lessor Childs was empowered to collect any and all rents then due to Shelburne by reason of the mutual agreement of the lessor Childs and the lessee Shelburne. Had Shelburne collected such rentals after he had defaulted in the payment of his rent to Childs, it would have been his duty, in accordance with the lien created thereon in favor of Childs, to pay such subrentals to the latter. The agreement of September 16, 1933, between the bank and Shelburne through which it was attempted to make the rentals collected by the latter the property of the trustee bank, can not impair or defeat the lien in favor of the lessor so long as the moneys were in the possession of Shelburne or paid by him or the subtenants to respondent. The trust indenture, under which respondent bank was acting as trustee, was made subject to the terms and conditions of the Childs lease and the bank at all times acted with full knowledge thereof.

We come now to a consideration of the item of $3,594.32 which was admittedly rentals collected by defendant Shelburne from the subtenants and paid under an agreement with appellant bank, to the latter, prior to the forfeiture date of January 17, 1940.

[8] While the principles hereinbefore enunciated by us are applicable to such rentals so long as they remained in the possession or under the control of Shelburne, we are here confronted with additional facts which in our opinion militate against the rights of respondent under its lien to recover the last mentioned amount from appellant bank. This because, at the time the bank received from Shelburne the money now in question, Shelburne was in default as to sinking fund requirements and interest payments, under the terms of the trust indenture securing the bond issue, and those defaults were never thereafter cured. Therefore, the bank acting in its capacity of trustee was a creditor of Shelburne and we do not think that either in equity or law, moneys that are paid by the lessee under a lease such as the one before us, which represent rentals from subtenants, and when such moneys are paid to creditors, can be recovered from such creditors. Under the terms of the lease here under consideration, so long as the moneys remained in the possession of the subtenants of lessee Shelburne, the lessor Childs could exercise its lien rights, but to say that such lessor could recover such moneys when paid to bona fide creditors is not consonant with the conscience of equity or principles of law. That portion of the judgment awarding the last mentioned item of $3,594.32 to respondent cannot be sustained.

[9] We now come to a consideration of the item of $266.88 insurance premiums refunded to appellant bank on policies insuring the interest of the bank as indenture trustee. It is not denied that this sum represented premiums paid on insurance policies by appellant bank and were uncarned by the insurer as of the forfeiture date January 17, 1940. In its brief respondent does not deny the contention

made by appellant that there is no evidence in the record that this amount of $266.88 was originally derived from income received by appellant bank from the building rentals. On this state of the record it can not be held that respondent met the burden of proof cast upon it to prove that the money in question came from sources upon which it had a lien or to which it possessed an assignment. By stipulation this money is held by appellant bank subject to a decision upon the claim of ownership thereof. The trial court held, and we think erroneously, that it was the property of respondent. The judgment must, therefore, be modified to award the sum to appellant bank.

[10] As heretofore noted, the remaining item of $537.31 represents unearned insurance premiums on policies which respondent continued in force after the forfeiture date of January 1, 1940. Appellant bank had paid these premiums on policies of insurance on the property prior to the forfeiture, and by the second cause of action in its cross-complaint appellant bank alleged that respondent Childs Company "promised and agreed to pay cross-complainant a sum equivalent to the unexpired premiums which had theretofore been paid by cross-complainant on account of said insurance policies". The policies upon which these premiums were paid were taken over and continued in effect by respondent after its declaration of forfeiture. By its findings the trial court determined that the aforesaid allegation relating to the agreement to repay such premiums to appellant bank were true, but nevertheless gave judgment thereon in favor of respondent. That portion of the judgment finds no support in either the evidence or the findings and must be modified to provide that appellant recover this amount of $537.31 from respondent.

From what we have heretofore stated, it necessarily follows that respondent should have judgment entitling it to retain the sum of $2,537.42 collected from defendant Shelburne's various subtenants while appellant bank should have judgment entitling it to retain the sum of $3,594.32 consisting of rentals collected by defendant Shelburne from its subtenants and paid over to appellant bank as a creditor; to also retain the sum of $266.88 representing premiums on certain cancelled insurance policies and which money is now held by appellant bank pursuant to stipulation and dependent upon a decision as to the ownership thereof; and appellant bank should also have judgment against respondent for the sum of $537.31 consisting of unearned insurance premiums on policies of insurance assigned to respondent in exchange for the latter's agreement to reimburse appellant bank for the amount of such unearned premiums. As so modified the judgment appealed from is affirmed, appellant to recover costs on appeal.

YORK, P. J., and DORAN, J., concurred.



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NATIONAL AUTOMOBILE INS. CO. v. WINTER et al.

Civ. 6828.

District Court of Appeal, Third District, California.

April 7, 1943.

Hearing Denied June 3, 1943.

1. Abatement and revival ⇨4

The pendency of another action is not available as ground for demurrer to complaint, unless it appears on face of complaint that such action is actually pending and involves same parties and cause. Code Civ.Proc. § 430.

2. Abatement and revival ⇨7

In action by surety on milk distributor's bond to recover on indemnity contract executed by a milk producer, the complaint, merely alleging that state director of agriculture brought action and obtained judgment against surety for penalty of bond and that surety paid judgment, without showing that indemnitor was party to such action or that surety's right to recover on indemnity contract was issue therein, was not demurrable as showing pendency of another action between same parties to same cause. Code Civ.Proc. § 430; St.1937, p. 43 et seq.

3. Abatement and revival ⇨7

"Another action pending", as ground for demurrer to complaint, does not include an action which has been fully adjudicated. Code Civ.Proc. § 430.

See Words and Phrases, Permanent Edition, for all other definitions of "Another Action Pending".

4. Pleading ⇐106(1)

The plea of another action pending is "dilatory" in nature and not favored. Code Civ.Proc. § 430.

See Words and Phrases, Permanent Edition, for all other definitions of "Dilatory Plea".

5. Abatement and revival ⇐4

The rule that pendency of one action abates another is based partly on supposition that first action is effective and affords ample remedy to plaintiff and that second action is unnecessary and vexatious and partly on legal principle that the law abhors a multiplicity of actions. Code Civ.Proc. § 430.

6. Abatement and revival ⇐7

The plea of another action pending between same parties for same cause is ineffectual, unless former action is actually pending when later action is commenced. Code Civ.Proc. §§ 430, 1049.

7. Abatement and revival ⇐7

A demurrer to complaint on ground of another action pending is untenable after judgment in such action has become final, and objection in such case must be based on "plea in bar" of "res judicata". Code Civ.Proc. § 430.

See Words and Phrases, Permanent Edition, for all other definitions of "Plea in Bar" and "Res Judicata".

8. Abatement and revival ⇐8(2), 9

A plea of another action pending is available only if causes of action and issues in two suits are substantially the same and they are between same parties standing in same relative positions as plaintiff and defendant. Code Civ.Proc. § 430.

9. Pleading ⇐216(1)

A demurrer reaches only matters appearing on face of pleading demurred to and must be determined on allegations of such pleading.

10. Pleading ⇐216(1)

Matters of defense, not apparent in pleading, are not available on demurrer thereto.

11. Pleading ⇐216(1)

On hearing of demurrer, court is bound by facts as alleged in pleading attacked and cannot consider facts presented through medium of affidavit.

12. Abatement and revival ⇐15

As judgment must be final to be available as bar to subsequent action, action in which judgment has been obtained cannot be "pending action" which may be pleaded as ground of demurrer to complaint in later action. Code Civ.Proc. § 430.

See Words and Phrases, Permanent Edition, for all other definitions of "Pending Action".

13. Contracts ⇐108(2)

"Public policy" does not forbid milk producer from agreeing to indemnify surety on distributor's bond for payment of amounts due producers for milk purchased by principal, regardless of whether relationship of debtor and creditor exists between such producer and distributor. St.1937, pp. 43, 44, 50, §§ 735(a), 735.1(d), 737.5.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Policy".

14. Food ⇐4

The benefit of provisions of Agricultural Code, requiring milk distributors to furnish bonds for payment of amounts due producers for milk purchased by distributors, may be waived by producers, unless public policy forbids such waiver, and a producer who becomes indemnitor of surety on distributor's bond, with knowledge that such producer is creditor of principal, or thereafter becomes such creditor, should be held to have "waived" such benefit. St.1937, pp. 43, 44, 50, 151, §§ 735(a), 735.1(d), 737.5, 735.3(e).

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

15. Contracts ⇐108(1)

"Public policy" requires and encourages making of contracts by competent parties upon all valid and lawful considerations, and courts will never declare a contract contrary to public policy, unless it is entirely plain that contract violates such policy.

16. Indemnity ⇐15(6)

In action by surety on milk distributor's bond to recover on milk producer's contract to indemnify plaintiff against loss, complaint *held* not to show so plainly on its face that such contract violated sound "public policy" as to compel conclusion that complaint did not state cause of action. St.1937, pp. 43, 44, 50, §§ 735(a), 735.1(d), 737.5.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Action by the National Automobile Insurance Company against R. E. Winter, the state Director of Agriculture, and another for enforcement of a contract to indemnify plaintiff against loss by reason of its execution of a milk distributor's bond as surety, injunction against defendant director's distribution to defendant Winter of any share of the amount paid by plaintiff in satisfaction of a judgment on the bond, subrogation of plaintiff to defendant Winter's rights and interests in such fund, payment to plaintiff of defendant Winter's pro rata share of moneys recovered, and recovery from defendant Winter of additional amount necessary to indemnify plaintiff. Judgment for defendants, and plaintiff appeals.

Reversed.

John J. Taheny, of San Francisco, for appellant.

Earl Warren, Atty.Gen., Ralph H. Cowing, Deputy Atty. Gen., and Robert W. Scott and Downey, Brand & Seymour, all of San Francisco, for respondents.

ADAMS, Presiding Justice.

Appeal from a judgment entered in favor of defendants upon plaintiff's failure to amend its complaint after demurrers thereto had been sustained.

The allegations of plaintiff's complaint, briefly stated, are that on or about December 31, 1938, one Dow L. Bonnell, a milk distributor, as principal, and plaintiff, as surety, executed a bond to the State of California, in favor of every producer of milk or cream purchased by said principal, conditioned for the payment by said principal of all amounts due to such producers for purchases from them by said principal for the year 1939, pursuant to the terms of division IV, chapter 10, of the Agricultural Code of California St.1937, p. 43 et seq.; that at all times mentioned in the complaint one V. J. Hostetter and the defendant Winter were producers and producer-creditors as defined in section 735.3(e) and section 737.5(b) of the Agricultural Code; that as an inducement for the issuance of said bond, and in consideration of the issuance of same by plaintiff, defendant Winter executed and delivered to plaintiff, at the time that Bonnell made application for said bond, an indemnity agreement in writing, wherein he agreed to indemnify plaintiff against any loss plaintiff might sustain by reason of its executing same, and that in consideration of the premium, and of the indemnity agreement of Winter, plaintiff executed said bond; that while said bond was in effect Bonnell purchased milk and cream from Winter and Hostetter and failed to pay for same; that on July 25, 1939, the Director of Agriculture brought suit against Bonnell and plaintiff for the purpose of recovering on said bond, and recovered a judgment against plaintiff in the sum of $2,000 and costs, which sum plaintiff paid to said Director of Agriculture; that plaintiff had made demand upon defendant Winter for performance of his agreement of indemnity but that Winter had refused and failed to comply; that the Director of Agriculture was in possession of the said $2,000 and proposed to pay same, pro rata, to Hostetter and Winter; that Winter was insolvent and that if his share were paid to him by the Director the indemnity agreement would be defeated and plaintiff would be unable to recover thereon. It prayed that the indemnity contract be enforced, that the Director of Agriculture be enjoined from distributing to defendant Winter any share of the proceeds recovered upon said bond, that plaintiff be subrogated to all right and interest of defendant Winter in and to said funds, that the Director be ordered to pay to plaintiff, as subrogee of Winter, his pro rata share of the moneys recovered on said bond, and that it recover from Winter such additional amount as might be necessary to indemnify it for its loss sustained by virtue of its bond and the failure of Winter to comply with his agreement of indemnification.

To this complaint both defendants demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action, and that another action was pending between the same parties for the same cause. At the same time defendants filed answers to said complaint, in which they set up, as a special defense, the institution of an action on the bond by the Director of Agriculture, alleging that in that action defendant (plaintiff herein) had set up in its answer, as a special defense, that Winter had, on or about October 31, 1938, entered into an indemnity agreement wherein he (Winter), in consideration of defendant's executing the Bonnell bond, joined in said indemnity agreement and as such became an indemnitor of said bond; that the trial court had found "that the allegations of the further separate and dis-

tinct defense in the answer of defendant National Automobile Insurance Company, are untrue, except that it is true that said R. E. Winter did execute the endorsement appearing on defendants' Exhibit 'A' in evidence, reading as follows, to-wit: 'In consideration of the National Automobile Insurance Company executing the bond hereinabove applied for, I hereby join in the foregoing indemnity agreement. R. E. Winter (Sgd)'"; and that the judgment in said action was a judgment on the merits "including the merits of the said separate and distinct defense of the said National Automobile Insurance Company"; and that the said judgment is a full and complete *bar* to the cause of action attempted to be stated in the complaint herein.

The only question presented by this appeal is whether the trial court erred in sustaining defendants' demurrers. The grounds urged by defendants before the trial court in support of their demurrers were that the judgment in the action brought by the Director of Agriculture against plaintiff operates as an "estoppel," and that said complaint shows upon its face that the contract which plaintiff seeks to enforce is against public policy in view of the provisions of sections 735(a), 735.1 (d) and 737.5 of the Agricultural Code. The same grounds are urged here in support of the judgment from which the appeal is taken.

[1, 2] Respondents apparently confuse the pleas of estoppel and res adjudicata with the pendency of another action as ground for demurrer to a complaint. Under section 430 of the Code of Civil Procedure the pendency of another action between the same parties for the same cause is made ground for demurrer; but to make it available it must appear upon the face of the complaint that said action is actually pending and that it involves the same parties and the same cause. This the complaint in the present action does not disclose. It merely alleges that the Director of Agriculture brought an action against the surety and obtained a judgment therein for the penalty of the bond plus costs. It does not appear from the complaint that Winter was a party to that action or that the question here sought to be litigated, to wit, plaintiff's right to recover from Winter on the latter's contract of indemnity, was an issue in that case. But it does appear that that action was no longer "pending" as it is alleged in the complaint that defendant (plaintiff herein) had paid the judgment.

[3-8] "Another action pending," as ground for demurrer, does not include an action which has been fully adjudicated. The plea of another action pending is dilatory in its nature and is not favored. The rule that the pendency of one action abates another is based in part upon the practical supposition that the first suit is effective and affords an ample remedy to the party and that the second is unnecessary and vexatious, and in part upon the legal principle that the law abhors a multiplicity of actions. 1 Cal.Jur. 23. The plea is ineffectual unless the former suit is actually pending at the time the later suit is commenced. Section 1049 of the Code of Civil Procedure provides that an action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, *unless the judgment is sooner satisfied.* After the judgment has become final, demurrer on the ground of another action pending is untenable, and the objection must be based on a plea in bar of res adjudicata. 1 Cal.Jur. 26. Also, see, Crowhurst v. Green, 99 Cal.App. 58, 59, 277 P. 886; Buhman v. Nickels & Brown Bros., 7 Cal.App. 592, 95 P. 177; Hilton v. Reed, 46 Cal.App.2d 449, 454, 116 P.2d 98; Beauregarde v. Capitol Amusement Co., 301 Mass. 142, 16 N.E.2d 672, 118 A.L.R. 1477. Another requisite for the plea of another action pending is that the causes of action and the issues in the two suits be substantially the same; and it must also appear that it is between the same parties as the later action and that these parties stand in the same relative position as plaintiff and defendant. 1 Cal.Jur. 32. The plea of another action pending is not raised by demurrer unless the complaint shows affirmatively that the prior action possesses such characteristics as to make the plea available.

[9-11] Respondents argue that in determining the sufficiency of the complaint this court should consider the answers of defendants, and their affidavits filed in the trial court in connection with application therein for a temporary restraining order. A demurrer reaches only matters appearing upon the face of the pleading to which it is directed, and it must be determined upon the allegations of such pleading. 21 Cal. Jur. 94. Matters of defense not apparent in the pleading are not available upon de-

murrer. 21 Cal.Jur. 116. On the hearing of a demurrer, therefore, the court is bound by the facts as alleged in the pleading attacked by the demurrer, and it is not entitled to consider facts presented to it through the medium of an affidavit. MacKay v. Clark Rig Bldg. Co., 5 Cal.App.2d 44, 42 P.2d 341.

[12] The complaint herein not only alleges that the judgment in the former action has been satisfied, but shows also that the parties to the two actions are not the same, as Winter was not a party to the former one. And if we were to consider the answers of defendants and their affidavits filed in the trial court, we would be constrained to note that in their answers they plead the judgment in the prior action as a bar to this one and as res adjudicata; and as a judgment must be final in order to be available as such bar, it cannot be said that such former action was, at the same time, a *pending* action justifying the pleading of the pendency thereof as grounds of demurrer.

We conclude that the complaint herein is not subject to demurrer on that ground.

[13] As to the remaining question, whether the complaint fails to state a cause of action because it alleges that the indemnification agreement sought to be enforced was given by a milk producer, respondents contend that such an agreement is invalid for the reason that public policy forbids such contracts, the complaint does not allege that Winter, at the time he entered into said contract, was a creditor of Bonnell, the principal on plaintiff's bond, or that plaintiff knew that Winter was, or intended to become, such creditor. It does allege that thereafter Bonnell purchased milk from Winter and refused to pay for same. Obviously when Winter sold to Bonnell he knew that he had agreed to indemnify plaintiff if Bonnell failed to make payment. If, then, it is to be held that this complaint fails to state a cause of action, it must be held that no producer may become the indemnitor on a surety bond given by any distributor; that it is contrary to public policy to permit such an agreement even though the indemnitor at the time he executes same may not be and may not intend to be a creditor of the distributor-principal on said bond; and that when such producer does become an indemnitor, if he is or afterwards becomes a creditor of the distributor he may avail himself of the benefits of the bond, but refuse to perform his indemnity agreement; that he cannot waive the provisions of the Agricultural Code in so far as same are for his benefit because to do so would contravene public policy and in some way affect the purpose of the statute to assure the public an adequate supply of milk.

There is nothing in the Agricultural Code prohibiting a milk producer from agreeing to indemnify a surety on a distributor's bond; there is nothing inherently corrupt, unlawful or fraudulent in such contract; and we can see nothing inherently inimical to the interests of society in such an agreement. Conceding that the milk industry is one affected with a public interest so as to be subject to regulation (Jersey Maid Milk, etc., Co. v. Brock, 13 Cal.2d 620, 91 P.2d 577); that the purpose of requiring a distributor to furnish a bond to secure payment to the producers from whom he purchases is proper as incidental to the broader purpose to protect the public milk supply by assuring producers of payment for the milk produced and sold by them, and that economic security to producers will tend to encourage compliance on their part with sanitary regulations and the maintenance of dairy herds sufficient to provide an adequate milk supply at reasonable prices to consumers (In re Willing, 12 Cal.2d 591, 86 P.2d 663), it does not necessarily follow that public policy forbids any producer from agreeing to indemnify any surety for any distributor, regardless of whether the relationship of debtor and creditor may exist between such producer and such distributor.

[14] In so far as the Agricultural Code sections, supra, are intended for the personal benefit of a producer, such benefit may be waived by him unless public policy forbids such waiver; and if at the time he becomes indemnitor he knows he is a creditor of the principal on the distributor's bond, or if he thereafter becomes such creditor, he should be held to have waived such benefits.

In Cox v. Hughes, 10 Cal.App. 553, page 563, 102 P. 956, page 959, where it was contended that an answer alleging a contract to assign future wages was void as against public policy, and a demurrer thereto was sustained for that reason, the court said:

"A person has the same right to assign his wages as he has to mortgage his homestead or to mortgage personal property that is exempt from execution. If he does not choose to avail himself of the liberal ex-

emptions which the statute provides, the courts cannot interfere in his behalf.

"It is universally held, as stated by Greenhood on Public Policy, that: 'The power of the courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt.'

"Before a court should declare a contract not malum in se opposed to sound public policy, it must be entirely satisfied that the public will be substantially benefited, and that such advantage is not merely theoretical or problematical."

In Gamble v. City of Sacramento, 43 Cal.App.2d 200, 110 P.2d 530, an agreement of police officers to donate a designated number of days of service without pay and authorizing the city to make up its pay roll accordingly, made in order to avoid a reduction in personnel of the force which would otherwise be necessitated by reduced revenues, was held not contrary to public policy.

In Bloom v. Hazzard, 104 Cal. 310, page 312, 37 P. 1037, page 1038, where a constable agreed to levy an execution at a rate less than that allowed by statute, charging the full charges in his return, and, after recovering the amount agreed to be charged, sought to recover the full legal fees, contending his agreement was against public policy, the court said: "We fail to see any valid ground on which this claim can be sustained. The agreement was not intended to work any fraud or wrong upon any party; and, so far as appears, it cannot be classed as malum in se or malum prohibitum. It may be that the property to be levied on and sold was not worth enough to pay the judgment and the constable's legal fees for making the levy and sale, and if so there was no violation of public policy in his agreeing to take less than his legal fees."

In Keybers v. McComber, 67 Cal. 395, 400, 7 P. 838, the court held that exemption of property from execution is a personal privilege which a debtor may waive. To same effect see Borland v. O'Neal, 22 Cal. 504, 506, 507; Stanton v. French, 83 Cal. 194, 23 P. 355. Also see Huntsman v. State Harbor Commissioners, 17 Cal. App.2d 749, 62 P.2d 771.

In McCowen v. Pew, 153 Cal. 735, page 751, 96 P. 893, page 900, 21 L.R.A.,N.S., 800, 15 Ann.Cas. 630, where the sufficiency of a cross-complaint to state a cause of action was in question and the validity of a contract therein alleged was challenged as contrary to public policy, the court said: "The error of the trial court was in holding, as it necessarily did, that per se this contract was void as against such policy. A contract should not be declared in contravention of public policy unless it is apparent that it contravenes some public statute, or is against good morals, or that its tendency is to interfere with the public welfare or safety. Nothing of this character appears from the allegations of the cross-complaint."

Also, page 752 of 153 Cal., page 900 of 96 P., 21 L.R.A.,N.S., 800, 15 Ann.Cas. 630: "The trial court based its conclusion that the contract for the option was invalid from the allegations of the cross-complaint, which does not pretend to disclose anywhere that any public convenience or necessity was subverted by the contract. The court held, as a matter of law, that a contract giving an option to purchase certain lands as an inducement to the building of a line of railroad between certain points was void upon its face, or void per se. The courts, however, as we have seen, declare expressly to the contrary, and that such a contract, in the absence of any showing that public interest has suffered in its making, is valid and enforceable."

And we find in Andrews v. Horton, 8 Cal.App.2d 40, 45, 46, 47 P.2d 496, 498: "'Public policy', it has been said, is a term of vague and uncertain meaning, and few cases can arise in which its application may not be disputed. Spence v. Harvey, 22 Cal. 336, 83 Am.Dec. 69; Wells, Fargo & Co. v. Enright, 127 Cal. 669, 60 P. 439, 49 L.R.A. 647. 'The power of the courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt.' Stephens v. Southern Pacific Co., 109 Cal. 86, 41 P. 783, 784, 29 L.R.A. 751, 50 Am. St.Rep. 17."

In Twin City Pipe Line Co. v. Harding Glass Co., 283 U.S. 353, 51 S.Ct. 476, 478, 75 L.Ed. 1112, 83 A.L.R. 1168, it was contended that a contract wherein the glass company agreed to take all its requirements of gas from plaintiff so long as the

latter could adequately supply them, and to pay rates fixed by public authority, was in contravention of public policy as tending to establish a monopoly contrary to the laws of the state. But the Supreme Court said that competent persons ordinarily have the utmost liberty of contracting, and their agreements voluntarily and fairly made will be held valid and enforced in the courts; that the meaning of the phrase "public policy" is vague and variable, that courts have not defined it and that there is no fixed rule by which to determine what contracts are repugnant to it; that the principle that contracts in contravention of public policy are not enforceable should be applied with caution and only in cases plainly within the reasons on which that doctrine rests; and that it is only because of the dominant public interest that one who has had the benefit of performance by the other party will be permitted to avoid his own promise. It commented that the contract under consideration by it was not arbitrarily or unfairly imposed upon the glass company, but left it free to obtain its supply elsewhere unless the pipe line company's service was adequate; and it said of said contract that "It may not be held invalid, in the absence of a clear showing that some definite public detriment will probably result from its performance."

In Smith v. San Francisco & N. P. Ry. Co., 115 Cal. 584, 600, 47 P. 582, 587, 35 L.R.A. 309, 56 Am.St.Rep. 119, the court said: "'Public policy' is a term of vague and uncertain meaning, which it pertains to the lawmaking power to define, and courts are apt to encroach upon the domain of that branch of the government if they characterize a transaction as invalid because it is contrary to public policy, unless the transaction contravenes some positive statute or some well-established rule of law. Sir George Jessel, as master of the rolls, said in Besant v. Wood, L.R. 12 Ch. Div. 605, that public policy is 'to a great extent a matter of individual opinion, because what one man or one judge might think against public policy another might think altogether excellent public policy'. And in another case (Printing etc. Co. v. Sampson, L.R. 19 Eq. 465), the same jurist said: 'If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice.'"

[15, 16] In Stephens v. Southern Pacific Co., 109 Cal. 86, 41 P. 783, 29 L.R.A. 751, 50 Am.St.Rep. 17, plaintiff leased land from defendant, one of the covenants of the lease being that the lessor should not be liable for any damage caused by fire whether caused by its engines or other means. Stephens' warehouse was burned because of a fire kindled by defendant's employees, on adjoining land, and Stephens and his insurance carrier brought this action, contending that the aforesaid covenant in the lease was void as against public policy. The court said, page 89 of 109 Cal., page 784 of 41 P., 29 L.R.A. 751, 50 Am.St.Rep. 17:

"This provision of the contract is declared by respondents to be opposed to public policy, in this: That it has a tendency to lessen the amount of care that defendant would exercise, both in the selection and operation of its machinery, and in the general conduct of its business, through its employés, in respect to the control of fire, the element here involved. That the undoubted effect of a contract exempting a party from damages flowing from his negligent use of fire is to increase the chances of conflagration,—that is, one who is protected by an agreement against the results of his carelessness in this respect will not take the same care as he otherwise would,—and, therefore, carelessness occasioned and caused by the agreement, increasing the probabilities of conflagrations, injuriously operates upon the interests of the public at large.

"The foregoing line of reasoning is ingenious, but we cannot indorse it as sound in law. It has been well said that public policy is an unruly horse, astride of which you are carried into unknown and uncertain paths, and here that horse would be carrying us beyond all limits ever reached before, if respondents' position should meet with our approval. While contracts opposed to morality or law should not be allowed to show themselves in courts of justice, yet public policy requires and encourages the making of contracts by competent parties upon all valid and lawful considerations, and courts, recognizing this, have allowed parties the widest latitude in this regard; and, unless it is entirely plain that a contract is violative of sound public policy, the court will

never so declare." Also see Maryland Casualty Co. v. Fidelity, etc., Co., 71 Cal. App. 492, 496–499, 236 P. 210.

It is asserted in the brief of respondent Director of Agriculture that "Though it is not alleged in the complaint, it is obvious that the purpose of the plaintiff surety company was to protect itself from loss on the distributor's bond by having a producer, to whom the distributor might default in payments for milk purchased, agree to indemnify it"; that the producer signs such a bond because of the "competition by producers to secure a market for milk"; that the producer "is subject to pressure from distributors, particularly the distributor who takes his milk," and that if his distributor wants him to go on the indemnity contract so that such distributor can secure his license and handle the producer's milk, the producer is in no position to refuse the demand.

The language of the opinion last above quoted may well be applied here, and we are unable to say that upon the face of the complaint in this action it is so entirely plain that the alleged indemnity contract of defendant Winter is violative of sound public policy so as to compel the conclusion that said complaint does not state a cause of action.

Whether the judgment in the prior action constitutes a bar to the present action we do not decide. That question can be determined on a trial of the cause on its merits in the light of the principles herein set forth.

The judgment is reversed.

PEEK and THOMPSON, JJ., concurred.

Hearing denied; TRAYNOR and SCHAUER, JJ., dissenting.



58 Cal.App.2d 190

BROWN et al. v. OSHIRO.

Civ. 13985.

District Court of Appeal, Second District, Division 2, California.

April 15, 1943.

Rehearing Denied May 6, 1943.

Hearing Denied June 10, 1943.

1. Contracts ⇐309(1)

Where the assumed possibility of a desired object or effect to be attained by either party to a contract forms the basis on which both parties enter into it, and this object or effect is or surely will be frustrated, a promisor who is without fault in causing the frustration, and who is harmed thereby, is discharged from the duty of performing his promise unless a contrary intention appears.

2. Appeal and error ⇐1178(8)

Where it could not be determined from the record whether evacuation of Japanese, as war measure, from vicinity of building leased to Japanese tenant, for purpose of conducting hotel and renting office space therein, made it impossible to conduct hotel and rent space, and location of the premises as regards its proximity to Japanese establishments was in doubt, the judgment declaring that the evacuation of the tenant should not affect the rights and duties of the parties under the lease was reversed, and the trial court was directed to permit such amendment to pleadings and proof as would enable court to ascertain accurately and declare the rights and obligations of the parties.

Appeal from Superior Court, Los Angeles County; Ben R. Ragain, Judge.

Action by Leon B. Brown and another, as trustees under the last will and testament of Anna D. Brown, deceased, and another, against Y. Oshiro for judgment declaring that compulsory evacuation of defendant, a Japanese, from the city of Los Angeles would not affect the rights and duties of the parties under a lease. From judgment for the plaintiffs, the defendant appeals.

Reversed with directions.

Ray L. Smith, of Los Angeles, for appellant.

Robert N. Gold, of Los Angeles, for respondents.

A. L. Wirin, of Los Angeles, amicus curiae.

W. J. WOOD, Justice.

Plaintiffs by a written instrument leased to defendant, a Japanese, part of the premises located at the northeast corner of First street and Los Angeles street in the city of Los Angeles for the period beginning February 1, 1940, and ending January 31, 1944, at a monthly rental of $175. In this action plaintiffs pray that a judgment be entered declaring that the compulsory

evacuation of defendant from the city of Los Angeles will not affect the rights and duties of the parties under the lease. Defendant has appealed from a judgment granting relief to plaintiffs as prayed.

The record before us consists of the complaint, the answer and the findings and judgment. The findings recite that the court had examined the pleadings and "written stipulations" but no stipulations are in the record. Nor does it affirmatively appear in the record whether any evidence was received by the court. In the complaint it is alleged that defendant is a person of Japanese ancestry and that on May 3, 1942, an order was issued by the officer in command of the army of the United States on the Pacific coast whereby all persons of Japanese ancestry on and after May 9, 1932, were to be excluded from that portion of the city of Los Angeles in which the demised premises are located. It is further alleged that plaintiffs had sent to defendant a letter, a copy of which is attached to the complaint, by which they waived any requirement in the lease that defendant personally occupy the demised premises and by which they consented to any assignment or sub-lease of the premises which defendant would care to make. It appears from a copy of the lease which is attached to the complaint that plaintiffs had leased to defendant all of the second floor of the building at the corner referred to, one of the entrances being on First street and the other entrance being on Los Angeles street. It is provided in the lease that the lessee shall personally occupy the demised premises. In paragraph XI of the lease it is provided that "the lessee shall use the premises for conducting a hotel and renting office space, and for no other purpose, except upon the written consent of the lessors".

Defendant filed an answer in which he alleges that he had been ordered by competent authorities to leave Los Angeles and its vicinity, that he had no alternative but to comply with the order and that, as a consequence, it was impossible for him to comply with the terms and conditions of the lease. Defendant prays that a judgment be entered declaring that his obligations under the lease were terminated by the evacuation order.

The findings of the trial court follow the allegations of the complaint. The court also found that during the period commencing February 1, 1940, and ending May 11, 1942, defendant conducted an hotel business on the leased property, but that during this period he "did not reside in or upon the demised premises, but employed various persons to reside on said premises and manage the hotel business conducted therein. Each day during said period the defendant visited the demised premises for the purpose of supervising and assisting the resident manager in his work". Under the heading "Conclusions of Law" the court concluded that the evacuation order did not make it impossible for defendant to perform his obligations as lessee under the lease and that the order did not effect a discharge of defendant's obligations under the lease.

A brief has been filed on behalf of the Japanese-American Citizens League as amicus curiae. It is set forth in this brief that the Japanese-American Citizens League is a national organization, organized in 1920 and incorporated in 1937; that it represents approximately 20,000 American citizens of Japanese ancestry; that it is maintained to protect their interests; that many members of the League are in a position similar to that of defendant; and that they have other contractual obligations which because of the evacuation order are either impossible of fulfillment or can be fulfilled only as the result of "unconscionable hardship". It is contended on behalf of the League that the record before the court does not disclose sufficient facts to enable the court to determine the intention of the parties to the lease, the ability of the lessee to comply with the terms of the lease, or the possibility that the property can be used for the purpose for which it was leased. It is suggested that the judgment should be reversed and a new trial permitted in order that evidence of all the pertinent facts necessary to a fair and accurate determination of the issues may be before the court.

There is much discussion in the briefs of the parties concerning matters which are not covered by the record. On behalf of defendant it is asserted that the location in question is in the center of that area which prior to the evacuation order against all persons of Japanese ancestry was frequently designated as "Little Tokio"; and that not only was defendant excluded from Los Angeles but also "the very persons who were tenants of the hotel were also, by the same government

decree ordered away"; and that "over night 'Little Tokio' became a ghost town". Appellants point out that there is no evidence in the record to support these claims and assert that, "had such allegations been pleaded or any evidence been offered in support thereof, it could have been established by competent evidence that the demised premises are actually on the outskirts of the Japanese district, and that many, perhaps a majority, of the inhabitants of the hotel were white persons unaffected by the exclusion orders".

[1] The rule which should be applied in the present action is stated in Restatement of the Law of Contracts, section 288: "Where the assumed possibility of a desired object or effect to be attained by either party to a contract forms the basis on which both parties enter into it, and this object or effect is or surely will be frustrated, a promisor who is without fault in causing the frustration, and who is harmed thereby, is discharged from the duty of performing his promise unless a contrary intention appears." This rule was followed in Johnson v. Atkins, 53 Cal. App.2d 430, 127 P.2d 1027, where it was held that a contract for the sale of copra for shipment to Colombia was terminated when the purpose of the purchase was frustrated by the cancellation by that country of permission for entry. It is apparent from the instrument now before us that the "desired object" of the parties was to provide "for conducting a hotel and renting office space". It cannot be determined from the record before us whether this object has in fact been "frustrated". The trial court did not find, and we are unable to determine whether the evacuation of the Japanese from the vicinity of the premises in question made it impossible to conduct a hotel or rent office space therein. The very location of the premises as regards its proximity to Japanese or non-Japanese establishments appears to be in doubt.

The issues presented should not be decided upon the incomplete factual record now before the court. Upon the going down of the remittitur the trial court should permit such amendments to the pleadings and such proof as will enable the court to accurately ascertain and declare the rights and obligations of the parties.

The judgment is reversed. Neither party to recover costs on appeal.

McCOMB, J., concurred.

MOORE, Presiding Justice (concurring.)

I concur in the order of reversal but am persuaded that judgment should be entered for defendant. Whether the location of the premises is within the confines of "Little Tokio" or near the precincts of that ghost town is immaterial. Certainly we "know" that it is within the general area where Japanese congregate, maintain mercantile establishments and operate hotels. Why should not the courts take notice of that which is visible to any one who walks or drives upon the streets of Los Angeles in the area in question?

Defendant is of Japanese ancestry. In the prosecution of a war by the United States with the island kingdom, the commander in chief of the armed forces, in the lawful execution of his duties ordered defendant and all others of the same status to remove from the coastal cities to interior points where they are held in concentration, virtual prisoners of the army. Such was an unanticipated circumstance and it has made performance of his obligations as lessee "vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract." 6 Williston on Contracts, Rev.Ed., p. 5410. If the parties never in fact agreed upon their mutual rights and obligations in the event they should be forced into such a crisis upon what principle may a court decree that they did so agree? Clearly the situation is far different from that existing at the making of the contract. Then there was an "equality between two opposing considerations," viz: the building of plaintiff and the rentals of defendant. Such equality has been violently disturbed by an authority beyond the control of either by reason of an event that neither could have anticipated. Defendant is now detained with those who would have been his patrons in a remote quarter. In such a situation the enforcement of the lease will impose enormous burdens upon him, so enormous that their fulfillment appears well nigh impossible. Breach of Contract Due to War, by Paxton Blair, New York, 1940. 20 Cal.L.A. 413, p. 1015. The very fact that its enforcement would be extremely onerous to defendant is apparent from the facts recited as well as from the insistence of plaintiffs that defendant operate the lease by remote control. If the terms of the lease were as easy of performance by de-

fendant as they were in February 1940, surely plaintiffs would not squander their time in seeking a decree to compel his performance, for others would to a reasonable certainty be ready to occupy the premises on equivalent terms. The lease was that of a hotel and office building to a person of Japanese origin in a community where people of his blood congregated and transacted business among themselves, where transient Japanese sought accommodations and where Japanese business men established offices. From the very nature of the lease and the surrounding circumstances the parties from the beginning must have known that it could not have been carried out by defendant unless during the term of the lease the presence of the Japanese colony in Southern California continued. They must have contemplated such continuous presence of that group as the basis for the operation of his business by defendant. Therefore, we must read into the lease the implied condition that the parties shall be excused in case performance without the default of either party becomes impossible because of the disappearance of those conditions which at first made the lease desirable. Straus v. Kazemekas 100 Conn. 581, 124 A. 234, 238; Johnson v. Atkins, 53 Cal.App.2d 430, 127 P.2d 1027. Had the current war and the exclusion of the Japanese from Los Angeles been envisaged by these litigants it cannot be doubted that they would have expressly covenanted that the lease should terminate on the day of the exclusion order by the military authorities.

Without the slightest token of bad faith, defendant now finds himself frustrated, unable to fulfill his obligations and should be relieved by the judgment of this court. Johnson v. Atkins, supra.

57 Cal.App.2d 987

TWISSELMANN et al. v. COHN.

Civ. 3058.

District Court of Appeal, Fourth District, California.

April 6, 1943.

Rehearing Denied May 5, 1943.

1. Vendor and purchaser ⇐21

Purchaser's escrow instructions, proposing to purchase realty for specified amount on detailed terms and conditions, and vendor's escrow instructions, stating that she would hand escrow holder a deed, to be delivered when holder could issue title insurance policy and obtain such amount for vendor, and incorporating general provisions in purchasers' instructions, constituted binding and enforceable contract for sale of realty.

2. Specific performance ⇐10(1)

One entitled, under partial distribution decree, to 45 per cent. interest in all property of decedent's estate, including property in section of land embracing one of three tracts which she contracted to sell, could not revoke contract and thereby bar its specific enforcement against her on ground that she did not have clear title to such tract because of its erroneous description in decree as being in another section of same township.

3. Specific performance ⇐29(2)

Provisions in escrow instructions of purchasers of land that grantor should retain all minerals under half of land conveyed in either 40-acre, 80-acre or half section parcels, that grantees should get all minerals in balance of land, and that grantor should have privilege of selecting acreage in which she retained minerals, did not render contract uncertain and not specifically enforceable against vendor.

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Action by Eleanora M. Twisselmann and others against Bertha M. Cohn for specific performance of a contract to sell realty. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Calvin H. Conron, Jr., of Bakersfield, for appellant.

Harvey, Johnston & Baker, of Bakersfield, for respondents.

MARKS, Justice.

This is an appeal from a judgment decreeing specific performance of a contract to sell certain real property in San Luis Obispo and Kern Counties.

[1] Defendant was the seller and plaintiffs were the buyers. On June 24, 1941, plaintiffs signed buyers escrow instructions addressed to the Title Insurance and Trust Company proposing to purchase the property for $4,250, which amount they deposited with the instructions. These instructions carefully detailed the terms and conditions of purchase. At the same time defendant signed and filed with the same company her instructions, which contained the following:

"I have read and approved the foregoing instructions. I will hand you Deed as called for which you will deliver when you can issue the policy of title insurance called for and obtain for me the sum of $4,250.00. The foregoing general provisions are hereby incorporated in these instructions. * * *" The "general provisions" referred to were part of the buyers' instructions.

Defendant deraigned title to the property from the estate of Charles M. Cohn, deceased, by means of a decree of partial distribution. She was entitled to a 45 per cent interest in the entire estate. When the title search to the property was being made it was discovered that the decree of partial distribution described one of the three tracts which defendant proposed to sell, as being in Section 28, Township 28 South, Range 22 East, M. D. B. & M., which Charles M. Cohn had not owned, instead of being in Section 8, Township 28 South, Range 22 East, M. D. B. & M., which was the proper description.

Under date of July 10, 1941, defendant wrote Christian Twisselmann the following letter: "I find I cannot deliver you a clear title to the Jerry Slough property. Clearing the title will necessitate legal steps which will take quite some time, for this reason I am terminating the escrow. Please note my new address."

On July 15, 1941, Twisselmann wrote defendant as follows: "Your letter *receieved* I gave the Abstract Company instruction to except the title too that land

in sec 8 at it as it is not worth anything anyway."

The title company wrote defendant as follows:

"Mr. Chis Twisselmann called today in answer to your letter stating that you could not deliver clear title to Section 8 and wished to allow him to withdraw from the escrow.

"Mr. Twisselmann does not wish to withdraw from the escrow but wants to proceed and take title by quitclaim deed to the property in Section 8 and take whatever title or claim you may have in accordance with a copy of his Amended Instructions to us which we enclose herewith.

"Please advise us if this is satisfactory to you."

Defendant first urges that the separate papers signed by the parties did not constitute a contract for the sale of the real property which can be specifically enforced

The escrow instructions in the instant case are identical in legal effect with those set forth in Tuso v. Green, 194 Cal. 574, 229 P. 327, 329, which were held to constitute a binding and enforceable contract for the sale of real property. It was there said: "A contract of sale may well consist of a proposal on the part of the seller embodied in a letter signed by him alone, and an acceptance thereof on the part of the buyer embodied in another letter signed by him alone. Such is the common practice in everyday affairs. When the minds of the parties meet, that is to say, when the respective writings match one another as to subject-matter, terms and conditions, a contract comes into existence between the parties, and when such terms and conditions are stated in writings which are signed by the respective parties, the contract is none the less a contract in writing merely because each of the respective writings is signed by but one of the parties. Such a contract in writing fully satisfies the statute of frauds. Frost v. Alward, 176 Cal. 691, 169 P. 379; Merkeley v. Fisk, 179 Cal. 748, 178 P. 945; 12 Cal.Jur. 904, and cases cited. In construing such a contract the separately executed instruments are to be considered and construed together as one contract. So construing and considering the two instruments entitled escrow instructions herein, the one signed by plaintiffs and the other by defendant, we find a complete contract of sale and purchase containing all of the necessary terms, covenants, and conditions. In such situation the mutual stipulations of the parties, the actual conveyance in escrow by one, and the promise by the other to pay the price, both being valid, constituted a sufficient consideration, and created a valid escrow. Rogers, etc., Co. v. Southern California, etc., Co., 159 Cal. 735, 115 P. 934, 35 L.R.A.,N.S., 543."

[2] It is next urged that as defendant made an honest mistake as to her title to the property, and as she did not have clear title to part of the property, she could revoke the contract and it could not be specifically enforced against her. In this connection it should be remembered that she was entitled to receive a 45 per cent interest in all of the property of the estate of Charles M. Cohn, deceased, which included the property in Section 8.

This argument was held unsound in Farnum v. Clarke, 148 Cal. 610, 84 P. 166, 169, where it was said: "It is not necessary, in order to sustain the right to a specific performance, that at the time such performance is sought to be compelled, the vendor should have a complete equitable or legal title to the land which he contracted to convey. It is sufficient that he then have some interest in the property. It is no answer for a vendor to say, when specific performance is sought under his contract, that the interest or title which the decree seeks to affect, is not as complete as he agreed to convey. If the vendee is willing to enforce the contract against a lesser interest, or a less perfect title, it does not lie with the vendor to object on that account. It is only when the vendor has no title nor interest in the lands at all, that such a decree will not be awarded, for the very good reason that courts will not attempt to require done what it is impossible to do. If, however, the vendor has any interest in the property contracted to be conveyed, the vendee may enforce the contract as to whatever interest he may possess."

[3] In the instant case the instructions of the buyers contained the following:

"As to parcel 1: It is agreed that the grantor shall retain all of the minerals under one-half the land conveyed either in 40-acre, 80-acre, or half Section parcels and that the grantees shall get all of the minerals in the balance of said land and that the grantor shall have the privilege of selecting the acreage in which she shall retain all of the minerals." It is now

argued that this provision made the contract uncertain so that it could not be specifically enforced.

In Fleishman v. Woods, 135 Cal. 256, 67 P 276, 277, the same argument was made under a contract which permitted the owner to select four and one-half acres of land to be conveyed to defendant's assignor out of a ten-acre tract that had been improved by defendant and his assignor. In holding the contract enforceable the Supreme Court said: "His argument is that, as appellant had the right to make the selection of the 4½ acres out of a specified 10 acres, specific performance is not the proper remedy. There is no uncertainty as to the manner in which the selection is required to be made, nor do we see any lack of power in a court of equity to compel the selection to be made."

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concurred.



58 Cal.App.2d 23

DOBBINS v. HORSFALL

Civ. 13805.

District Court of Appeal, Second District, Division 1, California.

April 8, 1943.

Hearing Denied June 3, 1943.

1. Costs ⇐32(5)

In action for delivery of personalty wherein defendant filed counterclaim, defendant was properly awarded costs as the "successful party" notwithstanding plaintiff obtained judgment on his complaint, where evidence disclosed that delivery could not be had of several of the pieces of personalty and in event of nondelivery value of property was found to be $552.50, and defendant recovered a judgment of $2,619.37 after deducting plaintiff's amount. Code Civ.Proc. §§ 438, 1032.

See Words and Phrases, Permanent Edition, for all other definitions of "Successful Party".

2. Set-off and counterclaim ⇐29(2)

A cross-complaint for monetary damages was not improperly filed against action in claim and delivery or for damages, where litigation was founded upon written contract or subsequent oral agreements and allegations of cross-complaint showed that they referred to transaction set forth in complaint. Code Civ.Proc. § 438.

3. Pleading ⇐148

Although whole transaction between parties is not set out in complaint, a defendant can plead the remaining facts constituting the entire transaction between the parties, and propriety and sufficiency of cross-complaint will be judged accordingly.

4. Set-off and counterclaim ⇐29(1)

Under liberal interpretation of the "same transaction" clause, courts tend to avoid circuity of action and multiplicity of suits by permitting a cross-complaint to be filed whenever thereby court is enabled to render judgment by which all of rights of all parties growing out of a particular transaction, matter, happening or accident, upon which action is brought, might be finally determined in the same action. Code Civ.Proc. § 438.

See Words and Phrases, Permanent Edition, for all other definitions of "Same Transaction".

5. Set-off and counterclaim ⇐42

A "counterclaim" need only tend to diminish or defeat plaintiff's recovery and must exist in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action. Code Civ.Proc. § 438.

See Words and Phrases, Permanent Edition, for all other definitions of "Counterclaim".

6. Husband and wife ⇐281

In former husband's action for delivery by former wife of certain items of personalty, evidence warranted filing of counterclaim based on plaintiff's oral agreement to purchase an automobile and insurance thereon for the former wife. Code Civ.Proc. § 438.

7. Appeal and error ⇐1011(1)

The trial court's finding on conflicting evidence that former wife was entitled to recover on counterclaim and cross-complaint for expenses incurred in caring for children and in maintaining property

which expenses the former husband had agreed to pay, could not be disturbed.

8. Contracts ⇐245(2)

The execution of written contract supersedes all negotiations or stipulations concerning matters which preceded or accompanied execution of contract.

9. Evidence ⇐443(1)

In former husband's suit for delivery of personalty wherein former wife counterclaimed for damages arising out of written property settlement agreement, evidence as to preceding collateral parol agreement covering matters not inconsistent with and not qualifying or impairing terms of the written agreement was admissible.

10. Evidence ⇐443(1)

Proof is always admissible of any collateral parol agreement, or of any independent fact which is not inconsistent with or does not qualify any of terms of written contract notwithstanding it may relate to the same subject matter.

11. Husband and wife ⇐278(5)

Husband's oral agreements to pay for children's expenses and for expenses of maintaining property were not unenforceable as wanting in "consideration" in view of disclosure of such considerations as scholarships acquired by wife for children and husband's promise to pay other incidental expenses, and the improving, repairing and handling of husband's realty by wife and the advancement of sums for independent obligations of the husband.

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration".

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action by Horace M. Dobbins against Mrs. Elsa Morse Horsfall in claim and delivery for the delivery to plaintiff of certain personal property wherein defendant filed a cross-complaint and counterclaim seeking recovery of money. From a judgment, plaintiff appeals.

Affirmed.

Aaron Sapiro, of Los Angeles, for appellant.

Chase, Barnes & Chase and Stanley N. Barnes, all of Los Angeles, for respondent.

WHITE, Justice.

This litigation was instituted by plaintiff when he filed in the municipal court of the city of Los Angeles a complaint in claim and delivery praying for the delivery to him by defendant of certain personal property, viz., a large teakwood table, a set of fire tools and an iron wood box allegedly worth in the aggregate the sum of $600. Defendant filed an answer denying plaintiff's claims and also filed a cross-complaint and counterclaim thereto in which she sought recovery of the sum of $2,317.-24 from plaintiff, representing amounts claimed to have been expended by her for the care, education and support of the children of plaintiff and defendant; for the upkeep and preservation of certain real property belonging to both parties and the payment of taxes on same. Defendant also filed a counterclaim for $630 for an automobile and insurance thereon which she claimed plaintiff orally agreed to purchase for her. By her cross-complaint, the defendant, who was the former wife of the cross-defendant, alleged that the articles enumerated in his complaint were part of property referred to in paragraph 8 of a certain property settlement agreement entered into and signed by the parties on September 1, 1937; "that at various times between the first day of January, 1936, and the 19th day of November, 1939," appellant agreed and contracted with respondent to reimburse her for any sums expended by her in connection with the care, education and support of the children, and in the upkeep and preservation of certain described real property. Upon the filing of the cross-complaint the cause was duly transferred to the superior court. Following an order sustaining a demurrer to the cross-complaint, with leave to amend, an amended cross-complaint was filed wherein it was further alleged that the aforementioned sums were expended "pursuant to said property settlement agreement, and in connection therewith and at various times between September 1, 1937, and November 19, 1939, plaintiff * * * and cross-complainant * * * orally agreed and contracted" that said expenses incurred by cross-complainant would be reimbursed by the plaintiff, and he would purchase an automobile and insurance thereon in consideration of certain services to be performed by cross-complainant on behalf of the children of plaintiff.

Upon trial of the actions by the court, judgment for plaintiff and cross-defendant was entered, under which judgment plaintiff was awarded the antique teakwood table or its value of $500 and the recovery of the set of fire tools, including andirons, metal fire screen, of the value of $52.-50. Defendant and cross-complainant was awarded the sum of $3,171.87, and in case she could not make delivery of the table, fire tools, etc., the sum of $552.50 to be offset against the sum awarded her. Costs of suit were awarded defendant and cross-complainant, Elsa Horsfall.

In its judgment, so far as the original complaint was concerned, the court did not award costs to the plaintiff and it is on this point alone that plaintiff bases that portion of his appeal taken from the judgment on the original complaint. He also appeals from that part of the judgment in favor of defendant on her cross-complaint and award of costs therein.

From the record it appears that plaintiff and defendant, having experienced difficulties in their married life, agreed to enter into a property settlement agreement for the division of their property. Section 8 of the written agreement reads as follows: "(8) The parties hereto do hereby state that they have divided the household furniture, furnishings and domestic equipment owned by each of them, according to two several lists prepared by them, and do hereby convey, assign, transfer and set over unto the other, all right, title and interest in and to the household furniture, furnishings and domestic equipment set forth in the respective lists of each of them, together with all the clothes, jewelry and other personal effects now owned, used or in the possession of the opposite party." It is this provision of the property settlement agreement that we are called upon to construe. The evidence indicates that the lists were never prepared or presented one to the other nor was there a complete division of the property described in the above section 8. The husband left for the east the next day after the execution of the property settlement agreement and a divorce was granted shortly thereafter. The parties communicated with each other at various times and defendant wife testified she performed certain services here for plaintiff husband in connection with his real property. She also testified she expended her own money for the education of the children and their transportation to and from schools and that she performed services and expended monies in entertaining guests of plaintiff husband, that she paid for public utilities and gardening services, medical, hospital and other expenses for the children, taxes on certain real property and for the repairing of roads and culverts, water bonds, etc. Defendant husband denied that these services and expenditures were made at his request. Upon this issue the trial court found in favor of cross-complainant wife.

[1] Appellant's first contention upon appeal is that he is entitled to costs on the judgment in his favor as a matter of course. With this claim we can not agree because the evidence shows that delivery could not be had of several of the pieces of personal property and in the event of nondelivery the value of the property was found to be the sum of $552.50. However, judgment was also awarded defendant upon her counterclaim and cross-complaint for the sum of $3,171.87. In effect, therefore, the judgment was in favor of defendant for the $3,171.87, less $552.50, or $2,619.37, and the defendant must be regarded as the successful party and therefore entitled to recover costs (Shelley v. Hart, 112 Cal.App. 231, 297 P. 82, and code sections and cases therein cited). Although this case was decided prior to the 1933 amendment of the Code of Civil Procedure by the addition of section 1032, said amendment did not change but merely consolidated the provisions of section 1024 into section 1032.

[2-4] Appellant's next ground of appeal is that no cross-complaint for monetary damages can be validly filed against an action in claim and delivery, or for damages. Under the law this contention can not be upheld in the instant case where plaintiff prayed for and received money damages. It is at once apparent that the litigation here in question was founded either upon the written contract, dated September 1, 1937, or the subsequent oral agreements, and in either event under the decisions, the action having been based upon a contract between the parties, the allegations of the cross-complaint clearly show that they refer to the same transaction or transactions set forth in the complaint. Furthermore, though the whole transaction between the parties is not set out in the complaint, a defendant can plead

the remaining facts constituting the entire transaction between the parties, and the propriety and sufficiency of the cross-complaint will be judged accordingly. Under the broad and liberal interpretation of the "same transaction clause" judicial decisions have tended to avoid a circuity of action and multiplicity of suits by permitting a cross-complaint to be filed whenever thereby the court is enabled to render a judgment by which all of the rights of all the parties growing out of a particular transaction, matter, happening or accident, upon which the action is brought, might be finally determined in the same action.

[5, 6] As to the question of whether the counterclaim is valid, under section 438 of the Code of Civil Procedure, decisions of this court have held that a counterclaim need only "tend to diminish or defeat the plaintiff's recovery and must exist in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action." Robertson v. Maroevich, 42 Cal.App.2d 610, 109 P.2d 708, 712. As to appellant's contention that the trial court's finding on the automobile and insurance was not supported by evidence, we think it was. The testimony discloses that appellant at no time made objection to the demand for such amount, which demand was contained in numerous letters to him by Attorney Barnes and was also testified to by respondent. Manifestly the cross-complaint and counterclaim in the instant case were properly filed. Metropolitan Casualty Co. v. Margulis, 38 Cal. App.2d 711, 715, 102 P.2d 459; Terry Trading Corp. v. Barsky, 210 Cal. 428, 292 P. 474.

[7] Such being the case, we think respondent correctly states the main question involved as being "Does the evidence, including therein all the testimony favorable to the respondent and all favorable inferences which may reasonably be drawn therefrom, support the judgment?" As heretofore stated, cross-complainant testified that appellant agreed to pay for school, transportation and medical expenses for the children, laundry, utilities, gardening, repair of washouts in roads and culverts and taxes on the Laguna Beach property; for one-half the cost of an accordion for the daughter, Suzanne; and for taxes and repairs to Casa LaRoca, which testimony, it is true, was denied by appellant, but corroborated by certain correspondence written by him and by the testimony of the attorney who represented both parties in preparing the original property settlement agreement as well as in all other matters between the parties up until approximately August, 1939. This simply established a conflict in the evidence and under rules too well known to require citation of authority we are not authorized to disturb the conclusion arrived at by the trier of facts.

[8-10] It is next contended by appellant that the execution of the contract in writing superseded all the negotiations or stipulations concerning the subject matter thereof, which preceded or accompanied the execution of the agreement and that evidence as to preceding, contemporaneous or subsequent negotiations or agreements was inadmissible because they tended to vary by oral agreements the terms of a written contract. Undoubtedly it is the law that the execution of a contract in writing supersedes all the negotiations or stipulations concerning the matters which preceded or accompanied the execution of the agreement, but as disclosed by the evidence herein, at no time did the parties attempt to vary the terms of the written contract or impinge on its contents, but the collateral parol agreement referred in its entirety to matters which were not inconsistent with and did not in any wise qualify or impair the terms of the written contract even though it be conceded that it related to the same subject matter. The written agreement here concerned made no reference to the settlement of the affairs referred to in the subsequent oral agreement. Plaintiff Dobbins by his testimony admitted that he did not wish to enter into a written agreement concerning certain matters because of the pendency of an eastern estate litigation. The subject matter of the subsequent oral agreement was entirely independent of any of the terms of the written property settlement agreement. "Proof is always admissible of any collateral parol agreement, or of any independent fact which is not inconsistent with or does not qualify any of the terms of the written contract, even though it may relate to the same subject-matter." Guidery v. Green, 95 Cal. 630, 635, 30 P. 786, 787.

Another case in point is that of Gardiner v. Burket, 3 Cal.App.2d 666, 40 P.2d 279, which involved a written community lease which was silent as to plaintiff's house,

its removal or the compensation to be paid therefor. The court stated, at page 669 of 3 Cal.App.2d, at page 280 of 40 P.2d: "Evidence of a contemporaneous oral collateral contract is admissible as long as the collateral contract does not conflict with the terms of the written contract, and covers a matter distinct from, even though closely related to, the express subject-matter of the written instrument, and is not embodied therein."

[11] Finally appellant urges that there was a failure to prove consideration for any of the alleged oral agreements. This claim is without merit because the record discloses such considerations as the scholarships acquired by respondent for the two children and appellant's promise to pay other incidental expenses. There is also embraced in the consideration the improving, repairing and handling of appellant's real estate by respondent and the advancement of sums of money for independent obligations of appellant.

For the foregoing reasons, the judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



57 Cal.App.2d 824

JONAS et al. v. LOS ANGELES RY. CORPORATION et al.

Civ. 13889.

District Court of Appeal, Second District, Division 2, California.

March 29, 1943.

1. Trial ⇐343

In action for death of prospective passenger of streetcar where evidence was conflicting, verdict for defendants implied that jury accepted motorman's testimony.

2. Carriers ⇐287(1)

Where motorman reduced speed of streetcar to 20 miles an hour as he approached crossing and because of darkness did not see prospective passenger crossing track ahead of streetcar until streetcar was 30 feet south of crossing, and bell was sounded and everything possible was done to stop car, it could not be said that motorman was negligent.

3. Carriers ⇐346

In action for death of prospective passenger killed at intersection by streetcar, evidence sustained finding that prospective passenger was contributorily negligent in attempting to cross in front of approaching streetcar.

4. Appeal and error ⇐1001(1)

The appellate court has no power to reverse a judgment that is supported by substantial evidence.

5. Carriers ⇐327

The presence of streetcar tracks was in itself a "warning" to prospective passenger to approach and cross with caution.

See Words and Phrases, Permanent Edition, for all other definitions of "Warning".

6. Carriers ⇐327
Street railroads ⇐98(5)

It is negligent for either a prospective passenger or an ordinary pedestrian to step upon the roadbed in front of a lighted, moving streetcar.

7. Carriers ⇐327

It was duty of prospective passenger to look in the direction from which danger might be expected before placing herself on streetcar track, and to continue to be alert to safeguard against injury.

8. Carriers ⇐327

Where prospective passenger stepped directly in front of oncoming streetcar and was struck at the same instant, she was contributorily negligent.

9. Carriers ⇐327, 339

Where, at moment motorman applied emergency brake, prospective passenger stepped upon track directly in front of streetcar which had been traveling at 20 miles an hour, prospective passenger was guilty of contributory negligence which contributed proximately to her death.

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by John Jonas and another against Los Angeles Railway Corporation and another for damages alleged to have been

suffered by reason of the death of plaintiffs' mother, who was killed by streetcar in an intersection. From a judgment for defendants, the plaintiffs appeal.

Affirmed.

Howard Painter and Reynolds & Painter, all of Los Angeles, for appellants.

E. H. Chapman and Gibson, Dunn & Crutcher, all of Los Angeles, for respondents.

MOORE, Presiding Justice.

Is a woman contributorily negligent who, on a dark, rainy night at an intersection adjacent to a loading platform attempts to cross the track of a car less than 50 feet from her, approaching at a speed of 20 miles per hour? Such is the question here presented.

This appeal is from the judgment for defendants after verdict against two adult sons who sued for damages alleged to have been suffered by reason of the death of the mother who was killed by the street car within an intersection.

The defendant corporation operates its railway line upon a private right of way down the center of Vermont Avenue. Defendant De Witt was its motorman in charge of the car. Vermont extends from the north across the city and for some miles into the sparsely settled suburban areas to the south. At 110th Street Vermont is 163⅓ feet wide between its curbs. The right of way is about 61 feet in width upon which lies a double track. It is paralleled on both sides by motor traffic highways. Between the two tracks stand the trolley poles. The first one is 19 feet south of the intersection; the second 108 feet; the third 235 feet. Just south of 110th Street for the accommodation of passengers is a concrete waiting platform, 60 feet in length, lying alongside of the east track. The width of 110th Street where it intersects Vermont is 57½ feet. At the northwest corner was a 250 candle power light and another 58 feet south of 110th Street on the east side of the avenue. The locus of the accident is thus seen to be open to the view, free of any obstruction other than the darkness and the elements. But for them on the night of January 23, 1941, a motorman would have had a panoramic, if not a clear, view of the intersection in the light projected by the two lamps.

Deceased had been escorted to the northwest corner about 9:35 o'clock by the witness Kalthoff. Because of the rain, according to his testimony, deceased stopped there under the canopy of the service station to await a signal from him at the time she should proceed to the platform to board the northbound car which then stood at the end of the line about six blocks to the south. In arguing the fallacy of the judgment appellants assume that the jury should have found the facts as recited by Kalthoff. It was his recollection that after he had waited on the platform twenty minutes and had observed the car leave its station and reach about 114th Street, Mrs. Jonas started in a "trotting walk" across 110th Street on the west side of Vermont, then easterly toward the track on which the car was rolling northward; that when she reached that track the car was about 25 feet away; that she proceeded to step upon the track when she was knocked down by the car. He did not say that the speed of the car was excessive. Other testimony fixed its rate of travel by the platform at about 20 miles per hour.

[1, 2] Upon such proof appellants contend that the motorman was negligent in not stopping at the platform; that his negligence was the sole proximate cause of the accident; that deceased was warranted in relying upon the car's stopping at the platform when signaled to do so; that she exercised ordinary care in attempting to cross the track when the car was 20 feet from her, still moving at 20 miles per hour, and that therefore she was free from contributory negligence. In view of our conclusion we shall not encumber this discussion with details of the motorman's conduct or with an extended consideration of the authorities cited in support of the thesis that the car was negligently driven into the intersection and against the body of deceased. Suffice it to say, upon that score, that the motorman testified that visibility was not good; that Kalthoff ran across the east tracks when the car was 60 feet south of the intersection; that as he approached 110th Street he reduced his speed to 20 miles per hour; that he did not see deceased until he was at a point 30 feet south of the crossing at which time she was running across the west tracks; that he sounded the bell and did all within his power to bring the car to a stop; that deceased continued to, and stepped upon, the tracks in front of the lighted, noisy, moving car. If the verdict implies as indeed it does, that the jury found in accordance with the testimony of

the motorman and those who corroborated him, then they found that the motorman exercised ordinary care. By reason of such finding, the cases cited by appellants (Badostain v. Pacific Electric Railway Co., 83 Cal.App. 290, 256 P. 576; Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513; Hook v. Missouri Pacific Railway Co., 162 Mo. 569, 63 S.W. 360; Amendt v. Pacific Electric Railway Co., 46 Cal.App.2d 248, 115 P.2d 588) do not define the acts of defendants as negligence.

[3, 4] But had the operator of the street car been as negligent as appellants conceive him to have been recovery would not be warranted by the doctrine of contributory negligence. This issue was raised by the answer, supported by the evidence and decided by the jury adversely to appellants. On appeal our power to reverse the judgment vanishes upon our determination that some substantial evidence supports the verdict. Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183.

[5-8] Deceased hurriedly approached the tracks of the approaching car while it was dark and rainy. The car was aflame with light. She saw and heard it coming. According to the witness, Lipe, a passing motorist, deceased was in 110th Street, 18 feet north of its south line, "proceeding at a running walk" as she stepped upon the northbound track. At that moment the car was entering the intersection. She had no assurance that the motorman had seen her or her companion. The speed of the car was 20 miles per hour before the emergency was applied. While she knew that it is the practice for the cars to stop on signal at the "receiving platform" at 110th Street yet also, as a reasonable person, in the exercise of ordinary care, she must also have known that on a dark and rainy night a clear view of the intersection is not made perfect by the two arc lights near by. The very presence of the track was itself a warning to approach and cross with caution. Badostain v. Pacific Electric Ry. Co., 83 Cal.App. 290, 256 P. 576. Such warning was accentuated by the onward movement of the lighted rumbling, huge machine. Under such circumstances it is negligence for either a prospective passenger or any ordinary pedestrian to step upon the roadbed in front of such moving car. If the unfortunate lady failed to look she was negligent; if she looked and did not see that it was proceeding on its course she was negligent. Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513; Hook v. Missouri Pac. R. Co., 162 Mo. 569, 63 S. W. 360; Badostain v. Pacific Electric Ry. Co., supra. Before placing herself on the track it was her duty to look in the direction from which danger might be anticipated. Flores v. Los Angeles Railway Corp., 15 Cal.App.2d 576, 580, 59 P.2d 856. It was her duty "to continue to be alert to safeguard against injury." Lavin v. Fereira, 10 Cal.App.2d 710, 52 P.2d 518. Having stepped directly in front of the oncoming car and having been struck the instant she entered upon the track, her contributory negligence is an unavoidable inference. Schooley v. Fresno Traction Co., 56 Cal. App. 705, 710, 206 P. 481.

[9] Appellants' contention that deceased was justified in assuming that the car would stop at the platform encounters significant facts. Throughout the 100 feet south of 110th Street the car traveled at a rate of 20 miles per hour. Its speed did not diminish prior to the motorman's discovery of the presence and approach of deceased. According to the motorman, when he applied the emergency brake, he was 30 feet from 110th Street. At the same moment deceased proceeded to step upon the track directly in front of the car, at a point 18 feet north of the south line of 110th Street. To do so under the conditions recited was neither reasonable prudence nor the exercise of ordinary care. Deceased was negligent and her negligence contributed proximately to her death.

The case of Ross v. San Francisco-Oakland Terminal Railways Co., 47 Cal.App. 753, 191 P. 703, is not applicable. There the motorman approached an arbitrary stop. He was required under all conditions to stop his car at an intersecting railway. At 110th Street on the Vermont Avenue line, the practice was to stop only to discharge or receive passengers visible to the motorman.

The judgment is affirmed.

W. J. WOOD and McCOMB, JJ., concurred.

58 Cal.App.2d 172

HOWARD v. HOWARD & SMITH, Inc., et al.

Civ. 14004.

District Court of Appeal, Second District, Division 2, California.

April 14, 1943.

1. Costs ⇐154

Reasonable expenses incurred in taking and transcribing deposition and one copy thereof are proper items of costs, unless it appears to trial court's satisfaction that taking of deposition was unnecessary. Code Civ. Proc. § 1032a.

2. Costs ⇐154

Where stockholder, filing complaint seeking order requiring corporation and its officers to make corporation's records available to plaintiff, was afforded opportunity to inspect records on taking of officers' depositions, after which action was dismissed as presenting moot questions, trial judge, in taxing costs, properly allowed plaintiff reasonable expense incurred in taking depositions, which were necessary to obtain information sought. Code Civ.Proc. § 1032a.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Minnie Howard against Howard & Smith, Incorporated, and others to require defendants to make defendant corporation's records available to plaintiff as a stockholder of such corporation. From an order taxing as costs the expenses incurred by plaintiff in taking certain defendants' depositions, defendants appeal.

Affirmed.

Kent Allen, of Los Angeles, for appellants.

Sylvan Y. Allen, of Los Angeles, for respondent.

McCOMB, Justice.

This is an appeal from an order taxing costs.

The sole question necessary for us to determine is:

Did the trial court properly tax as costs sums incurred by plaintiff for the taking of depositions of defendants Howard and Smith?

[1] This question must be answered in the affirmative. The reasonable cost of 1) taking and transcribing a deposition, and 2) one copy of such deposition, are proper items of costs, unless it appears to the satisfaction of the trial court that the taking of such deposition was unnecessary. Section 1032a of the Code of Civil Procedure.

[2] In the present case the affidavits before the trial judge disclosed that April 18, 1941, plaintiff filed a complaint as a stock holder of defendant corporation, seeking an order requiring defendants to make available to plaintiff the records of defendant corporation. July 25, 1941, defendants' attorney wrote the attorney for plaintiff a letter, granting permission to plaintiff to examine the books of defendant corporation. Thereafter, the minute books of defendant corporation were deposited with plaintiff's attorney. However, before plaintiff's attorney had completed his examination thereof, defendants' attorney requested that they be returned to him, promising that they would be redelivered for further examination. Subsequently when plaintiff's attorney requested the minute books, defendants' attorney informed him that his client, defendant corporation, was unwilling to release the books for further inspection, and that they could not be obtained except on a court order. Thereafter plaintiff proceeded to take the depositions of defendants Howard & Smith, serving upon them subpoenas *duces tecum* to produce the minute books and records of defendant corporation for inspection and examination.

At the time of the taking of these depositions plaintiff was afforded the opportunity of inspecting the records of defendant corporation with the result that plaintiff obtained the relief he sought in the action which had been instituted. Thereafter, upon motion of defendants, the action was dismissed upon the ground that the questions therein presented had become moot.

Applying the above stated rule of law to the facts as disclosed by the affidavit of plaintiff's attorney, Sylvan Y. Allen, it is clear that the questions presented in the action did not become moot until after the depositions of Messrs. Howard & Smith had been taken, and that it was necessary to take such depositions in order to obtain the information which plaintiff sought. It is, therefore, evident that the taking of the depositions was necessary, and the trial

judge in taxing costs properly allowed plaintiff the reasonable cost incurred in taking such depositions.

The order is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.



58 Cal.App.2d 296

SATTERBERG v. PACIFIC GAS & ELECTRIC CO.

Civ. 3064.

District Court of Appeal, Fourth District, California.

April 20, 1943.

Rehearing Denied May 20, 1943.
Hearing Denied June 17, 1943.

1. Electricity ⇐19(2)

Complaint did not fail to state a cause of action because farmer failed to allege that he did not know of presence of iron pipe and ground wire from which he received an electric shock, where complaint described installation of ground wire and pipe below surface of ground in uninsulated condition, and alleged that they were permitted to remain in unprotected condition dangerous to a person who might innocently come in contact therewith.

2. Electricity ⇐19(12)

In action against electric company by farmer for injuries sustained by farmer when his plow came in contact with ground wire extending from pole, or with iron pipe to which wire was attached, company was not entitled to nonsuit or directed verdict because of farmer's testimony that he intended to touch pole with plow, where farmer had no knowledge of uninsulated ground wire and iron pipe below surface of ground.

3. Electricity ⇐19(3)

Power company having installed a power line along a highway, presumption obtained that the right acquired by the company was one in the usual form in which such rights are customarily acquired and that the owner of the fee had the right to use its property in so far as such use did not interfere with the right of the power company.

4. Electricity ⇐15(1)

Farmer who was owner of property constituting roadway subject to easement for travel, and who was injured when his plow came into contact with electric company's ground wire extending from pole laid along roadway or with iron pipe to which wire was attached, was not precluded from recovering from company on ground that he was a "trespasser" where he could not reasonably be expected to know of presence of ground wire and pipe underneath ground.

See Words and Phrases, Permanent Edition, for all other definitions of "Trespasser".

5. Electricity ⇐17

Farmer who was injured when his plow came in contact with electric company's ground wire extending from pole on power line, or with iron pipe to which wire was attached, was not precluded from recovering from company because electricity which injured farmer may have come from pump belonging to farmer's neighbor, since fact that neighbor's fault may have contributed to farmer's injury was no defense to company whose own negligence helped to bring about injury.

6. Electricity ⇐19(6, 12)

In action against electric company by farmer for injuries sustained by farmer when his plow came in contact with ground wire extending from pole, or with iron pipe to which wire was attached, whether company was negligent and whether farmer was contributorily negligent were questions for jury, though sign on pole read "Danger High Voltage Keep Away" where wire and pipe were underground.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by Albert A. Satterberg against the Pacific Gas and Electric Company to recover for injuries sustained by plaintiff when his plow came into contact with electric equipment maintained by defendant. From a judgment in favor of the plaintiff, the defendant appeals.

Judgment affirmed.

Thos. J. Straub, F. H. Pearson, and W. R. Dunn, all of San Francisco, for appellant.

H. E. Barbour, W. B. Backlund, and Lawrence W. Young, all of Fresno, for respondent.

BARNARD, Presiding Justice.

This is an action for damages. The plaintiff was injured when his plow came into contact with certain electric equipment maintained by the defendant. A power pole stood in the public highway in front of the plaintiff's vineyard, being some seven feet from the property line. An iron pipe had been driven into the ground a few inches from this pole, the top of the pipe being three or four inches below the surface of the ground at the time in question. A ground wire covered by a wooden molding extended from a transformer near the top of the pole to a point some twelve or fourteen inches below the surface of the ground. From that point this ground wire, uninsulated and unprotected, was looped outward and upward to the top of the iron pipe where it was attached by a clamp. This equipment was installed in 1923.

In April, 1941, the plaintiff was plowing his vineyard with a one-horse plow. In accordance with the usual custom he was plowing a few feet beyond the property line and turning in the roadway. As he made such a turn and was plowing back toward the vineyard he drove the plow so that the guide bar thereon would touch the pole, leaving the plowshare close to the pole, in order to plow under weeds and grass which were near the pole. As he was doing this the point of his plowshare came into contact either with the iron pipe or with the uninsulated wire near the place where it joined the pipe. As a result of this contact the plaintiff received an electric shock causing serious injuries. In this action which followed a jury returned a verdict in his favor for $7,500 and the defendant has appealed from the judgment.

[1] It is first contended that the complaint failed to state a cause of action and that the appellant's demurrer thereto should have been sustained. It is argued that by failing to allege that he did not know of the presence of this iron pipe and this portion of the ground wire the respondent admitted that he did have such knowledge and that the allegations of the complaint are not sufficient to bring him within that class of persons who might be said to have innocently come into contact with this part of the equipment. The case of Hauser v. Pacific Gas & Elec. Co., 133 Cal.App. 222, 23 P.2d 1068, is particularly relied upon. In that case it appeared that the injury resulted not from an accidental contact with the wire but from a deliberate act of the plaintiff taken with full knowledge of the circumstances. No such situation here appears. The complaint here described this particular installation below the surface of the ground, alleged negligence in failing to place, protect or insulate this ground wire and pipe so as to prevent the charging with or escape of electric current therefrom, and alleged that the appellant improperly placed and allowed the same to remain in an unprotected condition and in one dangerous to a person who might innocently come in contact therewith. While the complaint is not a model it is sufficient to apprise the appellant of the facts relied upon by the respondent, the case was tried upon that theory and no possible prejudice to the appellant appears, and the cases relied upon by the appellant are not controlling.

[2] It is next urged that the court should have granted a nonsuit or a directed verdict and that the judgment is against law because the respondent took himself out of the class of persons who might innocently have come in contact with this wire or pipe, in the exercise of their lawful occupation, in that he testified that he intentionally drove the point of his plow toward this pole with the intention of striking it at the very place where he knew the wire to be. In this connection it is argued that the respondent was a trespasser at the time in question, with the result that the appellant owed no duty toward him other than to refrain from wilful or wanton injury. The respondent testified that he intended on this occasion to plow up next to the pole for the purpose of cleaning out the weeds and grass. The appellant relies on a part of one sentence of the respondent's testimony in which he said: "I mean to hit any object that I go near, so as to clean everything from it." This was a part of the answer to a question as to whether in past years the guide bar of the plow always touched the pole when he went by with the plow. The entire answer was: "I have an idea it did, but I don't remember. I never paid any attention to that. I kind of think it did, because I mean to hit any object that I go near, so as to clean everything from it." The respondent directly testified that on this occasion he meant to have the guide

bar on the plow strike the pole in such a manner that the plowshare would go around the pole. The only reasonable inference from all of the evidence is that he tried to plow up close to the pole to clean out the weeds and that he neither intended to nor did strike the pole with his plowshare. While the appellant contends that the respondent knew exactly where the wire was and that he intentionally or recklessly drove his plowshare against the wire at the point where it joined the iron rod there is nothing in the evidence to sustain this contention. While it appears that the respondent knew that there was a ground wire running down this pole which was covered by a wooden molding it clearly appears that he knew nothing about any part of the installation which was below the surface of the ground. Insofar as he had knowledge of it this ground wire was running along the surface of the pole and was covered. He might naturally and reasonably assume that the same situation existed below the surface of the ground. So far as appears from the record he had no knowledge of, and there was nothing to indicate to him, the fact that this wire after entering the ground extended beyond its covering and was looped upward and outward to join the top of a buried pipe at a point near the surface of the ground. The situation which actually existed was not only unknown to the respondent but was one which could well be described as a trap. There was nothing to warn anyone that it would be dangerous to plow up to this pole and, to say the least, the only possible question in this regard was one of fact.

[3, 4] It is further argued that the respondent was a trespasser here because, although he was the owner of the property constituting the roadway, subject to an easement for the purposes of travel, it must be presumed under the holding in Gurnsey v. Northern Cal. Power Co., 160 Cal. 699, 117 P. 906, 36 L.R.A.,N.S., 185, that the appellant, having installed its power line along this highway, had acquired the right to do so by grant or eminent domain. Such a presumption does not necessarily follow from the holding in the case cited as it might also be presumed that the respondent had merely lost the right to bring an action in ejectment. In any event, no more could be presumed than that the appellant had acquired in some way the right to maintain its power line along this highway in which the respondent also possessed some rights. In the absence of any other evidence than the presumption relied on it must be presumed that the right acquired by the appellant to maintain its power line on this roadway was one in the usual form in which such rights are customarily acquired, and that the respondent as the owner of the fee had the right to use the property insofar as such use did not interfere with the right of the appellant. The respondent was engaged in thus using the property and insofar as anything he knew or could see is concerned he was doing nothing to interfere with any right which the appellant may have acquired. In our opinion, his status was not changed to that of a trespasser merely because the appellant had installed a part of its equipment underneath the ground and where the respondent could not reasonably be expected to know anything about it. Langazo v. San Joaquin L. & P. Corp., 32 Cal. App.2d 678, 90 P.2d 825. Assuming that the appellant had the right to install this portion of the equipment in that place it does not follow that it had the right to install it in that manner, or that the respondent had no rights in the area over and about the buried equipment.

It is next urged that there is no evidence that the appellant negligently placed and permitted this wire and pipe to remain in this position so near the surface of the ground. It is argued that since the respondent had plowed near this pole for some eighteen or twenty years he must have thus removed some of the dirt so that eventually the wire and pipe were too near the surface of the ground, and that certain pictures in the record indicate that this must have occurred. Assuming that there is enough evidence in the record to have sustained a finding in this connection in favor of the appellant the evidence is ample to sustain the jury's implied finding to the contrary.

[5] Appellant's next point is that it clearly appears from the evidence that the injuries suffered by the respondent were caused solely by the negligence of a third party. There is evidence that this ground wire was installed for the purpose of carrying excess voltage into the soil in case of lightning striking the wires on the pole or in case of a short circuit occurring. After the accident, it was discovered that the insulation on some wires in connection with a pump belonging to a neighbor of the respondent had rubbed off with the re-

sult that while that pump was running the electricity was passing therefrom into the ground and thence into the ground wire on the pole here in question. It appears quite probable that this was the source of the electricity which caused the injuries to the respondent. The fault of a third party which may have contributed to the injury is no defense for one whose own negligence helped to bring about the injury. Pastene v. Adams, 49 Cal. 87. The appellant was handling a dangerous instrumentality and we are unable to see how it makes any difference in this case whether the electricity itself came directly from appellant's wires or came back into those wires after having passed through another's property. Regardless of any negligence on the part of a third party this injury would not have occurred had it not been for the appellant's installation and the fact that the respondent came into contact therewith because it was hidden from view. If the appellant was negligent in thus maintaining its equipment that negligence was a proximate and contributing cause of the accident and it cannot be said, as a matter of law, that the appellant was without fault.

[6] The last point raised is that the respondent was guilty of contributory negligence in that he failed "to keep away from the wire that proximately caused the accident." The respondent had no warning of the concealed danger near this pole. He was engaged in plowing his vineyard and also plowing a few feet of the adjoining highway in order to keep down the weeds, a practice which was common in the vicinity in which he lived. While there was a sign on the pole reading "Danger High Voltage Keep Away" and another sign warning employees of the appellant not to work on the wires without proper equipment, these signs could reasonably have been taken by the respondent as referring to a danger which might be anticipated at the top of the pole, where the main wires and transformer were located, and they could hardly be held sufficient, as a matter of law, to have been a warning of the concealed danger at the base of the pole and underneath the surface of the ground. The entire question of contributory negligence, as well as that of negligence on the part of the appellant, was one of fact for the jury.

It may be further observed that if the sign on the pole was intended as a warning of danger in connection with the ground wire under the surface of the ground, this was an admission of the danger existing in that part of the equipment. The danger inherent in leaving charged wires unprotected is of such common knowledge that, under this view, the jury could well have concluded that this part of the equipment constituted a dangerous concealed trap, and that even a trespasser might recover if injured by it without contributory negligence on his part.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.



58 Cal.App.2d 157

PEOPLE v. ABRAMS.

Cr. 3669.

District Court of Appeal, Second District, Division 2, California.

April 13, 1943.

1. Criminal law ⇐1144(13)

On appeal by accused from a conviction and order denying motion for new trial, evidence was viewed in light most favorable to the people.

2. Gaming ⇐98(3)

Evidence sustained conviction of pool selling or bookmaking. Pen Code, § 337a, subd. 1.

3. Criminal law ⇐1159(2)

Before a verdict will be set aside on ground of insufficiency of the evidence, it must be made clearly to appear that upon no hypothesis whatever is there substantial evidence to support the conclusion reached by the trier of fact, and, if the circumstances reasonably justify the verdict, the opinion of the appellate court that those circumstances might also reasonably be reconciled with accused's innocence will not justify the appellate court in interfering with the jury's determination.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Marty M. Abrams was convicted of engaging in pool selling or bookmaking, and he appeals.

Affirmed.

Max M. Solomon, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., by Lewis Drucker, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From a judgment of guilty of violating section 337a subdivision 1 of the Penal Code, after trial before the court without a jury, defendant appeals. There is also an appeal from the order denying defendant's motion for a new trial.

[1] The evidence being viewed in the light most favorable to the People (respondent), the essential facts are:

July 24, 1942, police officers of the Los Angeles Police Department entered a cocktail bar of the Ritz Hotel in Los Angeles. In an adjacent hallway near a telephone booth they observed several persons, among whom was defendant, reading scratch sheets and racing forms.

Various persons in the group directed defendant's attention to the scratch sheet. One of the party gave defendant a dollar, consulted a scratch sheet with defendant, and pointed to the fifth and seventh race entries on the sheet; whereupon defendant went to the telephone, dialed a number, and, scratch sheet in hand, said, "Fifty cents to win and fifty cents to place, parlayed from Maupeace to Lovely Dawn."

Thereafter defendant was arrested, and the scratch sheet in his possession, dated July 24, 1942, disclosed that the name of one of the horses running in the fifth race at Rockingham Park was named "Maupeace", and a horse running at the same track in the seventh race was named "Lovely Dawn". Defendant had in his possession $339.75.

While in the custody of the officers defendant admitted that he took bets from people in the cocktail bar and thereafter telephoned them to a "regular bookmaker".

Defendant relies for reversal of the judgment on the proposition that there is not any substantial evidence to sustain the judgment.

[2] This proposition is untenable in view of the decision of our Supreme Court in People v. Newland, 15 Cal.2d 678, 104 P.2d 778, and the decisions of this court in People v. Kahn, 27 Cal.App.2d 645, 81 P.2d 632; People v. Abraham, 53 Cal.App.2d 564, 128 P.2d 39; and People v. Bateman, 135 P.2d 192, filed March 9, 1943. In none of the cases cited was the evidence stronger than in the present case, nevertheless the convictions were sustained in the first case by the Supreme Court, and in the others by this court.

The rule relied on by defendant as stated in People v. Yoder (1939) 35 Cal.App.2d 347, 349, 95 P.2d 470, is no longer the law in California. This case was decided in 1939 in reliance upon the decisions of the Supreme Court in People v. Staples (1906), 149 Cal. 405, 425, 86 P. 886, and People v. Lamson (1934), 1 Cal.2d 648, 661, 36 P.2d 361. A later decision of the Supreme Court held that the Lamson case decided nothing except that the judgment of the trial court should be reversed, and limited the rule in People v. Staples to the facts of that case (People v. Newland (1940), supra, 15 Cal.2d at page 681, 104 P.2d at page 779).

[3] The rule in California now is that a court on appeal will not attempt to determine the weight of the evidence but will decide whether on the face of the evidence it can be held that sufficient facts could have been found by the jury to warrant an inference of guilt, and before the verdict of a jury will be set aside on appeal on the ground of insufficiency of the evidence to sustain it, it must be made clearly to appear that upon no hypothesis whatever is there substantial evidence to support the conclusion reached by the trier of fact. If the circumstances reasonably justify the verdict of the jury, the opinion of the appellate court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not justify the appellate court in interfering with the determination of the jury (People v. Pianezzi (1940) 42 Cal.App.2d 270, 277, 108 P.2d 685; People v. Newland, supra, 15 Cal.2d at page 681, 104 P.2d at page 779).

For the foregoing reasons the judgment and order are and each is affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.

57 Cal.App.2d 874

GARDNER v. RUTHERFORD.

Civ. 6653.

District Court of Appeal, Third District, California.

March 29, 1943.

1. Corporations ⇐1

Where corporation is merely the business conduit of individual, courts will look through corporation to the individual, but to cast aside legal fiction of distinct corporate existence, it is not enough that corporation is so managed as to make it merely an instrumentality of stockholders, but it must further appear that they are the business conduits and alter ego of one another and that to recognize their separate entities would aid consummation of a wrong.

2. Appeal and error ⇐173(2)

The defense of corporate alter ego which was not pleaded nor urged in trial court and upon which there was no finding could not be urged for the first time upon appeal.

3. Corporations ⇐1

Evidence that president who was also general manager owned 89 per cent. of corporation's stock, that corporation was operated in its corporate capacity for over 12 years when it made an assignment for benefit of creditors and that its corporate entity was preserved in all of its transactions failed to show that corporation was merely the "business conduit" or "alter ego" of the president.

See Words and Phrases, Permanent Edition, for all other definitions of "Alter Ego" and "Business Conduit".

4. Corporations ⇐1

That one or more individuals or corporations own all of stock of another corporation is not of itself sufficient to cause court to treat last corporation as the "alter ego" of individual or corporation owning its stock, but it must be shown that there is such a unity of interest that observance of fiction of separate existence would sanction a fraud or promote injustice.

5. Corporations ⇐1

Bad faith in some form must be shown before court may disregard fiction of separate corporate existence.

6. Limitation of actions ⇐53(2)

A "book account" means the entire account between parties at time action is commenced, and period of limitations upon such an account must be computed from date of last item, notwithstanding there may have been a lapse of more than four years between some of the items. Code Civ.Proc. § 337, subds. 1, 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Book Account".

7. Limitation of actions ⇐165

The statute of limitations is a bar to the remedy only, and does not even impair debtor's obligation.

8. Limitation of actions ⇐53(6)

An action on account against corporation was not barred by four-year statute of limitations because there were no debits or credits on the account for more than four years where accounts, though sued upon as separate ledger accounts, comprised a complete account and there was no lapse of four years between any of items of combined account. Code Civ.Proc. § 337, subds. 1, 2.

9. Limitation of actions ⇐53(2)

That corporation's separate ledger accounts were made the basis of separate causes of action did not change the rule as to operation of statute of limitations where all books were introduced in evidence and showed clearly the entire account between plaintiff and the corporation. Code Civ.Proc. § 337, subds. 1, 2.

10. Account, action on ⇐3

An action upon an open account may be based upon an account kept by either party.

11. Limitation of actions ⇐29(2)

An action for rent against corporation's assignee was not barred as to items more than two years old on theory that it was based on oral lease for payment of rental and not upon a book account, where evidence disclosed that so-called rent account was carried on books of corporation as a complete account showing rent transactions, that it was intended by parties to be so carried and that rent account was carried as an open book account. Code Civ.Proc. § 339.

12. Limitation of actions ⇐29(2)

An action against corporation's assignee on so-called "note account" was not

barred by four-year statute of limitation on theory that action was based on a note and not upon an open book account under findings supported by evidence that note was carried as a separate book account in ledger and trial balance books of corporation and that interest was credited thereon annually. Code Civ.Proc. § 337, subds. 1, 2.

13. Bills and notes ⇐52

Where account covered by corporation's note was part of a pre-existing obligation which continued to be carried on books as an account and note was not renewed but was carried by agreement of parties as an account upon the books, physical destruction of note did not discharge the obligation.

14. Appeal and error ⇐662(1), 1010(1)

An appellate tribunal is bound by the record and by findings of trial court as to questions of fact where there is evidence to support such findings.

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Action by G. C. Gardner against J. Wesley Rutherford as assignee, etc., to recover money lent, rental on real property and salary and also on a note. From a judgment for plaintiff on certain causes of action, defendant appeals.

Affirmed.

Wallace Rutherford and Sheldon Rutherford, both of Napa, for appellant.

Coombs & Dunlap, of Napa, and David C. Dunlap, of San Francisco, for respondent.

SCHOTTKY, Justice pro tem.

Respondent G. C. Gardner and Frank Ponceitta were partners in a business known as the "Napa Valley Creamery" from December, 1923, to January 1, 1927. Shortly before January 1, 1927, they incorporated under the name of "Ambrosia Creamery, Inc., " and on that date transferred all the assets of the Napa Valley Creamery to the new corporation, and had the corporation assume all the liabilities of the partnership. Eighty-nine per cent of the stock was issued to respondent Gardner and eleven per cent to Ponceitta, but three of these shares were issued to three other persons in order that they might qualify as directors, one of the three being respondent's father, one, his attorney, and the third, the bookkeeper of the partnership who also continued as the bookkeeper for the corporation. The books of the partnership were continued as the books of the corporation. Respondent Gardner was elected president and general manager of the corporation and Ponceitta was elected secretary. On April 21, 1939, the said corporation made an assignment to the Sheriff of Napa County for the benefit of creditors, and at a meeting of the creditors, held on April 29, 1939, appellant was elected by the creditors as assignee in the place and stead of said sheriff.

On May 25, 1939, respondent commenced this action against appellant. The complaint contained thirteen causes of action, the first three causes of action being to recover $3,256.02 for "money lent" to the corporation by respondent, the first being on an open book account, the second, upon an account stated, and the third, upon an open, mutual and current account. The fourth, fifth and sixth causes of action were to recover $12,349.31 for rental on real property owned by respondent and operated by the corporation, the fourth being upon an open book account, the fifth being upon an account stated, and the sixth being upon a mutual, open and current account. The seventh, eighth and ninth causes of action were to recover the sum of $3,522.35 for salary due respondent as president of the corporation, the seventh being upon an open book account, the eighth upon an account stated, and the ninth upon a mutual, open and current account. The tenth, eleventh and twelfth causes of action were to recover the sum of $1,044.51 for salary due respondent as an officer of the corporation, the tenth being upon an open book account, the eleventh upon an account stated and the twelfth upon a mutual, open and current account. The thirteenth cause of action was to recover the sum of $3,900 upon a promissory note executed by the corporation in favor of Dora L. Gardner, and assigned to respondent.

Appellant assignee in his answer to the complaint denied the various indebtedness set forth in the complaint; set up several sections of the Code of Civil Procedure relating to the statute of limitations; and as to the rent account, appellant set up the further defense that respondent, as president and general manager, caused the bookkeeper of the corporation to charge to the rent account certain items which it had previously been the custom to charge to his salary and loan account at a time when the

corporation was insolvent and after the assignment for the benefit of creditors had been made, and that such charges were made for the purpose of obtaining as against the other creditors a preference by tolling the statute of limitations.

At the trial there was no contest as to the thirteenth cause of action upon the promissory note to Dora L. Gardner. As to other causes of action the court found in favor of respondent as to the first, fourth, seventh and tenth causes of action, finding that the evidence sustained respondent's allegations of an open book account, and finding further against appellant's defense of the statute of limitations and the other defenses set forth by appellant. Judgment was entered in favor of respondent and this appeal is from said judgment.

Before discussing the various points raised by appellant upon this appeal we will make a brief statement of the factual situation as shown by the record. As hereinbefore stated, there were thirteen separate causes of action, but the first twelve of these involved four accounts which appeared on the books of the corporation, and which are referred to in the briefs as the "loan account," the "rent account," the "note account" and the "salary account." These accounts were separate ledger accounts on the books of the corporation, and were sued upon as separate accounts, but, as we view the matter, the four accounts together comprises the complete account between respondent Gardner and appellant corporation. We make this statement at the outset because so much of the argument of appellant as to the application of the statute of limitations is based upon the assumption that each account must be regarded as a separate account bearing no relation to the other accounts.

The "loan account" arose out of various advances made by Gardner to the corporation. It was stipulated that as of January 1, 1931, the sum of $2,535.51 was owing to Gardner on this account. From 1931 to 1935 no payments were made on this account and there were no additional advances or interest charges so no new entries were made on the ledger sheet. The account, however, was carried on the monthly trial balance books of the corporation. On January 1, 1936, this balance of $2,535.51 was again entered on the ledger sheet. On February 10, 1936, payments on the account totaling $1,429.49 were made by the corporation and entered in the account. On February 17, 1936, respondent advanced $2,000 more to the corporation and on May 17, 1938, he made a second $2,000 advance. From March, 1936, to March, 1939, the corporation made payments totaling $1,850 which were entered in said ledger account as the sum of $50 per month was deducted by the bank from the bank account of the corporation to be applied by the bank on money which respondent had borrowed from the bank.

Respondent Gardner purchased the property upon which the business was conducted in 1924, at which time the partnership had a lease upon the property for five years from May 15, 1920. This lease expired in 1925, and although it had an option for renewal, the option was not exercised. The rental under the lease was $100 a month, and after the corporation took over the business this rental continued at $100 until May 31, 1927, at which time it was raised to $125 per month. The rent account, as shown by the ledger, balanced on January 1, 1930. The rent payable to respondent was entered in the ledger rent account monthly, but after 1931 there were no payments entered on the rent account until April, 1939, when several items totaling $284.02 were charged against respondent on the rent account. It appears that these items were actually entered in the ledger rent account after the date of the assignment, and it is argued by appellant that these items should have been credited to the loan and salary accounts as had been the custom previous to this time.

In 1930 respondent was given a note by the corporation in the sum of $2,670 to cover a portion of his back salary, the amount of the note being at that time deducted from his salary account. An account was opened on the corporation books covering the note, and interest was credited on the account annually until December 31, 1936, at which time the amount of principal and interest, as shown by the ledger account, amounted to $3,522.35, and no further interest was charged after that date. The note itself was destroyed by Gardner but it is clear from the record that it was agreed between respondent and the corporation that the so-called note account should be considered as a book account, and the court found that the account was carried as a book account in the ledger of the corporation.

As to the so-called "salary account" the only difference between the parties is that

appellant contends that the items credited by the corporation in April, 1939, upon the rent account should have been credited upon the salary account, which would make the balance on this account $903.54 instead of the $1,044.51 alleged by respondent and found by the court. Respondent in answer to this contention of appellant states that it makes no difference to him what account the April credits are applied to. The so-called salary account appears to be a ledger account in which the amount of respondent's salary was credited monthly and in which payments made to him or for his account were likewise entered down to and including April, 1936, when, according to the ledger, said account showed a balance of $1,044.51 due to respondent.

[1] Appellant urges a number of contentions why the judgment should be reversed. He first contends that the corporation, Ambrosia Creamery, Inc., was the alter ego of respondent Gardner and that, therefore, Gardner should not be permitted to establish his asserted claims against the corporation because he was the corporation. Appellant asserts: "To permit respondent to share with the creditors the assets of the insolvent corporation under all the circumstances of this case would create a situation that would not be fair, in our opinion, to the real creditors; he would, under the decision in this case, if permitted to stand, have an undue and unfair advantage." Appellant points out that respondent Gardner owned 89% of the stock of the corporation, that he was president and general manager, that he supervised the business including the directing of how the books should be kept and how credits should be entered, that he collected large sums as monthly salary and in addition received large amounts in additional salary at the end of various years at a time when the corporation was not paying its rent. He then cites Sweet v. Watson's Nursery, 33 Cal.App.2d 699, 92 P.2d 812, and other cases in which the well-settled rule of law is stated that where a corporation is merely the business conduit of an individual or partners, the courts will look through the corporation to the individual. But it is also a rule of law, as stated in Erkenbrecher v. Grant, 187 Cal. 7, at page 11, 200 P. 641, at page 642:

"In order to cast aside the legal fiction of distinct corporate existence as distinguished from those who own its capital stock, it is not enough that it is so organized and controlled and its affairs so managed as to make it 'merely an instrumentality, conduit or adjunct' of its stockholders, but it must further appear that they are the 'business conduits and alter ego of one another,' and that to recognize their separate entities would aid the consummation of a wrong. Divested of the essentials which we have enumerated, the mere circumstance that all the capital stock of a corporation is owned or controlled by one or more persons does not, and should not, destroy its separate existence; were it otherwise, few private corporations could preserve their distinct identity, which would mean the complete destruction of the primary object of their organization."

[2-5] The difficulty with this contention of appellant is that while the manner in which the affairs of the corporation were conducted might lend some support to appellant's argument that the corporation was controlled by respondent Gardner largely for his own benefit, the defense of alter ego was not pleaded, was not urged in the trial court, and there is no finding of the court upon it. Such a defense should be pleaded so that it can be passed upon by the trial court, and may not properly be urged for the first time upon appeal. But, apart from the matter of pleading, and bearing in mind that the trial court, with all the books of the corporation and all the testimony before it, determined that respondent was entitled to judgment for the various amounts found to be due him, we do not believe that the evidence compels a finding that the corporation was merely the business conduit of respondent Gardner. There can be no question that the Ambrosia Creamery, Inc., was operated as a corporation from January 1, 1927, to the date of the assignment, that its corporate entity was preserved in all of its transactions and in its books and accounts. As was said in Hollywood Cleaning & Pressing Co. v. Hollywood Laundry Service, Inc., 217 Cal. 124, at page 129, 17 P.2d 709, at page 711:

"Whatever may be the rule in other jurisdictions, the rule is well settled in this state that the mere fact one or two individuals or corporations own all of the stock of another corporation is not of itself sufficient to cause the courts to disregard the corporate entity of the last corporation and to treat it as the alter ego of the individual or corporation that owns its stock. In addition it must be shown that there is such a unity of interest and ownership

that the individuality of such corporation and the owner or owners of its stock has ceased; and it must further appear that the observance of the fiction of separate existence would, under the circumstances, sanction a fraud or promote injustice. Bad faith in one form or another must be shown before the court may disregard the fiction of separate corporate existence."

The second contention of appellant is that the judgment on the first count, the so-called "loan account," is erroneous because there were no debits or credits on said account from December 31, 1930, to February 10, 1936, and it was therefore barred by subdivisions 1 and 2 of section 337 of the Code of Civil Procedure, and that respondent failed to prove a new acknowledgment signed by the corporation as required by section 360.

The trial court found as to the first count that the corporation was indebted to respondent upon an open book account and that it was not barred by subdivisions 1 and 2 of said section 337. In the case of Furlow Pressed Brick Co. v. Balboa Land & Water Co., 186 Cal. 754, at page 763, 200 P. 625, at page 629, the court said:

"The rule has long been settled in this state with reference to 'a mutual, open and current account' mentioned in subdivision 2, § 337, Code of Civil Procedure, that the statute runs from the date of the last item shown in the account. Carter v. Canty, 181 Cal. 749, 186 P. 346. The evident purpose of the amendment, subdivision 2, § 337 Code of Civil Procedure, was to put an open book account upon the same basis. Such an account is differentiated from an open, mutual, and current account solely by the fact that to constitute an open, mutual, and current account it was necessary that items other than cash appear as credits upon the account, whereas, in an open book account cash payments alone are sufficient to characterize the account as an 'open book account.' If we apply the rule so well established as to 'a mutual, open, and current account,' it would follow that the four-year period of limitations runs from the date of the last payment, in this case August 13, 1914." See, also, Bailey v. Hoffman, 99 Cal.App. 347, 350, 278 P. 498; Egan v. Bishop, 8 Cal.App.2d 119, 123, 47 P.2d 500, 503.

[6] While it is true that there appears to be no case in California in which the precise question of an open account in which there was a lapse of more than four years between items was before the court, we are convinced that both upon reason and authority a book account means the entire account between the parties at the time the action is commenced, and the period of the statute of limitations upon such an account must be computed from the date of the last item, even though there may have been a lapse of more than four years between some of the items. In other words, to quote the language of Egan v. Bishop, supra, "the action is not barred piecemeal as to the several items, because in an action on the book account they are all to be regarded as a part of one entire account and cause of action."

[7] We believe further that such must have been the intent of the legislature in the 1917 amendment to subdivision 2 of said section 337. It must always be borne in mind that the statute of limitations is a bar to the remedy only, and does not extinguish, or even impair, the obligation of the debtor.

[8, 9] So we conclude upon this point that the so-called "loan account," even taking it as it appeared on the ledger of the corporation, was not barred by subdivision 2 of section 337. But, as we have hereinbefore stated, we believe that even though the "loan account" and the other accounts were separate ledger accounts, and were sued upon as separate ledger accounts, the four accounts together comprise the complete account between respondent Gardner and the corporation of which appellant is the assignee, and with this in mind it appears that there is no lapse of four years between any of the items of the combined account. The fact that said separate ledger accounts were made the basis of separate causes of action and were thus presented in the trial court does not in our opinion change the rule as to the operation of the statute of limitations, because all of the books of the corporation were introduced in evidence and showed clearly the entire account between Gardner and the corporation. To quote once more from Egan v. Bishop, supra:

"It is claimed by appellant that these records were insufficient to constitute a single book account and that they in reality show a great number of book accounts, wholly unrelated to each other. We do not accede to this view. The law does not prescribe any standard of bookkeeping practice which all must follow, regardless of the nature of the business of which the

record is kept. We think it makes no difference whether the account is kept in one book or several so long as they are permanent records, and constitute a system of bookkeeping as distinguished from mere private memoranda. The records were sufficient to support a cause of action on a book account."

[10] There is, of course, no doubt as to the rule that an action upon an open account may be based upon an account kept by either party. Moss v. Underwriters' Report, Inc., 12 Cal.2d 266, 83 P.2d 503; Shanklin v. Scribner, 62 Cal.App. 487, 217 P. 130.

[11] Appellant's third contention is that the so-called "rent account" is based upon an oral lease for the payment of rental and not upon a book account and it is barred by section 339 of the Code of Civil Procedure as to all items of rent more than two years old. Appellant points out that after the corporation was organized on January 1, 1927, it continued to pay the same rental as was specified in the lease to the partnership, which lease expired in 1925, until the rental was raised to $125 in May, 1927, and that respondent cannot avoid the statute of limitations by bringing his action for rent upon an open book account. Appellant relies very strongly upon the case of Tillson v. Peters, 41 Cal.App.2d 671, 107 P.2d 434, 437, in which this court said:

"Clearly this suit is founded on an oral contract for the leasing of real property. Sec. 1945, Civ.Code. It is a suit in assumpsit to recover deferred installments of rent which became due monthly at specified times and in definte sums according to the terms of the oral contract. It has been held that the fulfillment of the terms of either a written or an oral contract, similar to the one which is here involved, may not be avoided by attempting to convert the suit for breach of the specific terms of a contract into an action based on an open book account. A suit to recover unpaid installments of rental due according to the terms of either a written or an oral contract, in specified monthly sums, is subject to the bar of the statute of limitations from the respective dates when each installment becomes due. In such an action upon an oral contract the statute of limitations may not be extended from two to four years by the mere device of attempting to convert the cause into a suit based on an open book account."

The facts in Tillson v. Peters are, however, quite different from the facts in the instant case. In that case the action was not upon a book account at all and the complaint made no reference to a book account. As the opinion states:

"The complaint does not pretend to state a cause of action based on a book account. It attempts to allege a cause of action for unpaid installments of rent due for a specified period of time from April 1, 1931, to April 1, 1936. * * *

"At the trial the plaintiff sought to avoid the effect of the statute of limitations by attempting to prove that the action was founded on a balance of rental shown to be due upon an open book account. It appears that the plaintiff kept an account book and ledger in which he credited the defendant only with certain sums of money, representing installments of rent, on the respective dates when they were paid. The history of the transaction was not recorded in the books. Neither the original indebtedness nor unpaid installments of rent were charged to the defendant or entered in the books. The books were not offered in evidence. It is impossible to determine from the testimony of the contents of the book entries which were adduced what the transaction was about, or whether any balance was thereby shown to be due to the plaintiff. Evidently the books do not disclose those facts."

In the instant case, however, it is clear from the testimony and the books themselves that the so-called rent account was carried on the books of the corporation as a complete account showing the transactions as to the rent, that it was intended by the parties to be so carried on the books of the corporation, and that the finding of the trial court that the rent account was carried on the books of the corporation as an open book account is supported by the evidence.

The true rule applicable to the facts of the instant case is well stated in Sacher v. Paige, 149 Kan. 662, 88 P.2d 1013, 1014, as follows:

"Defendant appeals, contending that plaintiff's cause of action was not based on a mutual, open, current account as defined in our decisions. Spencer v. Sowers, 118 Kan. 259, 234 P. 972, 39 A.L.R. 365. He argues that the items of monthly rental for part of plaintiff's building were not proper to be included in the account because each month's rent was a separate and distinct

charge for which a separate action could have been maintained and eviction for non-payment could have been enforced. There need be no quarrel with that general rule of law. But there is nothing in that rule of law which forbids the landlord and tenant to satisfy their obligations towards each other by the practice of a mutual, open and current account. 1 C.J. 672.

"In Nedvidek v. Meyer, 46 Mo. 600, the action was upon an open, mutual, current account of miscellaneous items, rent, board, services, and goods sold. There, as in the case at bar, there was a question whether items for rent could properly be included in such an account. In giving an affirmative answer to that question, the Missouri supreme court said: 'Whether the rent was recoverable in an action upon the account is a question which can not be determined upon a motion in arrest. That is a matter to be settled by the evidence. If the parties had mutual dealings, and the rent became a subject of account between them, by mutual understanding and arrangement, it thereby became a proper matter of book charge, and recoverable in an action upon the account.' [46 Mo.] page 601."

We, therefore, are unable to agree with appellant's contention that the judgment is erroneous as to the "rent account" which is the fourth cause of action.

[12] Appellant's fourth contention is that respondent's seventh cause of action, upon the so-called "note account," was based upon a note and not upon an open book account and "that said cause of action was either not proved, or was barred by subdivisions 1 and 2 of section 337 of the Code of Civil Procedure of the State of California, and upon the further ground that plaintiff Gardner cancelled the note and the obligation by his deliberate and intentional destruction of the note by tearing it and then burning it in the furnace of the Corporation."

The trial court found as to said seventh cause of action:

"That on December 31st, 1930, Ambrosia gave to Plaintiff its promissory note in the sum of $2,670.00, bearing interest at the rate of 4% per annum, (Plaintiff's Exhibit No. 15); that this note was for back salary due Plaintiff from Ambrosia; that at the same time Gardner's salary account, hereinafter covered in these findings, was debited in this amount. (Exhibits 9 and 15). This note was also carried as a separate book account in the ledger and trial balance books of the corporation and interest credited thereon annually until December 31, 1936, after which time, there were no further charges or entries made. (Plaintiff's Exhibits 14, 15, 16, 17 and 18). Both the Ledger and trial balance sheets of the corporation contained an interest credit as of December 31, 1936, and showed a balance due the Plaintiff, Gardner, in this account on that date in the sum of $3,522.35. This amount was carried in the ledger and trial balance book until April 21st, 1939, in an account known as the 'G. C. Gardner Note Account.' This action was filed by Plaintiff on the 25th day of May, 1939, less than four (4) years after the date of the last entry in this account.

"The Court further finds that this note account had been opened and kept by the bookkeeper of the corporation in accordance with instructions given by Gardner and Frank Ponceitta, who were stockholders, officers and directors of the corporation."

In view of this finding by the court, which is supported by the record, the cases cited by appellant upon this point are not applicable as it must be held that the cause of action was upon the account and not upon the note.

[13] We are not impressed with appellant's argument that because the note was destroyed the obligation was cancelled. While this may be the result of the destruction of a note where such is the intention, yet where, as here, the account covered by the note was part of a pre-existing obligation which continued to be carried on the books as an account, and where, in view of the ledger account, the note was not renewed, but was carried by agreement of the parties as an account upon the books of the corporation, we do not believe it can be held that the physical destruction of the note discharged the obligation. In fact, the destruction of the note supports the view that the parties were relying upon the account rather than the note.

[14] What we have hereinbefore stated makes it unnecessary to prolong this opinion by discussing several other points raised by appellant. Appellant closes his brief with the statement that to permit respondent to share with the creditors of the insolvent corporation would not under the circumstances of this case be fair and just to the real creditors. The record may lend

some support to this view, but an appellate tribunal is bound by the record before it and by the findings of the trial court as to questions of fact where there is evidence to support such findings. Appellant in his pleadings and in the trial chose to rely solely upon the statute of limitations, and has neither alleged nor proved any fraud on the part of respondent, and while we may well believe that the manner in which the corporation's business was conducted was far from the best business management, yet we cannot say that the learned trial judge erred in the conclusion he reached in this case and in the judgment rendered.

In view of the foregoing the judgment is affirmed.

THOMPSON, J., and ADAMS, P. J., concurred.



58 Cal.App.2d 69

PARKER v. TREFRY et ux.

Civ. 13846.

District Court of Appeal, Second District, Division 1, California.

April 9, 1943.

1. Joint adventures ⇐1

Generally, relation of "joint adventurers" is created when two or more persons combine their money, property or time in conduct of particular line of trade or for some particular business deal, agreeing to share jointly, or in proportion to capital contributed, in profits and losses, if circumstances do not establish technical partnership. Civ.Code, § 2412(a).

See Words and Phrases, Permanent Edition, for all other definitions of "Joint Adventurer".

2. Joint adventures ⇐1

The relation of "joint adventurers" between parties themselves is matter of intent and arises only where parties intend to associate themselves as such. Civ.Code, § 2412(a).

3. Joint adventures ⇐1

To constitute a "joint adventure" the parties must combine their property, money, efforts, skill or knowledge in some common undertaking, and the contributions of the respective parties need not be equal or of the same character, but there must be some contribution by each joint adventurer of something promotive of the enterprise. Civ.Code, § 2412(a).

See Words and Phrases, Permanent Edition, for all other definitions of "Joint Adventure".

4. Joint adventures ⇐1

In determining whether "joint adventure" exists, it is immaterial whether property involved was individually owned before joint venture was entered upon or was thereafter acquired, so long as it was contributed and devoted to the uses and purposes of the enterprise. Civ.Code, § 2412 (a).

5. Joint adventures ⇐1

A joint proprietary interest and right of mutual control over subject matter of enterprise or over property engaged therein is essential to a "joint adventure". Civ. Code, § 2412(a).

6. Joint adventures ⇐1
Master and servant ⇐1, 5

An agreement between owner of land and building contractor for construction of houses on the land and division of profits gives rise to relation of "joint adventurers" rather than that of "master and servant" or "independent contractor", where it discloses an intent that both parties shall contribute to enterprise, exercise control over it, and be accountable to each other for their acts in carrying it out. Civ. Code, § 2412(a).

See Words and Phrases, Permanent Edition, for all other definitions of "Independent Contractor" and "Master and Servant".

7. Joint adventures ⇐1

The omission of provision for sharing of losses in a "joint adventure" is immaterial because the law supplies that provision, and in absence of agreement, losses are shared in same proportion as profits are to be divided. Civ.Code, § 2412(a).

8. Joint adventures ⇐1
Master and servant ⇐1, 5

Contract under which defendants furnished lots on which houses were constructed by plaintiff, and the parties agreed to divide profits from sale of houses, and evi-

dence of acts of the parties under the contract revealed intention of parties to enter into "joint adventure" even though there was no express agreement to share losses, and fact that enterprise resulted in a loss rather than profit was not sufficient to change the character of the transaction to one of "employer and employee" or of "independent contractor". Civ.Code, § 2412 (a).

See Words and Phrases, Permanent Edition, for all other definitions of "Employer and Employee".

Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge.

Action by E. L. Parker against Edgar C. Trefry and wife to recover amounts allegedly due under a contract whereby defendants furnished lots on which plaintiff constructed houses and the parties agreed to divide profits from sale of houses, wherein defendants filed cross-complaints. From an adverse judgment, defendants appeal.

Reversed and remanded with directions.

E. V. Knauf, of Glendale, for appellants.

Donald Paul Covert, of Burbank, for respondent.

YORK, Presiding Justice.

The instant action arose out of the construction and sale of two houses in Glendale, California, under a written contract covering the first house and which was used as a basis for the second house, providing as follows:

"This agreement, made this 14th day of March, 1938, by and between Edgar C. Trefry * * * the party of the first part, and E. L. Parker * * * the party of the second part:

"Witnesseth: That the party of the first part is the owner in joint tenancy with Helen F. Trefry, his wife, of that certain piece or parcel of ground described as Lot 1, Tract 11057, of Rossmoyne, in the city of Glendale * * * That he hereby agrees to furnish said lot for the construction thereon by E. L. Parker * * * that certain residence the plans and specifications for which have been prepared * * * and approved by both parties to this agreement. And party of the first part hereby agrees to pay the cost of said construction on the basis of general contractors' cost of labor and material;

"Witnesseth Further: That E. L. Parker, party of the second part, a building contractor, agrees to furnish the labor and material for the construction and completion of said residence in a good workmanlike manner at the net cost of same, according to the plans mutually agreed upon; that said E. L. Parker may receive payment for same in the manner provided in the loan escrow * * * as the work progresses. Costs of the work in excess of said loan funds shall be provided by the party of the first part upon completion of same.

"Further, both parties to this agreement, their heirs or assigns, agree that upon completion of said residence the property shall be placed upon the market for sale, and when sold, the proceeds thereof, over and above construction costs, net cost of said lot, financing charges, interest on loans, sales commission and 5% building fee for administration and superintendency to party of the second part, shall be equally divided between them. It is further agreed herein that no arbitrary sales price shall be fixed by either party that would tend to prohibit sale at a fair and reasonable profit, but both parties agree to maintain the sale price agreed upon without change except by mutual consent.

"It is further mutually understood and agreed that both parties to this agreement shall have equal access at all times to all records, contracts, plans and figures pertaining to matters covered by this agreement and specifically referred to."

After completion the houses were on the market for about a year and a half before sale and, instead of realizing a profit therefrom, losses were sustained thereon. Respondent instituted the instant action, as stated in his brief, to recover:

"a. The difference between the 'net cost' of labor and materials furnished by him and the total amount he had received from 'building loans' and from appellants;

"b. Five per cent of the cost of the two houses as a 'building fee for administration and superintendency' of the construction; and

"c. One-half of the difference between the total costs of the houses and the prices at which the parties had agreed the houses should be sold."

Appellant Edgar C. Trefry filed a second amended cross-complaint alleging the existence of a partnership relation between him and cross-defendant Parker; that said

cross-complainant had expended his own funds on behalf of the joint venture because the cross-defendant had wrongfully increased the cost of the buildings in order to increase the 5% building fee referred to in the written agreement; and prayed for actual damages in the sum of $5,000 and $1,000 punitive damages.

It was found by the court that "plaintiff is entitled to judgment against the defendants, and each of them, for the balance of the costs of construction not paid to him from the loan funds and by the defendants, which balance amounts to the sum of $147.08 on the first house and $580.59 on the second house * * *." Accordingly, judgment was entered in favor of plaintiff Parker for the sum of $727.67, with the proviso that he pay unpaid bills amounting to $431.34 out of the sums collected by him upon said judgment; it being further adjudged that cross-complainant Trefry take nothing by reason of his cross-complaint.

This appeal is prosecuted from said judgment, appellants contending, as they did at the trial, that the parties to the transaction were joint adventurers and that respondent should pay one-half of the loss suffered by appellants; that the items of cost and the money received were stipulated, leaving as the real issue the question of the relationship of the parties.

Respondent agrees that a determination as to the existence of a joint venture controls this case, but submits that unless he must share the losses as a joint adventurer, he is entitled to the sum of $727.67, being the balance of the "net costs" of construction, for which judgment was rendered in his favor.

On the issue of joint venture the court found: "XVIII. That no partnership or joint adventure existed between plaintiff and the defendants, or either of them; that there was no agreement, either oral or in writing, or understanding that losses which might be incurred upon the sale of said houses, and each of them, were to be shared, or any part thereof paid by Parker."

The court also found that the total cost of the first house was the sum of $10,160.12 and of the second house the sum of $9,144.72; that upon completion of the first house a sales price of $16,500 was agreed upon; and upon completion of the second house a sales price of $14,500 was agreed upon therefor, and that no sales price less than said respective sums was ever agreed upon between the parties.

Apparently the first house was sold for $10,500 and the second house for $9,400.

It is shown by the record herein that the lots upon which the houses were built were purchased specifically for the purpose of building houses thereon and selling them, the profit derived therefrom to be divided, as stated in the written agreement. Title to the lots apparently was taken in the names of appellants who executed the necessary documents to procure the loan to finance the construction of the buildings. There was no cash payment made upon the lots, it being understood that they were to be paid for out of the sale price for the completed houses. Costs of building in excess of the loan were to be provided by appellants and when the buildings were completed, all profits derived from the sale were to be equally divided between the parties after deducting "construction costs, net cost of said lot (s), financing charges, interest on loans, sales commission and 5% building fee for administration and superintendency to party of the second part (respondent)."

It is also clear from the evidence adduced at the trial herein that there were no typewritten or printed specifications but that the blue prints and city ordinances, as well as mutual discussion as the work progressed, were to function in place of typewritten plans and specifications.

Appellants cite the consolidated cases of Irer v. Gawn et al., 99 Cal.App. 17, 277 P. 1053, as being directly in point. In these cases the owner of certain lots and another agreed that this other should furnish money to erect a bungalow, and that each should receive pay for personal services in the construction of the building, and that they should share the profits. It was there held (page 23 of 99 Cal.App., page 1056 of 277 P.): "In both the original and amended conclusions of law the court did correctly find 'that the said agreement * * * constituted a joint adventure.' The single transaction of becoming joint owners of real property upon which a bungalow court is constructed for sale from the joint contributions of the interested parties, under the circumstances disclosed by the record in these cases, clearly indicates that the parties intended to create a joint adventure. The nature of this transaction, as a joint

adventure, is not changed by the fact that the agreement incidentally provided that the respective parties were to render personal services in the construction of the buildings, and, when so employed, they were to receive $10 per day, which allowance was to be charged as 'items of expense in the construction.' * * * The rule prescribed by the statutes of California with respect to partnership profits and losses announces only the common-law doctrine which is applicable to the circumstances of the present cases. Section 2403 of the Civil Code provides: 'In the absence of any agreement on the subject the shares of partners in the profit or loss of the business are equal, and the share of each in the partnership property is the value of his original contribution, increased or diminished by his share of profit or loss.' This means that, in the event of the termination of a contract of joint adventure, the respective parties are entitled to be reimbursed to the extent of the value of their original contribution, less their proportion of the loss sustained."

Both parties rely upon the case of Spier v. Lang, 4 Cal.2d 711, 53 P.2d 138, in which the plaintiffs sued to recover for materials furnished to defendants for the purpose of drilling for oil on a leasehold owned by the defendant Lang, on the theory that they were partners of Lang or joint adventurers. Whether such a partnership relation existed was the only issue on the trial.

The court there stated (page 716 of 4 Cal.2d, page 141 of 53 P.2d): "The main reliance of the plaintiffs is on the provision of the contract that the defendants were to share in a division of the profits. But this feature of the agreement has long been held not to require a conclusion that a partnership relation existed where also there was no joint participation in the management and control of the business, and the proposed profit-sharing was contemplated only as compensation or interest for the use of the money advanced. [Citation of authorities.] The foregoing conclusion and cited cases are in conformity with the definition of the partnership relation contained in the Civil Code (section 2400, Stats. 1929, p. 1898, formerly contained in section 2395), which includes as an essential element the joint participation in the conduct of the business. The presence of the same element is necessary to constitute the parties joint adventurers. [Citation of authorities.] The plaintiffs urge that subdivision (4) of section 2401 of the Civil Code, providing that the receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner, has some controlling weight in this case. It has no bearing, however, in the absence of any evidence that profits were received, and there is no evidence of the payment of any to the defendants."

[1-6] "The courts have not laid down an exact definition of the term 'joint adventure'; nor is it possible to enunciate a general rule by means of which the question as to what amounts to a joint adventure may be answered, inasmuch as the answer depends largely upon the terms of the particular agreement, upon the construction which the parties have given it, as indicated by the manner in which they have acted under it, and upon the nature of the undertaking, as well as upon other facts. * * * It may be stated in general terms that the relation of joint adventurer is created when two or more persons combine their money, property or time in the conduct of some particular line of trade, or for some particular business deal, agreeing to share jointly, or in proportion to the capital contributed, in the profits and losses, assuming that the circumstances do not establish a technical partnership. * * * As between the parties themselves, the relationship of joint adventurers is a matter of intent and arises only when they intend to associate themselves as such. * * * To constitute a joint adventure, the parties must combine their property, money, efforts, skill or knowledge in some common undertaking. The contributions of the respective parties need not be equal or of the same character, but there must be some contribution by each coadventurer of something promotive of the enterprise. Although it has been contended that the property with which the parties to a joint adventure are to operate must be acquired after the relationship has come into existence, it seems clear that it is immaterial whether the property involved was individually owned before the joint venture was entered upon or was afterward acquired, so long as it was contributed and devoted to the uses and purposes of the enterprise. * * * a joint proprietary interest and right of mutual control over the subject matter of the enterprise or over the property engaged therein is essential to a joint adventure. * * *

"* * * an agreement between the owner of lots and a building contractor for the construction of houses on the lots, and a division of the profits from the sale of the houses, gives rise to the relationship of joint adventurers, rather than that of master and servant or of independent contractor, where it discloses an intent that both parties shall contribute to the enterprise, exercise control over it, and be accountable to each other for their acts in carrying it out. Keiswetter v. Rubenstein, 235 Mich. 36, 209 N.W. 154, 48 A.L.R. 1049." 30 Am.Jur. 680, sec. 7; 681, sec. 8; 682 sec. 11; 685 sec. 16.

On the question of losses suffered by parties to a joint venture, 30 Am.Jur. 694, sec. 33, enunciates the following rule: "Although there is authority to the effect that an agreement to share losses is not in all cases an essential element of a joint adventure, such an agreement express or implied is usually involved in the enterprise. In several instances, however, it has been held that where the contribution of a party to an adventure consists merely of services which are performed, he is not liable to his associates on account of financial losses sustained in the venture. * * * Where the joint enterprise is the purchase and sale of property, the view has been taken that a party thereto cannot be charged with a loss until it is established by a sale."

[7] The omission of a provision for the sharing of losses in a joint adventure is immaterial because the law supplies that provision. In the absence of agreement, losses by the parties are shared in the same proportion as profits are to be divided. See section 2412, subd. (a), Civil Code: "The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules: (a) Each partner shall be repaid his contributions, whether by way of capital or advances to the partnership property and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits."

"In the absence of evidence [of an agreement] to the contrary, the members of a joint adventure will participate equally in the profits and losses of the enterprise. [Citation of authorities.]" Arnold v. Humphreys, 138 Cal.App. 637, 643, 33 P.2d 67, 70. See, also, Irer v. Gawn, supra.

[8] An analysis of the terms of the agreement of March 14, 1938, coupled with the acts of the parties thereunder, as established by their own testimony, reveal an intent to enter into a joint enterprise, and the fact that it resulted in a loss rather than in a profit is not sufficient to change the character of the transaction from that of a joint adventure to one of employer and employee or of independent contractor.

For the foregoing reasons, the judgment is reversed and the cause remanded with directions to the court below to determine the losses sustained by the said venture, and to enter a judgment thereon in conformity with the views herein expressed.

DORAN and WHITE, JJ., concur.



57 Cal.App.2d 829

KIER CORPORATION v. TREASURE OIL CO. et al. (DODD, Intervener).

Civ. 13948.

District Court of Appeal, Second District, Division 2, California.

March 29, 1943.

1. Stipulations ⇐13

Where action for accounting for oil royalties was tried on stipulation of facts and, on appeal, intervener sought to set aside stipulation but substantial averments of affidavit of intervener's attorney were contradicted by affidavit of defendant's attorney and it appeared that plaintiff's attorneys in preparing stipulation acted in good faith for intervener as well as for plaintiff, stipulation was not disturbed.

2. Appeal and error ⇐1122(2)

On appeal by intervener, intervener's motion to take testimony as basis of new findings by appellate court was denied under rule that such findings may be made by an appellate court only for purpose of affirming judgment. Rules of Supreme Court and District Courts of Appeal, rule 38; Code Civ.Proc. § 956a.

3. Appeal and error ⇐780(1)

Where record disclosed that powers of corporate plaintiff had been long suspended, corporate plaintiff was powerless to maintain its action in first instance, hence its appeal from adverse judgment was required to be dismissed.

4. Mines and minerals ⇐79(1)

Provision in oil lease protecting lessor from any deficiency judgment in event of foreclosure of senior trust deed and guaranteeing continuity of lease and of royalties reserved to lessor in event of discovery of oil in paying quantities before foreclosure did not obligate lessee to pay royalties in event foreclosure occurred prior to completion of well.

5. Mines and minerals ⇐79(2)

Where oil lease relieved lessee from payment of any sum in event no oil was discovered in paying quantities on any leased lot, in absence of discovery of oil in paying quantities while lessee possessed lots or in absence of proof that oil was ever discovered on such lots, lessee was not obligated.

6. Mines and minerals ⇐79(2)

In an action on oil lease which relieved lessee from payment of any sum in event no oil was discovered in paying quantities on leased lots combined with other lots under a community lease, showing that lessee breached agreement to sink a well on community lease was insufficient to justify a judgment for oil royalties.

7. Mines and minerals ⇐74

Covenant of lessee to pay royalties if oil was discovered on leased lots prior to foreclosure of senior trust deed was a "personal covenant" of lessee and not a "covenant running with the land" so as to require a subsequently organized corporation, which later acquired lots, to pay such royalties.

See Words and Phrases, Permanent Edition, for all other definitions of "Covenant Running With the Land" and "Personal Covenant".

8. Mines and minerals ⇐74

Where lessee, which had made a personal covenant to pay royalties, lost its interest in property before lessor's assignee acquired interest therein, assignee could not recover royalties from lessee.

9. Mines and minerals ⇐74

Where intervener in action for oil royalties, in her capacity as executrix of husband's estate, had conveyed lands involved to trust company in satisfaction of trust deed liens thereon and thereafter, as a precautionary measure, trust deeds had been foreclosed and purchased by trust company, trust company, not intervener, was owner in fee of lands and entitled to royalties earned thereon.

10. Mines and minerals ⇐74

Where executrix under authority of probate court conveyed lots to trust company in satisfaction of trust deed liens thereon, subsequent delivery of notice of rescission to trust company with nothing more was insufficient to revest title in executrix, and hence chain of title based on executrix' subsequent conveyance to corporation, royalty lease by corporation to oil company, and assignment of lease and quitclaim of lands to executrix in her individual capacity failed, and there was no enforceable obligation on oil company, which produced no oil, to carry out its personal covenant to pay royalties on oil subsequently produced by another company. Civ.Code, § 1691.

11. Deeds ⇐177

The mere delivery of a notice of rescission alone does not serve to annul a conveyance. Civ.Code, § 1691.

12. Cancellation of instruments ⇐1
Contracts ⇐266(1)

To effect a rescission, in absence of mutual agreement, aggrieved party must accompany his demand with an offer to restore whatever of value he received, and, upon failure thereby to effect a rescission, he must seek judicial process to enforce his demand and may invoke aid of equity. Civ. Code, § 1691.

13. Deeds ⇐177

The regaining of possession by grantor of a delivered but unrecorded deed is insufficient to restore title in grantor.

14. Mines and minerals ⇐74

Where conveyance by executrix of estate realty to a corporation without authority of probate court was void, oil company which leased property from corporation, after loss of title, was not obligated on its personal covenant to pay royalties on

oil produced by another oil company. Probate Code, § 755.

15. Executors and administrators ⇐375

Where executrix with authority of probate court had conveyed land to trust company and thereafter, without authority, gave trust company notice of rescission and conveyed land to corporation, subsequent order of probate court, made without required notice and made 59 days after second conveyance, attempting to confirm executrix' actions was void for want of power of probate court to divest trust company of its title by such an order, for want of power to reanimate executrix' void deed, and for want of timely petition and proper notice. Probate Code, § 755.

16. Executors and administrators ⇐375

A sale of realty of an estate, to be valid, must be reported by verified petition to probate court within 30 days after sale and, after notice by clerk, it must be confirmed by court, and, in absence of such notice of hearing of petition, order of confirmation is void. Probate Code, § 755.

17. Landlord and tenant ⇐61

One who enters lands under a lease cannot retain possession and appropriate its benefits and still question title of landlord.

18. Executors and administrators ⇐367
Mines and minerals ⇐60

Where executrix' deed under which lessor claimed was void for want of authority in executrix to execute deed, and title to property involved was vested in another at time of execution of deed, and real owner established its rights, lessor could not invoke rule that lessee may not question landlord's title so as to compel lessee to pay oil royalties provided in lease.

19. Contracts ⇐1

Parties to a contract are privileged to include any legal condition subsequent or precedent in their contract.

20. Mines and minerals ⇐74

Where oil lease provided for discovery of oil before lessee should be obligated to pay royalties for use of land, in absence of discovery of oil or waiver of condition, assignee of lease could not enforce payment of royalties against lessee.

21. Mines and minerals ⇐74

Where oil lease relieved lessee of obligation to pay royalties for use of land until oil was discovered and lessor, lessor's assignee, and lessee were ousted from property before discovery of oil, lessor's assignee could not enforce royalty provisions of lease against another oil company with which she had no contract and which subsequently developed property.

Appeals from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by Kier Corporation against Treasure Oil Company and others for an accounting of royalties under an oil lease, wherein Ione Estes Dodd intervened. Facts were stipulated. From an adverse judgment, plaintiff and intervener appeal.

On plaintiff's appeal, appeal dismissed; on intervener's appeal, judgment affirmed.

H. A. Andrews and J. M. Danziger, both of Los Angeles, for plaintiffs and appellants.

John L. Schaefer, of Los Angeles, for intervener and appellant.

Henry G. Bodkin and Charles S. Gass, both of Los Angeles, for respondents.

MOORE, Presiding Justice.

This action had its genesis in an oil lease executed by the Kier Corporation, hereinafter referred to as Kier. The lease contemplated that other parcels contiguous to the leased lots should be acquired from the owner under a lease similar in form to that given by Kier, that the combined area should be operated as a community lease and that the royalties were to be apportioned according to the areas described in the respective leases. This action was instituted to obtain an accounting of the royalties alleged to have accrued under the Kier lease. Inasmuch as the appeal of Kier is to be dismissed we have now to consider only the appeal of Mrs. Dodd, the intervener.

The question for decision as stated by the intervener who claims as the grantee of Kier is whether a lessee under a community lease is obliged to pay royalties to the lessor or its grantee notwithstanding the leased property has been sold pursuant to foreclosure proceedings of a senior lien. Intervener bases her claim to such royalties upon a covenant of the lease which intervener construes to be a promise of lessee to protect the lessor's royalties in the event

of sale under such foreclosure after delivery of the lease.

In June, 1930, one William J. Dodd, of Los Angeles County deceased leaving some estate and his surviving widow Ione Estes Dodd. For brevity hereinafter the widow in her individual capacity will be referred to as intervener; as executrix of the estate of her departed husband she will be referred to as executrix. Following the death of Mr. Dodd intervener and the Security First National Bank qualified as executors of the estate. The inventory included ten city lots, hereinafter referred to as the Dodd lots, and showed an appraisement in the sum of $17,950 and that the aggregate amount of the subsisting liens against the property were secured by trust deeds and exceeded $17,000. After joining with executrix in objecting to the appraisement of the lots and averring their value to be not in excess of $5,000, the bank thereafter, in 1933, resigned as co-executor. In the same year executrix procured an order from the probate court to quitclaim the lots to the Title Guarantee and Trust Company, herein referred to as Title Guarantee, trustee under the trust deeds, in full satisfaction of all sums secured by the Dodd trust deeds. On March 2, 1934, pursuant to such order, executrix made her conveyance. In the following January without an order she undertook to convey the Dodd lots to Kier whose powers had been suspended since the preceding May.

With the status of the title as above outlined, and Kier's powers still suspended, on March 7, 1935, Kier executed the lease of the Dodd lots to the Treasure Oil Company, hereinafter referred to as Treasure Oil. In order to comply with the ordinances of Los Angeles requiring a drill site to consist of not less than one acre the Kier lease provided that its lessee should obtain similar lease upon parcels adjoining the Dodd lots which, with the Dodd lots, should constitute a community lease. Four days later Treasure Oil acquired from one Fletcher a lease on three lots, contiguous to four of the Dodd lots. Their combined area was not less than one acre.

On March 13, 1935, executrix petitioned the probate court for authority to rescind the quitclaim deeds which she had delivered to Title Guarantee. In her petition she advised the court (1) that a notice of rescission had been mailed to Title Guarantee December 11, 1934; (2) that she had already conveyed the lots to Kier; (3) that Kier had agreed to protect the Dodd estate from any deficiency that might become payable on account of the trust deeds theretofore executed by deceased and herself; (4) that the consideration passing from her for the Kier agreement was the interest of the estate in the Dodd lots. Pursuant to her petition the court made an order setting aside the conveyance to Title Guarantee and approving the transfer to Kier. Such order was made on the 28th of March, 1935, and without the notices required to be published for the sale of real property by an estate.

Following the last mentioned order Title Guarantee as trustee in the trust deeds of Mr. and Mrs. Dodd, declared the notes thereby secured in default following which intervener and executrix made a lease of the Dodd lots to Treasure Oil. Immediately thereafter, Treasure Oil was granted a permit by the city to drill a well on one of the Fletcher lots. The drilling of the well commenced on July 23, 1935, and its operations were suspended on the 22d of the following October for lack of funds to complete the drilling of the well. Evidently fearing the inability of Treasure Oil to make the payment of rentals on the Dodd lots on September 3, 1935, Kier obtained an order for a moratorium as to that property. About the same time Treasure Oil, apparently in need of funds, conveyed all of its leases in trust to Security Title Insurance and Trust Company to secure payment of its note in the sum of $35,000 in favor of Alma Spreckles. Upon such indebtedness, Treasure Oil defaulted and on November 24, 1936, the interest of Treasure Oil in all of its leases was sold at public auction to Mrs. Spreckles, sister of G. de Bretteville, incorporator of Treasure Oil.

Thereafter on January 10, 1936, Treasure Oil quitclaimed the Dodd lots to Kier and contemporaneously Kier by Mrs. Dodd, its president, quitclaimed the same lots to intervener, and the deed was recorded. By virtue of this deed intervener now lays claim to the royalties payable to Kier under its lease to Treasure Oil. Notwithstanding Kier's covenant to hold the Dodd estate harmless as to the indebtedness of Mr. and Mrs. Dodd nothing in fact was ever paid and the trust deeds were foreclosed by the trustee's sale on the 9th of March, 1936. Title Guarantee was the purchaser at the sale.

Pursuant to a judgment obtained by Mrs. Spreckles against Treasure Oil execution was issued and by virtue thereof the Fletcher lots were sold at sheriff's sale December 21, 1936. Mrs. Spreckles became the purchaser. On the following day Treasure Oil quitclaimed all of its interest in the Fletcher lots to Mrs. Spreckles. On the 14th day of January, 1937, Mrs. Spreckles quitclaimed the Fletcher lots to the Treasure Company which had been incorporated on August 3, 1936. In the same month executrix filed her second report in the Dodd estate in which she stated that the encumbrances on the Dodd lots had been foreclosed; that the leases had been abandoned; and that the estate's four per cent interest in the oil products to be recovered from the lease was of no value. In September, 1939, through Attorney Schaefer she filed her amended second report containing substantially the same facts as those in her second report and it was approved on October 5, 1939.

After thus becoming vested with title to the lease on the Fletcher lots, Treasure Company in April, 1938, obtained a lease on certain other lots contiguous to the Fletcher property from one Robert Burns. Immediately thereafter it contracted with one Scoville and the Adamant Company, strangers to all of the transactions heretofore mentioned, whereby it assigned certain interests in the well on the Fletcher property for monies necessary for the completion of the well. By agreement the Burns and Fletcher leases were combined into a community lease. The well was completed and thereafter produced from and after December 7, 1938. On the 9th of February, 1939, Treasure Oil quitclaimed the Dodd lots to executrix and intervener. In drilling on the Fletcher lot Treasure Company has made use of only one of the Dodd lots which it acquired by lease from Title Guarantee after its purchase of the Dodd property at the foreclosure sale.

The foregoing is a résumé of the facts stipulated by the parties for submission to the trial court. Before considering the questions involved in intervener's attack upon the judgment, it is necessary first to dispose of certain motions appertaining to the appeal.

The Motions

[1] In order to augment the record and to enlarge the issues intervener filed an extensive motion to have this court make findings. Respondents countered with a similar motion and with a motion to dismiss Kier's appeal. These motions must be first decided.

The transcript in this case was filed in the Supreme Court on the fourth day of October, 1941. Intervener joined with the plaintiff in filing the opening brief on November 26, 1941, and the closing brief on March 28, 1942, on behalf of both parties. Attorneys Andrews and Danziger appeared by such briefs on behalf of Kier while Schaefer signed for intervener.

On the 19th day of September, 1942, Attorney Schaefer caused Mr. Dottenheim to be substituted in the place of Messrs. Danziger and Andrews. Together they filed a motion (a) to be relieved of the stipulation of facts on which the case was tried; (b) to set aside the stipulation of facts; (c) to vacate the judgment; (d) to take additional evidence under section 956a Code of Civil Procedure pursuant to rule XXXVIII of this court.

In support of his motion, Mr. Schaefer averred that while in the city of New York in October, 1939, he was stricken with a coronary thrombosis; that upon his return to Los Angeles in the following December he was confined to his home for 20 months; that the stipulation was signed on the first of November and the trial thereon was had on the fourth of November; that he took no part in the trial except to converse with Danziger and Andrews; that several drafts of the stipulation were mailed to him; that he made suggestions by telephone and otherwise and called upon counsel at their offices; that a carbon copy of the proposed final draft of the stipulation was submitted for his additions and corrections; that he made such corrections relating to the very facts of which he would now make proof in order to obtain new findings. He declares that he struck out important portions of the proposed final draft which were not in accordance with the facts and inserted entire paragraphs and signed the last sheet before mailing the documents to Danziger and Andrews; that he heard no more and assumed that the document included his corrections.

After declaring his amazement and distress at the omission of his amendments from the stipulation he deplores Danziger's inability to get the Schaefer amendments allowed and is disappointed that Danziger and Andrews would not insist that the con-

troversial points raised by the Schaefer amendments be heard in open court. Because of his opinion that the omission of certain facts from the stipulation leaves it incomplete and because the language of paragraph thirty of the lease, as construed by respondent, creates an ambiguity, he insists that oral testimony concerning the circumstances surrounding the negotiations for the original leases be taken in order to resolve the ambiguity.

Without enlarging further upon the motion and the voluminous affidavits in support thereof it will suffice to observe (1) that Schaefer organized and managed Kier and that he retained Danziger and Andrews to act for Kier in all matters relating to the present action; (2) that the substantial averments of Schaefer are contradicted by Attorneys Bodkin and Gass and by Mr. G. de Bretteville. In addition thereto, Mr. Bodkin avers (1) that the correspondence between Danziger and Schaefer prior to the submission of the case below shows that Schaefer had been advised as to all proceedings in connection with the preparation of the stipulation, (2) that neither Bodkin nor Gass had refused to stipulate to anything, but had cooperated; (3) that no mention was ever made by Schaefer of his claim that he did not sign the final draft of the stipulation until after the oil well had been placed on production after which he demanded that respondent pay Mrs. Dodd a portion of the royalties as a compromise; (4) that neither Schaefer nor his client manifested interest in the fortunes of the Kier leases until the Treasure Company had taken over the property and completed an oil well, almost three years after Treasure Oil had abandoned the property in January, 1936, and the Dodd trust deeds had been foreclosed. During the period following the advent of the Treasure Company in August, 1936, there is no evidence in any of the affidavits that either Mr. Schaefer or his client took any action or did anything to indicate that they expected to participate in the earnings of the well completed on the Fletcher property. There was no redemption from the execution sale made under the Spreckles judgment. Moreover, Schaefer and intervener both knew of Treasure Company's transaction with Scoville and the Adamant Company whereby the latter parties were to receive 44 per cent of the well's production. Of this fact Schaefer was fully informed but never made any claim at any time that intervener or the Kier Corporation had any interest in the well. He caused the present action to be instituted only after the well had been placed on production. Furthermore, Schaefer knew of the Treasure Company's lease from Burns whereby it could complete the drilling of the well and avoid the injunction threatened by Title Guarantee in the event the drill stem should pass into one of the adjoining Dodd lots to which it held the title.

From the foregoing it must appear that it would be inequitable to disturb the record established by the trial court with the cooperation of able counsel representing all parties in that court. They acted in good faith for intervener as well as for plaintiff and the stipulation will therefore not be disturbed.

[2] Intervener's motion to take testimony as the basis of new findings by this court will be denied. Such findings can be made by an appellate court only for the purpose of affirming the judgment. Kleinsasser v. McNamara, 127 Cal.App. 258, 15 P.2d 788; Evans v. McGranahgan, 4 Cal. App.2d 202, 41 P.2d 937.

[3] The appeal of Kier must be dismissed because the proof on file shows that its powers have long since been suspended and it cannot therefore maintain its action.

It appearing that the new findings are unnecessary in order to determine the rights of respondents to prevail their motion to take evidence and to make additional findings will be denied.

The Merits of the Appeal

(1) In spite of the tangled skein of the probative facts of this case, intervener undertakes to defeat the judgment upon a provision contained in paragraph 30 of the Kier lease. Before quoting the language, however, it will serve the understanding to bear in mind that prior to the date of the lease executrix had once conveyed the lots by quitclaim deed to Title Guarantee, grantee in the Dodd trust deeds, "in full satisfaction of any and all claims." Subsequently she conveyed the property to Kier, her own corporation, which agreed to avoid a deficiency judgment against the estate. After the transfer to Kier and her notice of rescission to Title Guarantee it was but a step to foreclosure under the trust deeds. It was the anticipation of such foreclosure that moved the contracting parties to insert the passage in the lease which reads as fol-

lows: "That should oil and/or gas be discovered under this lease or community lease of which this lease may be a part thereof, in paying quantities pending the final sale of said lots under foreclosure of said Deeds of Trust, should said Deeds of Trust be foreclosed after the execution and delivery of this lease, then in that event the lessee hereby agrees to protect the lessor on all of said lots so that said lessor shall not have a deficiency judgment taken against lessor in said foreclosure, and to protect the validity of the within lease and the royalties reserved to the lessor herein; but should no oil and/or gas be discovered in paying quantities on any of said lots, then the lessee is not obligated in any manner to protect the lessor as hereinabove provided, notwithstanding anything to the contrary herein contained; and any and all money paid by the lessee upon said Deed of Trust, or either of them, shall be repaid to lessee out of 50 per cent of the royalty due lessor until lessee is paid in full therefor."

[4] Such provision is nothing more than the personal obligation of the Treasure Oil. By no principle of logic can it affect the Treasure Company which came into being some three years following the execution of the Kier lease. It is not the alter ego of Treasure Oil. Neither by explicit language nor by implication did Treasure Company ever assume the obligation sought to be imposed upon Treasure Oil by the foregoing provision. The language quoted provides that if oil or gas in commercial quantities should be discovered under this lease or the community lease pending the final sale of the Dodd lots at that time subject to foreclosure, then Treasure Oil agrees to protect Kier so that Kier will have to pay no deficiency should the sale bring less than the amount of the Dodd notes. It is an agreement of Treasure Oil to guarantee the continuity of the lease and the royalties reserved to the lessor, should such discovery of oil occur. Such provision was inserted in the lease as a protection to Kier by reason of its contract with the Dodd estate at the time it acquired its deed to the lots from the estate. But nothing contained obligates Treasure Oil to pay royalties in the event of the foreclosure of the trust deeds upon the lots without regard to the completion of a well prior to a foreclosure sale. Had there been such intention in the minds of the parties it would have been stated in explicit language in the lease.

[5, 6] But whatever obligation might be construed to arise out of the first clause of the quoted passage it was nullified by the latter part of the paragraph which relieves the lessee from the payment of any sum in the event no oil or gas should be discovered "in paying quantities on any of said lots." In the first place, in order to fasten an obligation upon Treasure Oil it would have been necessary to discover oil in paying quantities while it had title to the Dodd lots. In the second place there is neither proof nor allegation that oil was ever discovered under any of the Dodd lots. Intervener's complaint proceeded upon the theory that Treasure Oil has performed the terms of the lease and is therefore indebted to intervener for the royalties due under the Kier lease from a well drilled thereon by Treasure Oil. She can have no such judgment because there was no production, no well. While she shows that a lease was made to Treasure Oil, she failed to prove that Treasure Oil drilled the well or holds any royalties for the account of intervener. To justify a judgment for royalties, in an action on the lease, it is not sufficient to show that Treasure Oil breached its agreement to sink a well on the community lease (Ericksen v. Rhee, 181 Cal. 562, 185 P. 847) "Allegata and probata must correspond."

[7, 8] Moreover, the agreement to pay royalties was the personal covenant of Treasure Oil. It was not a covenant running with the land and it did not require another who might subsequently lease adjacent property to pay such royalties. The covenant in the Kier lease was that Treasure Oil should pay a sum equal to one/sixth of the market price of oil produced and sold by it from the Dodd lots. Intervener, as successor in ownership of the lots cannot recover the royalties from Treasure Oil because that corporation had lost title to the lots, as will presently appear, before Kier quitclaimed to her. Furthermore, she is without right against the Treasure Company, an independent corporation of a later vintage, which is described in intervener's complaint as the "successor in interest" of Treasure Oil. There was no proof that Treasure Company did succeed to such interest from Treasure Oil as grantor. Neither is there allegation or proof that Treasure Company ever assumed the obligation to pay the royalties promised by Treasure Oil or any other debt of the lat-

ter corporation. In the absence of such allegation recovery could not be had against Treasure Company, even though the action had sounded in damages for a breach of the lease and adequate proof thereof been received. It follows that intervener must fail both on account of the absence of necessary allegations as well as by reason of the failure of her proof with reference to the payment of royalties.

[9] (2) Intervener is utterly without right of recovery by virtue of the fact that the lots had been conveyed to Title Guarantee by executrix in March, 1934, and to make assurance doubly sure the senior liens upon the Dodd lots were foreclosed at trustee's sale on March 9, 1936. The trust deeds had been executed by Mr. and Mrs. Dodd in October, 1929. At the sale the trustee, to-wit Title Guarantee, purchased the lots and was thenceforth as owner of the fee entitled to the oil beneath them and to all royalties to be earned by the land. Fahrenbaker v. E. Clemens Horst Co., 209 Cal. 7, 284 P. 905; Sullivan v. Superior Court, 185 Cal. 133, 195 P. 1061; White v. McVey, 168 Okl. 19, 31 P.2d 850, 94 A.L.R. 656; Callahan v. Martin, 3 Cal.2d 110, 43 P.2d 788, 101 A.L.R. 871; McIntire's Adm'r v. Bond, 227 Ky. 607, 13 S.W.2d 772, 64 A.L.R. 630; Lever v. Smith, 30 Cal.App.2d 667, 87 P.2d 66. If the royalties earned are "rent" or "an incorporeal hereditament, issuing from the profits of land," surely they would follow the owners of the fee and payment thereof to another would be a conversion. If the royalty due the land owner follows the fee, then the foreclosure of the Dodd trust deeds vested in Title Guarantee all royalties for oil taken from the Dodd property.

[10-14] (3) Had there been no foreclosure on the Dodd lots, intervener would have been unable to recover for the reason that the Kier lease was ineffectual to vest the title of the property in Treasure Oil. This results from the interrelationship of the following facts heretofore outlined: In October, 1933, the probate court authorized executrix to quitclaim the lots to the Title Guarantee in full satisfaction of its claims and liens upon the lots. Pursuant thereto, on May 2, 1934, she made such conveyance. The Title Guarantee having thus obtained title in October, 1934, it was impossible, by virtue of the actual occurrences, for Kier to gain a title prior to its lease to Treasure Oil on March 7, 1935. Intervener's attempt to prove title successively in herself and in Kier arises out of a novel bit of logic whereby intervener asserts that on December 11, 1934, she gave a notice to Title Guarantee of her rescission of her quitclaim of December 11, 1934, to Title Guarantee and that, consequently she thereby restored the title to the lots in herself. A notice of rescission alone does not serve to annul a conveyance merely by means of a delivery of such notice. Fairbairn v. Eaton, 6 Cal.App.2d 264, 43 P.2d 1113. Unless a rescission be effected by mutual agreement the party who deems himself aggrieved must accompany his prompt demand with an offer to restore whatever of value he has received from his adversary. Failing thereby to effect his rescission, he must seek judicial process to enforce his demand. Section 1691, Civil Code. The reluctant response of the wrong doer to the demand for rescission may impel the victim of chicane or mistake to invoke the aid of equity to restore him to his quondam status. Fairbairn v. Eaton, supra. Not only did executrix fail to regain title by her notice of rescission, but failing to have her right to rescission favorably adjudicated, in order for her to regain title to the lots from Title Guarantee, it would have been necessary for the latter corporation to execute a conveyance in legal form and to make delivery thereof with the intention of revesting executrix with the title. Even had she regained possession of her own unrecorded deed from the grantee, such repossession would not have been sufficient to restore title to her. In re Estate of Bruck, 140 Cal.App. 300, 308, 35 P.2d 341. It follows that, since she had no title, her act of January 28, 1935, purporting to convey the Dodd lots to Kier was abortive. Indeed, for another good reason, her deed to Kier was a nullity because it had not been authorized by the probate court. Section 755, Probate Code.

[15, 16] Furthermore, the order of the court on the 28th of the following March pretending to confirm intervener's deed of January 28, 1935, was ineffectual for vesting the title in Kier because (1) such an order of the probate court was powerless to divest Title Guarantee of its title; (2) the order of March 28 could not reanimate executrix' void deed to Kier (In re Estate of Delaney, 49 Cal. 76); and (3) the order authorizing the conveyance to Kier was void. To make valid a sale of the realty

of an estate, the sale must be reported by verified petition to the court within 30 days after the sale and, after notice by the clerk, it must be confirmed by the court. Section 755, supra; Lass v. Eliassen, 94 Cal.App. 175, 270 P. 745. In the absence of notice of a hearing on the petition the order of confirmation is void. Texas Co. v. Bank of America, etc., 5 Cal.2d 35, 53 P.2d 127. Therefore, inasmuch as Kier had no title to the lots on March 7, 1935, its lease to Treasure Oil was a nullity.

Not only were the Dodd lots acquired by Title Guarantee in March, 1936, but the interest of Treasure Oil in the property as well as its interest in the Fletcher lots, was conveyed in trust on August 31, 1935, to secure a loan of Alma Spreckles' in the sum of $35,000. In the subsequent November she foreclosed her lien and purchased at the sale the land covered by her trust deed, including the Fletcher lot on which the well had been drilled. In the meanwhile Treasure Company having entered the arena, Mrs. Spreckles conveyed the Fletcher lot to that corporation. It resumed drilling operations and completed the well on December 7, 1938. From the foregoing it is seen that Treasure Oil was completely divested of title to the Dodd lots after Mrs. Spreckles had foreclosed and Treasure Company entered upon the premises.

[17, 18] (4) Intervener contends that Treasure Oil as lessee of Kier cannot question the title of its lessor. It is trite that one who enters lands under a lease cannot retain possession and appropriate its benefits and still question the title of his landlord. But no such situation exists here. So far as the lease of Kier to Treasure Oil was concerned, the Dodd lots ceased to be, just as if they had sunk into a flaming chasm, when they passed into the ownership of Title Guarantee. Lessee's rights under the lease having been thus erased, is it possible that Kier or its successor could require the payment of royalties for the use of the property after the change of ownership? In response to intervener's contention that the ownership of the fee is immaterial to her right of recovery, it is clear to us that since neither Kier nor intervener could have restored Treasure Oil to possession after the ownership shifted to Title Guarantee, it is now appropriate for the erstwhile lessee to denounce the asserted ownership of Kier in March, 1935, or at any time thereafter as a basis for collecting royalties for the use of the property after both parties had been ousted. Oneto v. Restano, 89 Cal. 63, 68, 26 P. 788. We have shown that Kier had acquired no title to the Dodd lots for two reasons: (1) Executrix had not procured an order authorizing the conveyance to Kier. Since the grantee of an executor is not required to know of the irregularities in the estate's proceedings, such grantee acquires nothing by such conveyance when executed without the court's previous authorization. Texas Co. v. Bank of America Nat. Trust & Savings Ass'n, 5 Cal.2d 35, 38, 53 P.2d 127. (2) The fee was vested in Title Guarantee on the date of the Kier lease. Under such conditions we cannot agree that by virtue of the Kier lease Treasure Oil, had it continued in possession under the new ownership, could have become obligated to pay Kier and its successors royalties on oil products saved from the Fletcher property. Neither is it unorthodox for Treasure Oil to show the nullity of the Kier title at the time of the lease.

So far as Treasure Company is concerned it never contracted any obligation with Kier or executrix or intervener.

[19-21] (5) Inasmuch as intervener advisedly makes no claim based upon executrix' lease to Treasure Oil in May, 1935, the foregoing discussion disposes of the contentions of intervener. But finally it is to be observed that the parties to a contract are privileged to include any legal condition subsequent or precedent in their contract. This was done at the time of drafting the Kier lease in providing for the discovery of oil before the lessee should be obligated to pay royalties for the use of the land. Intervener therefore could not enforce the payment of such royalties unless the prescribed condition had obtained or been waived by Treasure Oil. Lucy v. Lucy, 22 Cal.App.2d 629, 632, 71 P.2d 949; Warman Steel Casting Co. v. Redondo Beach Chamber of Commerce, 34 Cal.App. 37, 166 P. 856. Since neither happened, she has no right of recovery against the lessee. She had no contract at all with Treasure Company.

It is therefore ordered that the motion of the intervener to be relieved of the stipulation of facts, to vacate the judgment, and to take additional evidence be and the same is hereby denied; also that the motion of

respondents to take evidence and to have additional findings by this court be and is likewise denied.

It is ordered that the appeal of Kier Corporation be and it is hereby dismissed.

It is ordered that the judgment be and it is hereby affirmed.

W. J. WOOD and McCOMB, JJ., concurred.



57 Cal.App.2d 1010

In re KNIGHT'S ESTATE.

RENNERT et al., v. WEST.

Civ. 12331.

District Court of Appeal, First District, Division 2, California.

April 7, 1943.

Hearing Denied June 3, 1943.

1. Descent and distribution ⇐14

The word "inheritance" as used in statute providing that kindred of half blood inherit equally with those of whole blood in same degree unless inheritance came to intestate by descent, devise or gift of some one of his ancestors, in which case those not of blood of such ancestor must be excluded from such inheritance, indicated legislative intent to confine provisions to identical real property, and statute does not relate to transmutations or income from or proceeds of real property. Probate Code, § 254.

See Words and Phrases, Permanent Edition, for all other definitions of "Inheritance".

2. Descent and distribution ⇐14

Intestate's paternal cousin of the half blood in fourth degree was entitled to succeed ratably with maternal cousins of the whole blood of same degree to portion of estate consisting of personal property, and income therefrom, coming to intestate by either bequest or gift, in transmutations of real property, and income therefrom and transmutations thereof. Probate Code, § 254.

3. Descent and distribution ⇐14

Underlying principle of doctrine of ancestral estates is that that which a man has earned by his own service should be kept in his family.

4. Descent and distribution ⇐14

At common law, on failure of lineal descendants estate went to decedent's collateral relations who were of the blood of first purchaser.

5. Descent and distribution ⇐14

Where at time of adoption of statute excluding from inheritance of realty which came to intestate by descent, devise or gift of one of his ancestors, those not of blood of such ancestor, prevailing rule was that heir must be of blood of ancestor who last purchased realty regardless of intervening transfers of title by descent or gift or gratuitous devise, Legislature is presumed to have intended meaning of phrase "one of his ancestors" to be ancestor last purchasing in accordance with then prevailing rule. Probate Code, § 254.

See Words and Phrases, Permanent Edition, for all other definitions of "One of His Ancestors".

6. Descent and distribution ⇐14

In construing ambiguous statute relating to collateral heirs of an intestate, if choice must be made between blood of an ancestor by whose industry property was acquired, and that of one to whom it came by accident of birth or marriage, blood of one whose industry brought property into family line is favored. Probate Code, § 254.

7. Descent and distribution ⇐14

The phrase "one of his ancestors" as used in Probate Code section relating to ancestral estates, refers to ancestor who brought estate into family. Probate Code, § 254.

8. Descent and distribution ⇐14

Where intestate's father was last purchaser of realty which he conveyed by deed of gift to intestate's mother from whom intestate inherited, intestate's paternal cousin of the half blood who was of the blood of intestate's father was of the blood of "one of his ancestors" from whom inheritance came to intestate within meaning of statute relating to ancestral estates, and was not excluded from participating in such realty upon intestate's death. Probate Code, § 254.

2. Descent and distribution ⇐14

Where intestate died without issue, spouse, parent, brother, sister, or descendant of a deceased brother or sister, intestate's paternal cousin of the half blood and of the fourth degree was entitled to participate ratably in all property of decedent's estate with decedent's maternal cousins of the whole blood and of such degree. Probate Code, § 226.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Proceedings in the matter of the estate of Coleman Haines Knight, deceased, by Mary E. Rennert and others against Bertha J. Williams West, to establish heirship. From an adverse decree, Bertha J. Williams West appeals.

Reversed.

Brandenburger & White, of Sacramento, for appellant.

Heller, Ehrman, White & McAuliffe, of San Francisco, and Peter A. Breen, of Los Angeles, for respondents.

NOURSE, Presiding Justice.

This is an appeal from a decree establishing heirship and determining that respondents were the sole heirs of decedent.

The decedent died intestate in April, 1941. He was the son and last surviving descendant of Thomas Knight and Serena Haines Knight. Mary E. Rennert, Franklin Guy Miller, and Eugene Guy Miller were the only surviving children of Emma Haines, a sister of Serena Haines Knight, the mother of decedent. Jessie Haines De Mauriac and Frederick Haines were the only surviving children of Anthony Haines, a brother of Serena Haines Knight. Frederick Haines died pending the appeal and his interest is represented by his assignee. All the respondents are maternal cousins of the whole blood of decedent and related in the fourth degree. Coleman Knight and Anna Libby were the parents of Thomas Knight, the father of Coleman Haines Knight, decedent. Anna Libby later married Warner Williams and was the grandmother of Bertha J. Williams West, the appellant herein. As the grandchild of the second marriage of decedent's paternal grandmother, appellant was therefore a paternal cousin of the half blood of decedent and like respondents related to decedent by collateral consanguinity in the fourth degree.

To facilitate the disposition of the proceedings to determine heirship the parties stipulated to the facts, the relation of the respective parties, the character of the property of the estate, and the questions of law involved. Upon this stipulation the trial court decreed that the respondents were the sole heirs and that appellant was not entitled to succeed to any portion of the estate.

The parties stipulated that the questions of law involved were whether the provisions of section 254 of the Probate Code excluded appellant from sharing with respondents in the distribution of the property of the estate, to wit:

"1. Real Property: All of which was acquired by said Coleman Haines Knight, deceased, pursuant to Last Will and Testament from Serena Haines Knight, deceased, who had acquired said real property by deed of gift from Thomas Knight, deceased, the last purchaser thereof?

"2. Personal Property:

"a. That portion thereof acquired by Coleman Haines Knight, deceased, by Last Will and Testament from Serena Haines Knight, deceased?

"b. That portion thereof which represents income from and the transmutations of such real property hereinabove referred to in subdivision '1' of this paragraph?

"c. That portion thereof which represents income from and the transmutations of such personal property hereinabove referred to in subdivision '2-a' of this paragraph?

"d. That portion thereof described in Exhibit 'B' attached hereto, which said Coleman Haines Knight acquired by gift from Serena Haines Knight?

"e. That portion thereof which represents income from and transmutations of said personal property described in said Exhibit 'B'."

It will not be necessary to give an extended discussion of all the questions of law presented to the trial court because, since the appeal was perfected, the Supreme Court determined some of them in Estate of Ryan, 21 Cal.2d 498, 133 P.2d 626, 630. For a better understanding of the controversy it is well at this point to quote the provisions of the code section: "Kindred of the half blood inherit equally with those of the whole blood in the same

degree, unless the inheritance came to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestor must be excluded from such inheritance in favor of those who are." Briefly then the question is to what extent does the section exclude one of the half blood from the right of inheritance in the several classes of property listed in the stipulation.

[1, 2] In the Ryan case the court held that the exclusion provision of the code section did not relate to personal property acquired by bequest or gift, that the use of the word "inheritance" indicated a legislative intent to confine the provisions to real property. In the same case it was held that the provisions of the code section should be confined to the identical real property, and hence it would not relate to the transmutations or income from or the proceeds of the real property. This decision sets at rest the issues presented here in the second question of the stipulation, and upon that decision alone, which is controlling upon us, we conclude that the appellant was entitled to succeed ratably to the portion of the estate consisting of personal property, and the income therefrom, coming to the intestate by either bequest or gift, in the transmutations of real property, and the income therefrom and transmutations thereof. In this connection it is proper to state that we refer to the "transmutations" of real and personal property in the same general way as the parties treat the subject in their briefs. Though they stipulated that succession to such "transmutations" was one of the issues involved the record does not contain any showing that any transmutations occurred. Whether the issue relates to sales made by the mother of decedent, to sales made in course of probate, or to sales made by order of court during the incompetency of the decedent does not appear. We are not disposed to discuss the rules relating to these various groups of "transmutations" as they are not argued by any of the parties.

There remains for consideration the single question whether the section relates to the real property which the parties agree came to the decedent by devise of his mother who acquired it "by deed of gift from Thomas Knight, deceased, the last purchaser thereof." Having thus stipulated as to the "last purchaser" as the only proof of the source of title the parties have presented the issue whether Thomas Knight, father of deceased, is to be deemed the "one of his ancestors" from whom the estate "came to the intestate," or since Thomas Knight had given the property to his wife, the mother of decedent, the latter should be deemed to be such "ancestor," since she was the one from whom the immediate transfer came to decedent. The reason for the controversy is that appellant is "of the blood" of Thomas Knight though kindred of the half blood of decedent, while respondents are kindred of the full blood of decedent, but not "of the blood" of Thomas Knight. The appellant has narrowed the issues by the concession that she does not claim to succeed to the entire portion of the realty to the exclusion of the respondents, but that she is entitled "to share with the respondents" ratably since all are related to deceased in the same degree. The appellant also concedes that, in number, the authorities favor respondents, but she contends that those authorities which support her view are more in accord with the common-law rule and are more clearly applicable to a reasonable interpretation of our own statutes.

[3, 4] We are in accord with the view of the appellant. The underlying principle of the doctrine of ancestral estates is that that which a man has earned by his own service should be kept in his family. (1 Jones' Blackstone, p. 1008.) Thus at common law it was the rule that on failure of lineal descendants the estate went to decedent's collateral relations who were of the blood of the first purchaser. (Id., p. 1007.) This common-law rule was cited as the "fifth canon of descent" in Chastain v. Larney, 134 Okl. 127, 272 P. 471, 472, where the court, though rejecting it as inapplicable in that jurisdiction, stated as follows: "The heir must be of the blood of the ancestor who brought the estate into the family; or to be more specific, the ancestor who last acquired the estate by purchase, no matter how many intervening transfers of title by descent or by gift or by gratuitous devise from an ancestor there may have been."

[5, 6] Section 254 Probate Code was originally adopted in California at the first session of the Legislature in 1850 as section 4 of "An Act to Regulate Descents and Distributions." Stats.1850, p. 221. In endeavoring to arrive at the intent of that early Legislature in first enacting this particular provision it is important to as-

certain the general state of the law as embodied in the decisions of the courts of this country which before that date had construed statutes dealing with the descent of ancestral estates. It is significant that in 1850 the weight of authority was clearly in favor of the rule looking to the blood of the "last purchaser." In favor of such construction were decisions of the courts of Maryland, North Carolina and Pennsylvania. Stewart v. Evans, 1810, 3 Harr. & J., Md., 287; Stewart v. Jones, 1836, 8 Gill. & J., Md., 1; Wilkerson v. Bracken, 1842, 24 N.C. 315; Maffit v. Clark, 1843, 6 Watts & S., Pa., 258; Lewis v. Gorman, 1847, 5 Barr, Pa., 164. Taking the contrary view was a single decision of the United States Supreme Court construing a statute of Rhode Island. Gardner v. Collins, 1829, 2 Pet. 58, 7 L.Ed. 347. That this heresy from the common law on the part of the Supreme Court of the United States, which in 1850 stood alone against the prevailing weight of authority, has since become the fountain head of what is today the prevailing American rule, as noted in the dictum in Estate of Ryan, supra, 21 Cal.2d 498, 133 P.2d 626, is of little assistance in determining the intent of our Legislature in adopting in 1850 what is now section 254 Probate Code. At that time it seems more likely that the legislators would have accepted what was then the prevailing American view, rather than an isolated divergence from it. This conclusion is reinforced by the fact that, as noted in Estate of Ryan, supra, 21 Cal.2d 498, 133 P.2d 626, 635: "* * * section 254 is derived more particularly from the common law doctrine of ancestral estates, with a well defined meaning and historical background * * *." Under that doctrine of ancestral estates, which must have been well known to the legislators of 1850 when Blackstone's Commentaries was the Bible of the American lawyer, the blood of the "last purchaser" and not that of the immediate ancestor was looked to in casting the descent. Natural justice is also better served by such construction of what is at best an illogical statute. If choice must be made between the blood of an ancestor by whose industry the property was acquired and that of one to whom it came by the accident of birth or marriage, such reason as can be attributed to a capricious statute favors the choice of the blood of the one whose industry brought the property into the family line. It is worthy of remark that in the three states the courts of which before 1850 had announced the "last purchaser" rule, that rule has never been departed from: Sturgeon v. Hustead, 1900, 196 Pa. 148, 46 A. 377; Garner v. Wood, 1889, 71 Md. 37, 17 A. 1031; Poisson v. Pettaway, 1912, 159 N.C. 650, 75 P. 930.

[7] Sections 226 and 254 of the Probate Code are not out of harmony with the common-law rule. Section 226 provides that "If the decedent leaves neither issue, spouse, parent, brother, sister, nor descendant of a deceased brother or sister, the estate goes to the next of kin in equal degree * * *." Section 254 bases the exclusion of kindred of the half blood upon the contingency that the inheritance came to the intestate from "some one of his ancestors." This language was emphasized in the Ryan case where, at page 514 of 21 Cal.2d, at page 635 of 133 P.2d, the court said: "The word 'one' indicates that the exclusion is intended to operate only as to specific property which came from a specific ancestor and remained vested in the heir in kind until the time of his death, intestate." It would seem that this language is more particularly appropriate here where the question is the source of title rather than the character of the specific property. Manifestly both Thomas Knight and Serena Knight were each "one" of the ancestors of the decedent and the real property here involved concededly came to the intestate from both—first from Thomas to Serena, and then from Serena to the intestate. If the section had contained any language indicating an intention to limit the word ancestor to the immediate transferor to the intestate the controversy would be ended. But since the section admittedly relates to "ancestral estates" we must assume that the language was used in the light of the common-law rule relating to the "last purchaser." The Supreme Court having held in the Ryan case that section 254 is an adoption of the common-law rule of "ancestral estates" we conclude that the term "some one of his ancestors" used in that section is an adoption of the "fifth canon of descent" to wit: the ancestor "who brought the estate into the family."

[8,9] For these reasons we conclude that since appellant is of the blood of the ancestor of the decedent who was the "last purchaser" she is not excluded from participating in the realty under section 254 of the Probate Code. The rights of the re-

spondents under that particular section having been conceded we do not discuss or determine the application of the section to persons in their relation. But upon the case here made we hold that, the parties being "in the same degree of kindred to the decedent" they succeed to and share ratably in all the property of the estate under the provisions of section 226 of the Probate Code.

The decree is reversed.

SPENCE, J., and DOOLING, J., pro tem., concurred.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.



57 Cal.App.2d 968

WOODS v. WALKER et al.

Civ. 12440.

District Court of Appeal, First District, Division 2, California.

April 6, 1943.

Rehearing Denied April 6, 1943.

Hearing Denied June 3, 1943.

1. New trial ⇐70

The fact that there may have been sufficient evidence to justify denial of defendants' motion for judgment notwithstanding verdict was not conclusive on defendants' motion for a new trial.

2. New trial ⇐71

On motion for new trial, it was court's duty to weigh the evidence and to determine in its discretion whether a new trial should be granted on the ground of the insufficiency of the evidence, regardless of a substantial conflict therein.

3. Appeal and error ⇐977(3)
New trial ⇐6

Great latitude is given to trial court in passing on motion for a new trial, and its action in granting the motion is conclusive upon appellate court unless it clearly appears that there has been an abuse of discretion.

4. Appeal and error ⇐977(3)

On appeal from order granting defendants' motion for a new trial, question before appellate court is whether it clearly appears that trial court has abused its discretion.

5. New trial ⇐70

Where a finding in favor of either plaintiff or defendants upon issues of negligence and contributory negligence would have found ample support in the evidence, it could not be said that trial court had abused its discretion in granting defendants' motion for a new trial.

6. New trial ⇐70

The powers and duties with respect to weighing the evidence and determining motion for a trial are the same, regardless of whether motion is passed on by judge who tried the case, or by another judge.

7. Judgment ⇐272

Sections 629 and 664 of the Code of Civil Procedure contemplate the entry of a judgment immediately following the denial of a motion for judgment notwithstanding the verdict, and trial court's order staying entry of judgment pending appeal was not authorized. Code Civ.Proc. §§ 629, 664.

8. New trial ⇐10

Defendants' alleged request for a stay of entry of judgment pending appeal from order denying motion for judgment notwithstanding the verdict, and exercise of right of appeal from such order were not inconsistent with defendants' right to move for a new trial and did not constitute a "waiver" or "estoppel" with respect thereto. Code Civ.Proc. §§ 629, 659, 664.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel" and "Waiver".

9. New trial ⇐138

Notice of intention to move for a new trial was timely, where made within ten days after receipt of written notice of entry of judgment. Code Civ.Proc. § 659.

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

Action by Walter Woods against Eugene Walker and another. From an order granting defendants' motion for a new trial, the plaintiff appeals.

Affirmed.

Charles J. Janigian and James F. Brennan, both of San Francisco, and Charles A. Tuttle, of Auburn, for appellant.

T. L. Chamberlain and Gerald B. Wallace, both of Auburn, for respondents.

SPENCE, Justice.

This is an appeal by plaintiff from an order granting defendants' motion for a new trial in a personal injury action.

After the jury had returned a verdict in favor of plaintiff, defendants made a motion for judgment notwithstanding the verdict. The trial court entered its order denying said motion and staying the entry of judgment during the pendency of an appeal from the order. On that appeal, the order denying defendant's motion for judgment notwithstanding the verdict was affirmed. Woods v. Walker, 51 Cal.App. 2d 307, 124 P.2d 844. During the pendency of that appeal, plaintiff petitioned the District Court of Appeal for a writ of mandate to compel the clerk of the superior court to enter judgment on the verdict. A peremptory writ of mandate was subsequently issued in that proceeding commanding the clerk to enter judgment on the verdict nunc pro tunc as of October 3, 1941, being the date of the order denying defendants' motion. Woods v. Rechenmacher, 53 Cal.App.2d 294, 127 P.2d 614. Judgment on the verdict was entered on July 9, 1942, and was endorsed as recorded on October 3, 1941. Notice of the entry of said judgment was given on July 10, 1942. After the filing on June 18, 1942, of the remittitur on the appeal from the order denying defendants' motion for judgment notwithstanding the verdict but before the rendition of the decision of the District Court of Appeal on July 7, 1942, commanding the writ of mandate to issue, and before the actual entry of judgment, defendants served and filed on June 24, 1942, their notice of intention to move for a new trial. It is not contended that the notice of intention to move for a new trial was prematurely served and filed. (Code of Civil Procedure, sec. 659.) Owing to the illness of the judge who had tried the case, the motion for a new trial was heard and determined by another judge. The order granting the motion for a new trial was dated August 4, 1942, and was filed on August 5, 1942. It read "A new trial in the above cause is granted on all of the issues upon the ground of the insufficiency of the evidence to sustain or to justify the verdict and upon the further ground of errors in law occurring at the trial and excepted to by the defendants."

[1-3] In support of the order granting the motion for a new trial, defendants' main contention is that the order was justified upon the ground of the insufficiency of the evidence. Plaintiff discusses the evidence in some detail and states that the decision on the former appeal (Woods v. Walker, 51 Cal.App.2d 307, 124 P.2d 844) "clearly shows that the evidence was sufficient to justify the verdict." But the question involved on the former appeal was entirely different from the question involved here. On the hearing of defendants' motion for a new trial, the mere fact that there may have been sufficient evidence in the record to justify the denial of defendants' motion for judgment notwithstanding the verdict was not conclusive. It was the duty of the trial court on the hearing of the motion for a new trial to weigh the evidence and to determine in its discretion whether a new trial should be granted on the ground of the insufficiency of the evidence and in so doing, it was not bound by the fact that there may have been a substantial conflict in the evidence. As this court said in Anderson v. Dahl, 121 Cal.App. 198, at page 200, 8 P.2d 883 at page 884: "Appellant's main argument in support of his contention that the trial court erred in granting the motion is based upon a misconception of the function of the trial court in passing upon such motion. The argument proceeds upon the theory that because of the conflict the trial court could not weigh the evidence and exercise its discretion. This is not the rule in this state. The trial court is not bound by the rule as to conflicting evidence as is an appellate court, but it is its duty to weigh and consider the evidence of both parties and exercise its discretion in passing upon a motion for new trial. Great latitude is given to the trial court, and its action in granting the motion is conclusive upon an appellate court unless it clearly appears that it has abused its discretion." See also Glascock v. Watters, 136 Cal.App. 713, 29 P.2d 434.

[4, 5] Therefore the question before us is whether it clearly appears that the trial court abused its discretion in granting the motion for a new trial. The facts are sufficiently stated in the above-mentioned opinion on the former appeal. Admittedly there was a conflict in the evidence and

it appears entirely clear that a finding in favor of either plaintiff or defendants upon the issues of negligence and contributory negligence would have found ample support in the evidence. Under these circumstances it cannot be said that the trial court abused its discretion in granting the motion for a new trial.

[6] Plaintiff further contends that as the judge who heard the motion for a new trial was not the judge who tried the case, his powers and duties with respect to weighing the evidence and determining the motion were not the same as would have been the powers and duties of the judge who tried the case in the event that the latter had heard and determined the motion. But the authorities in this jurisdiction are all to the contrary. Jones v. Sanders, 103 Cal. 678, 37 P. 649; Wilson v. California C. R. Co., 94 Cal. 166, 29 P. 861, 17 L.R.A. 685; Miller v. Logan, 32 Cal.App. 28, 161 P. 1022.

Finally plaintiff makes several related contentions challenging defendants' right to move for a new trial at the time and under the circumstances that the motion was made in this case. It is contended that defendants waived their right to move for a new trial; that defendants waived notice of entry of judgment; that defendants are estopped to assert that they were not served with notice of entry of judgment on October 3, 1941; that defendants' notice of intention to move for a new trial, which was filed on June 24, 1942, was filed too late, despite the fact that no judgment was actually entered until July 9, 1942; and that the trial court was without jurisdiction to grant a new trial. We find no merit in any of these contentions. They are based largely upon plaintiff's construction of sections 629 and 664 of the Code of Civil Procedure and upon the decision in Woods v. Rechenmacher, 53 Cal.App.2d 294, 127 P.2d 614.

[7-9] A reading of said sections shows that they contemplate the entry of a judgment immediately following the denial of a motion for judgment notwithstanding the verdict; and a reading of said decision shows that the trial court's order staying the entry of judgment was unauthorized. But the fact remains that the judgment herein was not actually entered until July 9, 1942, and that notice of entry thereof was not served and filed until July 10, 1942. Defendants could have filed and did file their notice of intention to move for a new trial before the actual entry of judgment but their time for filing such notice did not expire until ten days after receipt of written notice of such entry. (Code of Civil Procedure, sec. 659.) We find nothing in the defendants' alleged request for a stay of entry of judgment or in defendants' exercise of their right of appeal from the order denying their motion for judgment notwithstanding the verdict which was inconsistent with their right to move for a new trial or which constituted a waiver or estoppel with respect thereto. We therefore conclude that defendants' notice of intention to move for a new trial was filed within the time allowed by law and that the trial court had jurisdiction to grant the motion.

The order granting a new trial is affirmed.

NOURSE, P. J., and DOOLING, J. pro tem., concurred.

Hearing denied; CARTER, J., dissenting.



57 Cal.App.2d 942

KRAMER v. MUSSER.

Civ. 12285.

District Court of Appeal, First District, Division 1, California.

April 5, 1943.

1. Fraud ⇐58(4)

In action by purchaser of apartment building against vendor to recover damages for alleged false representations in negotiation and sale that building was free from termites and dry rot, evidence sustained finding that purchaser relied on vendor's representations.

2. Fraud ⇐22(1)

Generally, where purchaser undertakes to investigate realty or truth of false representations concerning realty and proceeds with investigation without hindrance, it will be considered that purchaser went far enough to be satisfied with what he learned.

3. Fraud ⇐58(4)

Where it fairly appears from evidence that purchaser undertook to investigate for himself matters as to which false representations had been made, purchaser cannot later claim that he acted on the representations, even though he voluntarily abandoned his investigation before it was completed.

4. Fraud ⇐58(4)

In action by purchaser of apartment building against vendor to recover damages for alleged false representations in negotiation and sale that building was free from termites and dry rot, evidence sustained finding that purchaser was justified in relying on vendor's representations.

5. Appeal and error ⇐994(3), 1012(1)

Weight of evidence and credibility of witnesses are matters for trier of fact.

6. Appeal and error ⇐1008(1)

In action by purchaser of apartment building to recover damages for vendor's alleged false representations that building was free from termites and dry rot, whether there was deception to the extent of preventing a proper investigation was a question for the trier of the fact.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by R. O. Kramer against J. C. Musser to recover damages for false representations made in negotiation and sale of realty. From a judgment in favor of the plaintiff, the defendant appeals.

Judgment affirmed.

Heller, Ehrman, White & McAuliffe, of San Francisco, for appellant.

A. B. Bianchi, of San Francisco, for respondent.

WARD, Justice.

Plaintiff brought this action to recover damages for false representations made in the negotiation and sale to him of a parcel of real property, on which was erected a three-story building divided into four residential flats or apartments. The representations were that the building was free from termites and dry rot; that the entire roof was covered with new roofing material, and that the hot and cold water pipes in the plumbing system were of copper and brass respectively.

The trial court found that the representations as to the freedom of the building from termites and dry rot had been made as alleged; that they were false and that plaintiff relied on them in making the purchase. It awarded him damages in the sum of $1,350 on that account. It made no findings as to the truth or falsity of the remaining allegations. Defendant appeals from the judgment.

Resolving all conflicts in the evidence in favor of the court's findings the evidence may be summarized as follows: The sale was negotiated by a real estate broker. The plaintiff, a successful business man with some experience in real estate transactions, accompanied by Mrs. Leona Hurst and a Mrs. Maushardt—the latter an employee of the broker—visited the premises late in the afternoon of March 14, 1938, for the purpose of examining them. This examination was cursory and occupied little time owing to the failing light, and it was then arranged that a further and more thorough examination should be made. Accordingly, the above parties, accompanied by defendant, went out to the property on March 15th. On this occasion the defendant conducted the parties through the entire building, showing them each apartment, the roof and basement. At this examination plaintiff noticed that one of the hot water pipes, represented to be of copper, was fabricated of brass; also that there was some discoloration of the ceiling in one of the upper apartments, indicating perhaps a leak from the roof. In the basement were a number of lockers or small storerooms used in connection with the several apartments. With one exception these were locked, the exception being a locker used by the defendant, who occupied one of the apartments. Defendant opened this storeroom and stepped in, followed by Mrs. Hurst. This lady—who later testified at the trial as a witness for the plaintiff—described the locker as practically filled with miscellaneous articles including step-ladders, boards, old clothing and, at the far end, a covered box-spring mattress up-ended and leaning against the wall. Defendant explained that the articles therein were his personal property and that he would have them removed and the place cleaned up. No particular examination was made of this storeroom, and Mrs.

Hurst described the visit as cursory and rushed.

The sale was concluded, and a stort time later Mrs. Hurst, on revisiting this locker, discovered an opening in the wall 2½ x 6 feet in size, at the spot against which the box-spring mattress had been placed. Through this opening could be seen part of the foundation of the building, showing much dry rot, which subsequent examination showed to be quite extensive; and in addition it was observed that the foundation and other structural parts of the building were badly infected by termites. These matters were called to the attention of the defendant, who had been connected with the property for a great many years, and he, after the sale, admitted that he had knowledge of the existence of the dry rot in the structure as in the past he had had occasion to make repairs on that account. In respect of termites and dry rot, the plaintiff testified that at the time of the purchase he did not know of the falsity of the representations in that regard, and relied upon them, but he admitted that at the time the representations were made he was aware of the impossibility of determining the presence or absence of termites and dry rot without opening the walls or woodwork of the building and making an examination.

In his brief the appellant states that the questions for the court's determination are (a) does the evidence support the finding of the lower court that, in purchasing the property from appellant, respondent relied upon representations found to have been made by appellant, and (b) does one who inspects property without let or hindrance before purchasing rely upon representations made by the vendor?

[1] The evidence as related affords an inference that plaintiff relied upon the representations of defendant, and is sufficient to support the court's finding. Is plaintiff as a matter of law now prevented from saying that he placed reliance upon such representations? Or, stating the matter in another way, in view of his knowledge of the difficulty in ascertaining the presence of termites on the one hand, and on the other his opportunity for investigation, was he legally justified in relying upon defendant's representations?

In Carpenter v. Hamilton, 18 Cal.App. 2d 69, 62 P.2d 1397, it was represented that a house and garage were in good condition. The evidence in many respects proved to the contrary. The seller on appeal contended that the buyers did not rely upon his representations; that the property was inspected by them several times, and that the purchase was in fact made in reliance upon what was, or could with due diligence have been, seen. It was held that there was evidence from which the buyers must have had knowledge of the falsity of the representations.

[2-4] The law relative to actions for damages for fraudulent representations in the sale of real property is set forth in the Carpenter case, pages 71, 72, 73 of 18 Cal. App.2d page 1399 of 62 P.2d, as follows: "Upon the question of knowledge it is held, generally, that where one undertakes to investigate the property involved or the truth of the representations concerning it and proceeds with the investigation without hindrance, it will be considered that he went far enough with it to be satisfied with what he learned. Mr. Pomeroy says, in speaking of one who has undertaken to make an inspection of the property, 'The plainest motives of expediency and of justice require that he should be charged with all the knowledge which he might have obtained had he pursued the inquiry to the end with diligence and completeness. He cannot claim that he did not learn the truth, and that he was misled.' 2 Pomeroy's Equity Jurisprudence (3d Ed.) § 893. 'One ground of this latter branch of the rule is the practical impossibility in any judicial proceeding of ascertaining exactly how much knowledge the party obtained by his inquiry; and the opportunity which a contrary rule would give to a party of repudiating an agreement or other transaction fairly entered into, with which he had become dissatisfied.' Id. If it fairly appears from the evidence that the buyer undertook to investigate for himself the matters as to which representations had been made, he cannot be allowed to later claim that he acted upon the representations, even though he voluntarily abandoned his investigation before it was completed. But it is not to be understood that in all cases he will be precluded from proving that he relied upon the representations, nor does Mr. Pomeroy state that the rule is invariable. A buyer who chooses to make an inspection of the property does not in every case forfeit his right to rely upon the representations. There are exceptions. One exception relied upon by

plaintiffs is that a buyer is not required to employ experts to investigate matters of a technical nature as to which the seller has full knowledge and the buyer none, and if for this reason the investigation is incomplete, he may show that he relied upon the representations as to matters which he did not investigate. Dow v. Swain, supra [125 Cal. 674, 58 P. 271]; Stockton v. Hind, 51 Cal.App. 131, 196 P. 122; Fay v. Mathewson, 179 Cal. 318, 180 P. 939. This rule is not available to plaintiffs under the facts of the present case where common physical conditions alone were involved which any one was competent to see and understand. Another exception relied upon by plaintiffs is that a buyer is not chargeable with knowledge of conditions which he fails to discover because of some artifice or deception of the seller. Plaintiffs cannot invoke this rule for the reason that no artifice was used to forestall a complete investigation. * * * Situations which call for the measurement of conduct by the standards of ordinary care usually present questions of fact for the jury, but a question of law arises when the established facts lead to a single tenable conclusion."

[5] There appears to be some resemblance factually between the Carpenter case and the present, but there is sufficient dissimilarity which may be pointed out. In that case the condition of the floors and walls was open to view; not so in the case of "termites" as found here. The condition of the window frames in the Carpenter case could have been ascertained by slightly drawing aside the drapes, which did not constitute a hindrance to investigation. In the present case it was a question of fact for the trial court whether the box-spring mattress and miscellaneous articles were in fact a "hindrance" to a thorough examination of the premises, and whether, "by artifice," the hole in the wall had been concealed. In the Carpenter case the seller's statement with reference to termites was not believed, and the buyers employed a man to make an inspection, as the result of which, the seller, before the sale, agreed to pay a specified sum to rid the premises of dry rot and termites found by the inspector underneath the house. In the present case the purchaser did not know of the termite condition. In both cases suspicious circumstances might have aroused doubt or distrust. In the Carpenter case, pages 74, 75, 76 of 18 Cal.App.2d, page 1400 of 62 P.2d, the following appears: "In the exercise of the slightest diligence, they would have learned that termites had attacked the woodwork in the attic, a fact which became known to them after they entered into possession. * * * There were other conditions such as the sinking of the foundations and the old and patched condition of the roofs which plaintiffs could have discovered easily if they had made the slightest effort. * * * All of the means of knowledge were at hand. The true condition of the buildings was before them. If they neglected to discover what was in plain sight, the law will nevertheless charge them with knowledge of what they should have discovered. They cannot deny knowledge of the patent defects which existed in the parts of the buildings which they did examine. * * * Plaintiffs were not dissuaded from making a complete investigation by any artifice of defendant and they therefore cannot complain of conditions which they would have discovered if they had pursued their investigations to the end."

[6] The soundness of the judgment herein hinges upon whether evidence supports the conclusion reached by the trial court. Whether there was deception to the extent of preventing a proper investigation is a question of fact. Wells v. Lloyd, 21 Cal.2d 452, 132 P.2d 471. The weight of the evidence and the credibility of the witnesses were, of course, matters for the court's determination.

In Shearer v. Cooper, 21 Cal.2d 695, 134 P.2d 764, page 769, it was contended by appellant that the evidence showed that the purchaser relied upon his own investigation, and that, the seller having misrepresented one material fact, the buyer was not justified in relying upon other representations. The court there said: "The defendant cannot be heard to say that his voluntary admission of a mistake prior to the purchase must be deemed to have put the plaintiff on guard as to the truth of other representations. The purpose of the rule invoked by the defendant is to close the door to false claims of reliance by the purchaser. * * * Furthermore, it is not the law of this state that some examination made by the buyer will shield the seller from an action for damages. As was said in Dow v. Swain, 125 Cal. 674, 58 P. 271, 273, 'Every case must be judged for itself, and the circumstances which warrant or forbid relief cannot be scheduled. If the seller knows the facts (and to that should

be added, or if he represents them as known to him), and the buyer is ignorant, and to the knowledge of the seller the buyer relies upon the representations,' there is no reason why relief should not be granted, 'although an imperfect examination was made. It may have been imperfect because of the representations.' "

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concurred.



58 Cal.App.2d 163

KLASS et ux. v. EVANS, Building and Loan Com'r.

Appeal of HISE, Building and Loan Com'r.

Civ. 13930.

District Court of Appeal, Second District, Division 1, California.

April 14, 1943.

1. Appeal and error ⇐994(3), 1012(1)

The intrinsic value of testimony, the weight thereof, and credibility of witnesses is for trier of facts.

2. Husband and wife ⇐232(3)

In action by husband and wife against commissioner in charge of liquidation of Building & Loan Association to recover sum deposited by plaintiffs in connection with plaintiffs' offer to purchase hotel, evidence sustained finding that after first offer, signed by both spouses, was rejected, second offer, signed by husband alone, on which commissioner based claim of right to retain sum deposited, was, regardless of husband's statutory right to make second contract without wife's concurrence, conditioned on wife's concurrence entitling plaintiffs to recover such sum after wife's failure to so concur. Civ.Code, § 172.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Jacques Klass and his wife against Ralph W. Evans, as Building and Loan Commissioner of the State of California, acting as such in the liquidation of the Mutual Building & Loan Association, to compel defendant to return to plaintiffs a sum deposited by plaintiffs with defendant in his official capacity. From a judgment for plaintiffs, Harley Hise, as Building and Loan Commissioner of the State of California, appeals.

Affirmed.

George S. Dennison, of Los Angeles, and W. G. Harmon, of San Francisco, for appellant.

Sidney A. Moss, of Los Angeles, for respondent.

WHITE, Justice.

This action was commenced by plaintiffs, who are husband and wife, against the defendant as Building and Loan Commissioner of the State of California, acting as such in the liquidation of The Mutual Building and Loan Association. By their complaint plaintiffs alleged that on June 12, 1941, they submitted to defendant an offer for the purchase of the Lafayette Hotel situate in the city of Long Beach, County of Los Angeles; that pursuant to and in accordance with the provisions of said written offer plaintiffs deposited with defendant commissioner the sum of $6,250; that said offer to purchase was not accepted by defendant but that the latter refused, in his official capacity, to return to plaintiffs the said sum of $6,250 and retained it in his possession.

By his answer defendant denied that the aforesaid sum was paid to him pursuant to the offer to purchase made by plaintiffs on June 12, 1941, and by way of affirmative defense, the answer alleged that said sum was received pursuant to another agreement to purchase executed June 19, 1941, by plaintiff Jacques Klass for the purchase of the Lafayette Hotel and also certain vacant property adjacent thereto; that said plaintiff Jacques Klass failed and refused to perform his said agreement of June 19th, and that the money in question was, in accordance with the terms and provisions of such agreement, retained by defendant commissioner.

[1] Briefly epitomizing the evidence in a light most favorable to plaintiffs and to sustain the findings made by the court, the record reflects that on June 12, 1941, both plaintiffs, who as heretofore noted were husband and wife, signed a written offer

to purchase the Lafayette Hotel property but not including the adjoining vacant property. Pursuant to the agreement plaintiffs deposited with defendant commissioner the sum of $6,250. This offer to purchase was rejected by defendant, but the deposit money was not returned to plaintiffs. The rejection of plaintiffs' offer took place on June 19th and was made known by defendant to plaintiff Jacques Klass only when he called at defendant commissioner's office to inquire concerning the acceptance of the offer of June 12th. Upon this occasion a discussion ensued between Mr. King, an employee of the commissioner, and plaintiff Jacques Klass concerning a new proposal made by said plaintiff to Mr. King, whereupon the latter prepared in writing an offer for the purchase of the hotel as well as the adjoining vacant property. According to plaintiff Jacques Klass, he at that time demurred to signing the new proposal to purchase, his testimony in that regard being: "Then Mr. King said 'You sign here' and I said 'Well, I will have to consult Mrs. Klass on that, I will have to have her signature'. He said 'That is not necessary now'." However, the witness signed the new proposal. Mr. Klass further testified in reference to a conversation had on June 19th with special deputy Building and Loan Commissioner McNitt, in charge of the Los Angeles office: "He (Mr. McNitt) suggested that I make a minimum offer. Of course, that minimum offer was contingent upon certain conditions upon my part, whether I wanted to talk it over with my wife." It should here be noted that Mrs. Klass was not present at the conference of June 19th and never did sign the offer of that date to purchase the hotel and the vacant property adjoining it. On June 20, 1941, defendant commissioner addressed a letter to both plaintiffs advising in part that the hearing "on your offer to purchase property located at 140 Linden Avenue, Long Beach, is July 3, 1941, at 10 a. m., in Department 34 of the Superior Court. * * * You or your representative are at liberty to be present". Plaintiff Jacques Klass attended the hearing at which the court authorized the sale of the hotel and the vacant lot in accordance with the offer to purchase signed by Mr. Klass alone on June 19th. Thereafter defendant commissioner forwarded to plaintiffs certain escrow papers including a "statement of identity" and this statement was signed by both plaintiffs. Plaintiff Klass testified that at the time he received the letter of June 20th with reference to the court confirmation proceedings "I did not know the court hearing referred to was not in connection with the offer of June 12th". Plaintiff husband also testified: "I went to see Mr. McNitt (Special Deputy Commissioner) between July 3rd and July 20th and asked him why he put through the memorandum agreement that he had and he told me that I had accepted that offer and that they had accepted it. I told him that I never accepted the offer of June 19th; that it was contingent upon taking the matter up with Mrs. Klass; and that I was only interested in the first offer because Mrs. Klass was not agreeable to the other." About July 10th plaintiff husband had a conversation with Special Deputy Commissioner McNitt about which he testified as follows: "I told Mr. McNitt I couldn't possibly go through with that offer, including the lot, because Mrs. Klass objected to it, and I explained the objection, the extra amount involved. Mr. McNitt said he would see what could be done about it". True, there was testimony contradicting some of the evidence herein narrated but under familiar rules, the intrinsic value of testimony, its weight and the credibility of witnesses must be left to the trier of facts.

The trial court found that plaintiffs deposited the $6,250 pursuant to their jointly signed and original offer of June 12, 1941, to purchase the hotel property alone; and that such sum was not paid in connection with or pursuant to the terms of the agreement to purchase of June 19th signed only by plaintiff Mr. Klass, and which involved the purchase of both the hotel property and the adjacent vacant lot. The court further found that the last mentioned agreement to purchase was conditioned upon the concurrence of the plaintiff wife, and that the latter never concurred or acquiesced therein, and that the minds of plaintiffs and defendant had not mutually met. It was further found that defendant never accepted the agreement of June 19, 1941, for the purchase of the hotel and lot, and that defendant commissioner never accepted the money pursuant thereto.

From the judgment in favor of plaintiffs for the recovery by them of the sum of $6,250 with interest, defendant prosecutes this appeal.

It is agreed by all parties to the appeal that the major question, if not the sole

question here presented, is whether there was substantial evidence to support the finding that the $6,250 was deposited by plaintiffs with defendant commissioner in connection with the original offer of June 12th signed jointly by both plaintiffs, and not in connection with the offer of June 19th signed only by plaintiff husband.

As to the date when the money was received by defendant commissioner there was positive testimony that the sum was delivered to him on June 12th, the date the check therefor bears, and contemporaneously with the written offer to purchase of that date. It would challenge reason in view of the testimony herein, both oral and documentary, to assume that the money was not originally deposited in connection with the jointly signed agreement of June 12th. The evidence also clearly establishes the fact that the original offer to purchase was rejected by defendant commissioner. In connection with the second offer to purchase, it should be borne in mind that the first offer, which was signed by both the husband and wife, referred to the purchase of the hotel property only. When that offer was refused plaintiffs were entitled to a return of their deposit; unless the minds of all parties met upon a new proposal under date of June 19th. It is also significant that the last mentioned offer called for a delivery of the property by deed in the name of both plaintiffs; was for property in addition to that mentioned in the first agreement and called for a greater consideration than did the first offer to purchase. Yet Mrs. Klass, one of the parties to the first agreement and at least a part owner of the money deposited, did not sign the second offer of June 19th, and there is not a scintilla of evidence that she knew anything about it until after it was signed by her husband. There is very substantial evidence, however, to support the finding of the trial court that the offer of June 19th was a conditional one, made by plaintiff husband, delivered conditionally by him upon the assumption and understanding that it would not become effective until the plaintiff wife concurred therein. This she never did. In fact her husband testified that she objected and refused to agree thereto. The evidence, including defendant commissioner's petition for confirmation by the superior court of the offer to purchase and sale thereunder, clearly negatives his contention that he was concerned in the second offer with a transaction involving only the husband, and with equal clarity indicates that the transaction was one which to his mind involved both the husband and wife. The court was therefore justified in finding that the contract of June 19th did not become a complete binding contract between defendant commissioner and the plaintiff husband.

We deem it unnecessary to discuss appellant's contention that insofar as he was concerned respondent Mr. Klass, being a married man, was entitled to make the contract of June 19th without the concurrence or acquiescence of his wife by reason of his right to manage and control the community property as well as his absolute power to dispose of it without his wife's consent (sec. 172, Civil Code). Be that as it may, the fact remains that there is evidence to support the court's finding that the offer to purchase made by the husband on June 19th was a conditional one, dependent upon the concurrence and acquiescence of the wife therein and that the minds of all the parties, involved and intended to be involved in the transaction of June 19th, never met. While the defendant commissioner's two letters of June 20th may tend to show that in his mind there was the thought of thereby accepting the agreement of June 19th, nevertheless such communications referred to "their" offer but the record shows that the only offer made by both respondents was the one of June 12th and plaintiff husband contended in the trial court that it was always his belief that the letters of June 20th referred to such first and only offer which "they" (both plaintiffs) made.

[2] Appellants claim that the finding of the court that defendant husband never paid $6,250 in connection with the offer of June 19th "is demonstrably and by respondent's brief, admittedly without support in the evidence" cannot be upheld because there is evidence in the record to support a conclusion on the part of the trial court that if the husband did make a deposit of $6,250 in connection with the offer of June 19th, he did so conditioned upon the concurrence and acquiescence of the wife, and there is substantial evidence that the latter never concurred or acquiesced in such offer and in fact objected to and refused sanction of it. In other words, the deposit, like the agreement of June 19th, was conditional and never completely or fully made. Both law and good con-

science therefore dictate the legality and justice of the trial court's decision requiring defendant commissioner to return to plaintiffs the sum of $6,250 involved in this litigation.

For the foregoing reasons the judgment is affirmed.

YORK, P. J., and DORAN, J., concurred.



58 Cal.App.2d 303

REUMAN et al. v. LA MONICA et al.

Civ. 3217.

District Court of Appeal, Fourth District, California.

April 20, 1943.

1. Negligence ⇐12

One who, in a sudden emergency, acts according to his best judgment, or who, because of want of time in which to form a judgment, omits to act in the most judicious manner, is not chargeable with "negligence", provided he exercised in the emergency the care of a reasonably prudent individual under like circumstances.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence".

2. Negligence ⇐12

One who is subject to the sudden peril rule is required to act as a reasonably prudent person would act under similar circumstances.

3. Appeal and error ⇐977(3)
New trial ⇐6

Trial court is vested with discretion in passing on motion for new trial, and court's exercise of such discretion will not be disturbed on appeal without showing of manifest abuse thereof, especially where motion has been granted.

4. New trial ⇐39

Where trial court, in action arising out of collision involving four automobiles at intersection, gave instructions defining standard of care required of defendant driver who found himself suddenly confronted with imminent peril, as requiring such driver to do the best such driver could do under the circumstances to avoid accident, granting plaintiffs' motion for new trial was not an abuse of discretion.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Action by Cliff F. Reuman and others against John La Monica and others for damages arising out of an automobile collision. Verdict for defendants. From an order granting new trial, defendants appeal.

Affirmed.

Spray, Davis & Gould, of Los Angeles, for appellants.

Jennings & Belcher, of Los Angeles, for respondents.

MARKS, Justice.

This is an appeal from an order granting a motion for new trial because of prejudicial error in instructions to the jury.

The case grew out of a motor vehicle collision which occurred on Grand Avenue, near its intersection with Washington Avenue, in the City of Santa Ana, California, at about two o'clock on the afternoon of December 7, 1941. The day was clear and the pavement was dry.

Grand Avenue runs north and south. It has an eighteen foot asphalt pavement in its center with a macadam shoulder eight feet wide on the east side, and another six feet on the west side of the pavement. There is also a dirt shoulder on the east side of the macadam strip.

Washington Avenue runs east and west and dead-ends in Grand Avenue. It is paved to a width of about thirty-three feet. There is a boulevard stop sign on Washington Avenue near the intersection.

Just before the collision Cliff F. Reuman was driving his automobile north on his right hand side of Grand Avenue at a speed of about twenty-five miles an hour. The other plaintiffs were riding with him. He saw two automobiles approaching the intersection from the north. The car nearest him was being driven by Perry Cook and the other by defendant John La Monica. A third car, described as a Ford with red wheels, entered the intersection

from Washington Avenue without making a stop and made a turn into Grand Avenue. Reuman reduced the speed of his car and swerved to his right. At the time of the collision it was still south of the intersection traveling at a speed of not more than ten miles an hour if it had not stopped, and it is probable that its right wheels were on the dirt shoulder. The La Monica car swerved around the left side of the Cook car, skidded eighty-four feet and crashed into the left front of the Reuman automobile, injuring plaintiffs.

Cook testified that he was driving south on Grand Avenue at a speed of not more than forty miles an hour with the La Monica car following him; that when he was about sixty feet north of the intersection he saw the red-wheeled Ford enter it; that he immediately applied the brakes of his car and stopped it a little less than forty feet south of the intersection with the red-wheeled Ford immediately in front of it.

Cook further testified that there was some loose gravel on the pavement and shoulders near the intersection; that when he applied his brakes the La Monica car went down Grand Avenue to his left and skidded across the street into the Reuman car.

La Monica testified that he was following the Cook car south on Grand Avenue at a distance of about seventy-five feet to its rear at a speed of from 35 to 40 miles an hour; that when he saw the Cook car slow down suddenly he applied the brakes on his automobile; that it skidded down and across the street into the Reuman car.

There is also evidence to the effect that there was a mechanical defect in the construction of the braking system of the model car La Monica was driving which would cause the brakes on the front wheels to lock when they were fully and suddenly applied; and when the brakes on the front wheels were locked the driver could not control the course of the car.

The jury returned a verdict for defendants and the trial judge granted a new trial because of two instructions given at the request of defendants.

The first of these instructions dealt with sudden emergency and concluded as follows: "* * * and you further believe that the defendant John La Monica, while exercising ordinary care himself, was suddenly confronted with a situation of imminent peril and that he did the best he could under the circumstances to avoid the accident, then I instruct you he was not guilty of negligence, and if you so find, your verdict in this case must be in favor of the defendants."

The second instruction dealt with sudden peril and concluded as follows: "You must consider only whether or not, after he found himself suddenly in a position of peril, he did the best he could, or exercised that degree of care in meeting the emergency which an ordinarily prudent person would have exercised. I therefore instruct you that if the defendant John La Monica while exercising ordinary care was suddenly confronted with a situation of danger and did the best he could under the circumstances to avoid the accident, then he was not guilty of negligence."

Both of these instructions contain the same vice in defining the standard of care required of La Monica under the conditions. They required him to do "the best he could under the circumstances to avoid the accident."

[1] The true rule to be applied in both instances is set forth in 38 American Jurisprudence, at page 686, as follows: "Acts in Emergency or Sudden Peril.—The prudence and propriety of an action are not to be judged by the event but by the circumstances under which it was done. The rule, as stated generally, is that one who, in a sudden emergency, acts according to his best judgment, or who, because of want of time in which to form a judgment, omits to act in the most judicious manner, is not chargeable with negligence, provided he exercised in the emergency the care of a reasonably prudent individual under like circumstances."

[2] An instruction quite similar in legal effect was held erroneous in Van Fleet v. Heyler, 51 Cal.App.2d 719, 125 P.2d 586, 593, where it was said: "As a statement of the sudden peril rule this instruction is erroneous. It excuses the defendant if he used his best judgment and followed the course of action which seemed to him best suited to prevent a collision. One who is subject to this rule is required to act as a reasonably prudent person would act under similar circumstances. 19 Cal.Jur. 598; Mortensen v. Fairbanks, 1934, 1 Cal.2d 489, 492, 35 P.2d 1030. The instruction sets up quite a different standard."

Carnahan v. Motor Transit Co., 65 Cal. App. 402, 224 P. 143; Allwein v. Asbury

Truck Co., 116 Cal.App. 736, 3 P.2d 320; and Mortensen v. Fairbanks, 1 Cal.2d 489, 35 P.2d 1030, are to the same effect.

[3] The trial court is vested with a discretion in passing on a motion for new trial and the exercise of this discretion will not be disturbed on appeal without a showing of a manifest abuse of such discretion. This is especially true where the motion has been granted so that the issues of fact may again be tried. Prescott v. City of Orange, 56 Cal.App.2d 144, 132 P. 2d 523; Lasch v. Edgar, 46 Cal.App.2d 726, 116 P.2d 949; Nance v. Fresno City Lines, Inc., 44 Cal.App.2d 868, 113 P.2d 244; Olinger v. Pacific Greyhound Lines, 7 Cal.App.2d 484, 46 P.2d 774.

[4] We have studied the entire record and can find no abuse of discretion on the part of the trial judge in granting the motion for new trial.

The order appealed from is affirmed.

BARNARD, P. J., and GRIFFIN, J., concurred.



57 Cal.App.2d 954

PALOMAR REFINING CO. v. PRENTICE

Civ. 3066.

District Court of Appeal, Fourth District, California.

April 5, 1943.

Hearing Denied June 3, 1943.

1. Depositions ⇐54

An order changing the place of taking deposition will not be disturbed unless the action taken is unreasonable, since the law permits the court to exercise reasonable control over its process.

2. Depositions ⇐54

An order changing the place of taking deposition of one of plaintiff's officers from a place about 90 miles from the plaintiff's offices to city where the officers were located was not unreasonable.

3. Continuance ⇐26(11), 33

Defendant's application for continuance of action on open account on ground that a deposition sought by defendant had not been taken was properly overruled, where after order was made changing the place of taking deposition defendant had taken no further action and plaintiff's affidavit in support of motion for change contained an offer to produce all records for defendant's use and inspection at the trial.

4. Continuance ⇐52
Judgment ⇐365

Defendant's motion to vacate an order denying a continuance and to vacate judgment entered against him in action on open book account, on ground that on date set for trial his attendance was required in another court, was properly denied, where defendant made no effort to have the dates of either proceeding changed, and it was not shown that he would have been unsuccessful had he done so.

5. Continuance ⇐52
Judgment ⇐344

Trial court should be vested with reasonable discretion in passing on motions to vacate order denying continuances and motions to vacate judgment.

6. Pleading ⇐236(5)

Permitting an amendment to a complaint to conform to the proof is within the discretion of the trial court.

7. Pleading ⇐236(5)

Permitting plaintiff in action on open book account to amend its complaint to conform to the proof was not an abuse of trial court's discretion.

8. Appeal and error ⇐616(1)

Where all the documents relied on by defendant for a reversal of judgment are contained in clerk's transcript which is not certified by the trial judge, they form no proper part of the transcript and there is no record before the District Court of Appeal.

Appeal from Superior Court, Kern County; William L. Bradshaw, Judge.

Action by Palomar Refining Company, a corporation, against B. H. Prentice on an open book account. Judgment was entered for plaintiff and from an order denying a new trial, defendant appeals.

Affirmed.

B. H. Prentice, in pro. per., for appellant.

Brittan & Mack, of Bakersfield, for respondent.

MARKS, Justice.

This is an appeal from a judgment against defendant in the sum of $377.43 on an open book account.

The complaint in this action was filed August 28, 1940. Defendant appeared by demurrer and also attempted to change the place of trial from Kern County to Los Angeles County. An appeal from the order refusing to change the place of trial was dismissed. Palomar Refining Co. v. Prentice, 47 Cal.App.2d 572, 118 P.2d 322.

Defendant's demurrer to the complaint was overruled and he was given fifteen days in which to answer. Notice of this ruling was served on him by mail on October 31, 1940. He failed to answer and his default was entered on November 20, 1940. Default judgment was taken against him on November 26, 1940. His motion to set aside the default and the default judgment, and to permit him to answer, was granted on February 10, 1941.

Defendant's answer, denying that any sum was owed plaintiff, was filed on March 8, 1941.

The cause was set for trial for January 13, 1942. On December 19, 1941, defendant filed his motion to continue the time of trial to a future date. This motion was granted on December 22, 1941, and the cause was set for trial for March 2, 1942.

Defendant gave notice of taking the deposition of Seth Turner, an officer of plaintiff, at Boron, California, on February 24, 1942, and obtained a subpoena duces tecum requiring Turner to produce all of the records of plaintiff that pertained to the account sued upon at the time and place set for taking the deposition. Boron is situated on the desert between ninety and one hundred miles from Bakersfield.

Plaintiff moved to quash and recall the subpoena and to change the time and place of taking the deposition. The subpoena was recalled and the place of taking the deposition was changed from Boron to Bakersfield and notice of taking it was shortened to one day prior to February 26th, the date fixed. Notice of this order was served on defendant by mailing it in Bakersfield on February 21, 1942. The order required plaintiff to produce the required records before the notary in Bakersfield. Defendant took no further action and the deposition was not taken.

On February 28, defendant filed the following written request for a further continuance of the trial:

"Defendant, B. H. Prentice, hereby respectfully requests that the trial of the above action as to him, which has been heretofore set for March 2, 1942, at the hour of 10:00 o'clock A. M., of said day, be continued, on the ground that this defendant has been denied the right to have the deposition of an officer of the plaintiff corporation taken prior to trial and has been deprived of the right to properly prepare his defense." This request was supported by a lengthy affidavit made by defendant.

Defendant did not appear either in person or by counsel at the trial. The trial court denied the application for a continuance, took evidence, and rendered judgment for plaintiff. At the close of the evidence the trial court granted the motion of counsel for plaintiff to amend the complaint by interlineation to conform to the proof. The complaint alleged a debt of $361.02 while the evidence showed the correct amount to be $377.43.

Defendant moved to vacate the order denying a continuance and the judgment. This motion was supported by an affidavit of defendant disclosing, for the first time, that he had appeared as complaining witness in a criminal case in the Justice's Court in Redlands, California, on February 26, 1942; that he had been arrested for violation of the Wage Payment Law of California and had been cited to appear for arraignment before the Municipal Court at San Diego on March 2, 1942; that he did so appear and entered a plea of not guilty.

The motion to vacate the order and judgment was denied. Defendant moved for a new trial, relying on much the same grounds. That motion was also denied and this appeal followed.

Defendant presents numerous grounds upon which he urges a reversal of the judgment. They may be consolidated under the following headings: (1) Purported error in changing the place and time for taking the deposition. (2) Purported error in denying the application for continuance. (3) Purported error in denying the motion to vacate the order denying the continuance and the judgment and in denying the motion for new trial. (4) Purported error

in granting the motion to amend the complaint to conform to the proof.

[1, 2] The law permits a court to exercise reasonable control over its process, and an order such as we have before us will not be disturbed unless the action taken is unreasonable. Hays v. Superior Court, 16 Cal.2d 260, 105 P.2d 975; Patrick Farms, Inc., v. Superior Court, 13 Cal.App.2d 424, 56 P.2d 1283. The action taken by the trial court seems to us to have been entirely reasonable. The only unreasonable factor about this phase of the case is the attempt of defendant to compel counsel for plaintiff, and one of its officers, to journey far into the California desert with the company books to take this deposition when we may take judicial notice that there are many notaries public in Bakersfield before whom the deposition could have been taken.

[3] Defendant's application for a continuance was based solely upon the ground that the deposition of Turner had not been taken. What we have already said would seem to dispose of this matter, as the responsibility for the failure to take the deposition must rest on defendant. Further, it should be noted that in an affidavit filed in support of plaintiff's motion to recall the subpoena, and to change the time and place of taking the deposition, there was an offer to have Turner produce all the company records pertaining to the transactions with defendant, for inspection and use by defendant at the trial. This affidavit was served on defendant and no good reason is made to appear why defendant could not have made use of these records and have availed himself of the testimony of this witness at that time in support of any defense he might have had. There was no error in denying this application. No prejudice is shown as the books and records were available to defendant. See, Patrick Farms, Inc., v. Superior Court, supra.

[4, 5] We can find no error in denying the various motions made by defendant after the judgment was rendered. The defendant then disclosed, for the first time, that he was a witness in the Justice's Court in Redlands on February 26th, the date set for the deposition; and that he had to be present in the Municipal Court in San Diego on March 2nd to enter a plea in a criminal case brought against him. There is no suggestion that he made any effort to have the dates of either of these other proceedings changed or that he would have been unsuccessful had he done so. He made his own choice of the forums in which he desired to appear without disclosing the actual facts to the court below until after judgment had gone against him. The trial court should be vested with a reasonable discretion in passing on motions made on these grounds, and we can see no breach of discretion in the action taken here. It must have occurred to the trial court, as it occurs to us, that defendant had succeeded in postponing the finality of a small but apparently just judgment against him for a long time.

[6, 7] There was no error in permitting plaintiff to amend its complaint to conform to the proof. Permitting such an amendment is within the discretion of the trial court and there was no abuse of discretion here.

[8] There is another compelling reason why the judgment must be affirmed. Practically all of the documents relied on by defendant for a reversal of the judgment are contained in the clerk's transcript which is not certified to by the trial judge. They form no proper part of the clerk's transcript so there is really no record before us to support the various arguments made by defendant. Stoltenberg v. Harveston, 219 Cal. 406, 26 P.2d 833; Kwon v. Kwon, 39 Cal.App.2d 232, 102 P. 2d 808; Tarvin v. Davey, 56 Cal.App.2d 846, 133 P.2d 844. Regardless of this fact, we have considered the various points presented by defendant as he is appearing here in propria persona as he did in the court below, and is not represented by counsel. We deem it the wise course to decide the case on its merits as well as on the technical ground of the insufficient record so that defendant may not feel that he has been deprived of his day in court by his own lack of knowledge of proper appellate procedure.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concurred.

58 Cal.App.2d 174

SHIPPEY v. SHIPPEY.

Civ. 14021.

District Court of Appeal, Second District, Division 2, California.

April 14, 1943.

1. Divorce ⇐312

Trial judge's refusal to listen to testimony of divorced wife who had been awarded full custody of child, before granting husband's motion for an order permitting him to have custody of the child on alternate weekends, was prejudicial error.

2. Trial ⇐29(1)

In a nonjury trial, trial judge should not pre-judge issues but should keep an open mind until all evidence is presented to him, and should refrain from forming an opinion on issues of fact until case is finally submitted.

W. J. WOOD, J., dissenting.

Appeal from Superior Court, Los Angeles County; Hon. Wm. S. Baird, Judge.

Action for divorce by Ida Venita Shippey against Clarence Basil Shippey. The plaintiff obtained a divorce and was awarded sole custody of a minor child of the parties. Thereafter defendant filed a motion for an order to obtain custody of the child at certain times. From an order permitting defendant to have custody of the child on alternate weekends, the plaintiff appeals.

Order reversed, and cause remanded for further proceedings.

Vernon W. Hunt, of Los Angeles, for appellant.

A. N. Minton, Carl W. Minton, and Hahn, Graf & Ross, all of Los Angeles, for respondent.

McCOMB, Justice.

This is an appeal from an order permitting defendant to have the custody of his minor son, of whom plaintiff is the mother, on alternate week-ends.

The essential facts are these:

May 13, 1937, defendant obtained a divorce from plaintiff in the State of Nevada. By the decree of divorce the sole custody and control of the minor son of the parties was awarded to plaintiff in the present action, with the right on the part of defendant to see said child at all reasonable times and places, provided that he had regularly paid to plaintiff each week the sum of $15 for the maintenance of plaintiff and their child.

May 13, 1940, plaintiff herein instituted an action for the purpose of obtaining a divorce from defendant. Subsequently an amended complaint was filed alleging the Nevada divorce decree and asking that it be established as a decree of the Superior Court. Thereafter, pursuant to stipulation of the parties, a decree was entered establishing the Nevada decree and specifically making the following order: "That the plaintiff, Ida Venita Shippey, shall be and is hereby awarded the sole and exclusive care, custody and control of said minor child, Clarence Basil Shippey, Jr., with the right on the part of the defendant, Clarence Basil Shippey, to see said child at all reasonable times and places, provided always that hereafter said defendant shall regularly and promptly pay the said weekly sum of $15.00 or such other sum as may be awarded hereafter, for the maintenance of the plaintiff and said minor child."

November 9, 1942, pursuant to notice, defendant made a motion in the trial court asking for an order "declaring and establishing the right of defendant to visit the minor child of the parties", and to fix the hours of visitation.

At the hearing, defendant, after being duly sworn, testified that he had remarried. He also testified relative to the conditions surrounding his present home, and that he was in arrears in payments of alimony to plaintiff in the sum of $265.

At the conclusion of his testimony and after refusing to hear testimony of plaintiff, the trial judge made an order permitting defendant to take his son to his home every other week-end.

[1] This is the sole question necessary for us to determine:

Was it prejudicial error for the trial judge to refuse to listen to the testimony of plaintiff before reaching a decision upon the motion presented for his consideration?

This question must be answered in the affirmative. After Mr. Hunt, attorney for plaintiff, had indicated that he had completed the cross-examination of defendant, who had testified in support of his motion, the following transpired:

"The Court: Well you keep up your payments for the child and you make the $10.00 payment on the arrearage, and then you may have the child every other week-end.

"Mr. Hunt: If your Honor please, may we be heard on that?

"The Court: You may, but it won't change my mind any.

"Mr. Hunt: I would like to be heard, if your Honor please. We have another side to it.

"The Court: What?

"Mr. Hunt: The decree; the decree does not provide that he shall take the child.

"The Court: I don't care what the decree provides. This Court rules as to the disposition of children; as far as that is concerned this Court has the last say.

"Mr. Hunt: If your Honor please, this man does not ask leave to take the child away.

"The Court: I know, and I am going to let him have the child, as long as he is paying for it.

"Mr. Hunt: He has been in default. I would like your Honor to hear the circumstances under which this situation has come about.

"The Court: I don't think so. What he has done in the past is gone. He is paying her now for his arrears. He is going to have the child every other week-end. When do you want it?

"The Defendant: I would like to have the child from 5:00 o'clock Friday afternoon until—I could take him back Monday morning on the way to work, every Monday morning, as I ride right by there.

"The Court: The boy goes to school?

"The Defendant: That is right. I would get him right back home at 7:00 o'clock every Monday morning.

"Mr. Hunt: If your Honor please, may we have some testimony from Mrs. Shippey on that?

"The Court: About what?

"Mr. Hunt: On the circumstances and the reasons he should not be permitted to take the child?

"The Court: No, I don't care to hear her reasons unless she has something to show his home is unfit; then she can do that.

"Mr. Hunt: We are not contending anything morally unfit, no, but I am claiming, if your Honor please, there are certain circumstances such as, the mother wanting the child to go to Sunday school, things of that sort, and he won't go very much under the circumstances existing there. That child should be in Sunday School where it belongs.

"The Court: I know.

"Mr. Hunt: Furthermore, the child has come from there ill on occasions. That is, after it has been with this party before on occasions, he has come home ill.

"The Court: I will give him another chance, that is, on Friday, commencing next Friday, afternoon. That is all."

The trial judge was in error in not permitting plaintiff to present testimony relevant and competent to the issues presented by the motion, one of which was, whether it was for the best interest of the minor child for defendant to be permitted to take his son home with him on alternate week-ends. Evidence regarding the conditions at defendant's home which might affect the child's health was of course relevant and competent to such issue.

We are fully cognizant of the press of business presented to the judge who presides over the domestic relations department of the superior court of Los Angeles County, and highly commend his efforts to expedite the handling of matters which come before him. However, such efforts should never be directed in such manner as to prevent a full and fair opportunity to the parties to present all competent, relevant, and material evidence bearing upon any issue properly presented for determination.

[2] Matters of domestic relations are of the utmost importance to the parties involved and also to the people of the State of California. This is especially so where the custody of a minor child is involved. Such children are the future citizens of this State and it is impossible to exercise too much care in the selection of the persons who are to care for and guide them during their period of infancy. It is likewise extremely important that they be provided with the best surroundings of which the circumstances permit. To this end a trial judge should not determine any issue that is presented for his consideration until he has heard all competent, material, and relevant evidence the parties desire to introduce. This rule is accurately stated by Mr. Justice Wood in Rosenfield v. Vosper, 45 Cal.App.2d 365, 371, 114 P.2d 29, 33,

thus: "A trial judge should not pre-judge the issues but should keep an open mind until all of the evidence is presented to him. When issues of fact are submitted to a jury for determination it is made the duty of the judge to admonish the jurors at each separation that 'it is their duty not to form or express an opinion thereon until the case is finally submitted to them.' Code Civ.Proc., § 611. In the case under review the trial judge took the place of the jury as a trier of the issues of fact. * * * These matters constituted issues of fact and the trial judge, like the jurors in a jury trial, had the duty to refrain from forming an opinion on such issues until the case was finally submitted to him."

For the foregoing reasons the order is reversed and the cause is remanded to the trial court for further proceedings in conformity with the views expressed above.

MOORE, P. J., concurs.

W. J. WOOD, Justice.

I dissent. The conduct of the hearing by the trial court is doubtless subject to criticism, but in my opinion no errors were committed which justify a reversal of the order.



58 Cal.App.2d 37

PEOPLE v. FLEMING.

Cr. 3664.

District Court of Appeal, Second District, Division 1, California.

April 8, 1943.

Hearing Denied May 7, 1943.

1. Criminal law ⇐1159(5)

Where there was substantial evidence to support a finding that defendant was guilty of rape and kidnapping testimony in support of defendant's alibi served only to create a conflict in evidence and to present a jury question, the determination of which could not be disturbed on appeal.

2. Criminal law ⇐1159(2)

An appellate court cannot disturb findings of jury on ground of claimed insufficiency of evidence unless it clearly appears that upon no hypothesis is there sufficient substantial evidence to support conclusion reached.

3. Criminal law ⇐566

Evidence identifying a defendant as perpetrator of crime charged need not be positive and uncontradicted to sustain a conviction.

4. Criminal law ⇐1159(2)

Where there is evidence that a crime has been committed and that defendant was perpetrator thereof, appellate court will not attempt to determine weight of evidence, but will determine only whether from a consideration thereof it can be held that sufficient facts could not have been found existent therein by jury to warrant inference of guilt.

5. Criminal law ⇐737(1)

Determination of what facts are established by evidence is function of jury in first instance and of trial court after verdict. Code Civ.Proc. §§ 1847, 2061.

6. Criminal law ⇐1159(2)

When circumstances reasonably support or justify verdict, belief or opinion of appellate court that such circumstances might also be reasonably reconciled with innocence of defendant does not authorize interference with determination arrived at by jury.

7. Criminal law ⇐553

Before testimony can be strictured as "inherently improbable" or unbelievable per se, it must appear therefrom that something has been done which could not possibly be done under circumstances described.

See Words and Phrases, Permanent Edition, for all other definitions of "Inherently Improbable Testimony".

8. Criminal law ⇐1159(2)

In prosecution for rape with defense of alibi, where accused offered no evidence upon his previous reputation for chastity and morality, evidence was not so inherently improbable as to require reversal of conviction on ground of apparent impossibility of commission of crimes described.

9. Criminal law ⇐768(1)

In prosecutions such as for rape where by very nature of offense corroboration is

ordinarily precluded and therefore not required, a cautionary instruction that such charges are easily made and difficult to disprove and that testimony of prosecutrix should be examined with caution is proper, but where conviction is not sought to be based on uncorroborated testimony, such instruction is unnecessary.

10. Criminal law ⇐1162

A judgment may be reversed because of error only when it appears from record that error was prejudicial, caused substantial injury, and that a different result would have been probable if error had not occurred.

11. Criminal law ⇐1173(1)

In prosecution for rape, where testimony of prosecutrix was credibly corroborated and no cautionary instruction was requested, failure of trial court to give such instruction did not require a reversal.

12. Kidnapping ⇐5
Rape ⇐51(1)

Evidence sustained convictions of rape and kidnapping.

13. Criminal law ⇐1023(5)

Attempted appeal from verdict was dismissed, since no appeal lies therefrom.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Harry S. Fleming was convicted of rape and kidnapping, and he appeals.

Affirmed.

Maurice A. Gleason, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

WHITE, Justice.

In an information filed by the district attorney of Los Angeles County defendant was accused in three counts of the crime of forcible rape while two counts charged him with kidnapping. A prior conviction of rape and robbery, for which the defendant served a term of imprisonment in the state prison, was also charged and admitted. Following not guilty pleas on all counts, trial was had before a jury resulting in the conviction of defendant upon each count of the information. From the judgments of conviction, the order denying his motion for a new trial and from the verdicts of the jury defendant prosecutes this appeal.

With reference to counts one and five wherein the defendant is charged with rape and kidnapping of the complaining witness, we find in the record evidence that between 9 and 10 o'clock on the night of June 28, 1942, the prosecutrix, returning home alone, was just stepping upon the porch of her residence when the defendant threw his hand arount her neck and placed one hand or fist against her right side and admonished her to keep walking. Turning around and looking at the defendant, the complainant asked him what was wrong to which he replied, "Don't say anything, but just keep walking". In obedience to defendant's command, the prosecutrix turned and went south on Wadsworth Street while the defendant had his one hand around her neck and the other against her side. She did not see anything in his hand but felt him punching her continuously in her side. They walked to an old shack or garage about three houses from the complainant's residence where defendant opened the door and forced the complaining witness in. When they were inside defendant told her to get on a table. At that time she looked at him and inquired what was wrong with him and whether he was crazy. At about that time defendant removed his hat and threw it over her face at which time she removed it therefrom and shoved it back. Prosecutrix then observed that defendant had a knife and that he was moving it back and forth about her neck, saying to her "Just be quiet and do as I tell you." Defendant then removed a portion of her clothing and accomplished an act of sexual intercourse upon her. Following the consummation of this act, defendant related to the prosecutrix that on the night before he "Was out to Gene Searles and had taken some woman home with him and that she kept his wallet." The importance of this statement will be apparent later when we discuss the question of corroboration. About ten minutes later defendant again pushed the complainant on the table and forcibly accomplished a second act of intercourse. He then asked the complainant what she was going to do about it and when she replied to the effect that she was not going to do anything he opened the door and told her to walk out in front of him. After emerging from the shack, he instructed her to keep walking ahead of him, which she did to a point at the next

street intersection where they both stood under the street light while he again interrogated her as to what she was going to do and as to whether she was going to call the police. During this interval, the prosecutrix testified, "Then I got a good look at him". After assuring the defendant that she was not going to take any action about what had occurred, he told her to walk ahead toward her house during which course he followed her for a short space and then disappeared. She made complaint to a neighbor of what had occurred and the following afternoon reported it personally to the police department. This neighbor testified that at the time the prosecutrix came to her house, the latter seemed to be very much frightened.

On July 19, 1942, about three weeks after the alleged assault, Officer Broady, of the Los Angeles Police Department, who was acquainted with the appellant, was driving west on Jefferson Boulevard when he asked the defendant if he wanted a ride, which invitation was accepted. During the course of this ride the officer inquired of defendant as to how he had been getting along and as to whether he was working, to which defendant replied that he had a job in Beverly Hills, and he then related the story to the officer of an occasion when defendant had been down to a place called Gene Searles and that while he was there he "made up" with a woman who, while he was asleep, took his wallet. This should be noted as identical with the story related by the prosecutrix as having been told to her by the defendant. Also during the ride the officer noticed that defendant had a cut about an inch and one-half or two inches long on his left hand which at that time was not bandaged with any adhesive tape.

In count two appellant was charged with forcible rape on or about July 16, 1942, and in connection therewith the prosecutrix testified that she had spent the preceding night at the home of her mother, leaving there shortly before 4 o'clock on the morning of the assault. As she was walking along the sidewalk and had passed a parked truck, defendant stepped out and struck her a very heavy and painful blow on the side of her head. At the time she was struck, the complainant cried out for help and the defendant uttered a vile epithet to her while he shoved her back of a truck on an adjoining parking lot and placed a handkerchief in her mouth. After pushing her approximately twenty or twenty-five feet back from the sidewalk he knocked her down and as the handkerchief came out of her mouth she "started to holler", whereupon he struck her a vicious blow and accomplished an act of sexual intercourse with her. Feigning unconsciousness, the prosecutrix lay very still after consummation of the act and defendant walked away saying, "I don't know why I did this. I am sorry." After determining that the defendant was out of sight, the complainant ran to a stranger's house near by where she was admitted and told the occupants what had occurred. They took her to the Georgia Receiving Hospital where some eight or ten stitches were required in the wound on the right side of her head. From the Receiving Hospital she was transferred to the General Hospital where she stayed from the 16th to the 29th of July by reason of the injuries received in her altercation with the defendant. The occupants of the house at which complainant sought refuge testified that at the time she awakened them she was bleeding from the head and told them she had been attacked by a man. The prosecutrix positively identified the defendant and described the color of the clothes he was wearing. She further testified that she was able to identify the defendant by reason of lights in the buildings across the street from the place of the attack.

The victim named in counts three and four, charging forcible rape and kidnapping, testified that just before midnight on July 20, 1942, she drove home in her automobile, parking it on the street near the front door. She then went to the back yard of her residence and was proceeding toward the back door at which time she heard footsteps in back of her and turning around observed a man. She positively identified defendant as this man. He addressed her saying, "Pardon me, lady, this is a stick-up." He then began hitting her on the head and admonished her not to cry out, but nevertheless she did. He struck her with the butt end of a pocketknife and also choked her with his right hand thereby causing her to stop screaming. He continued to choke her as he dragged her out to the front sidewalk and started down the street, during which time he kept telling her to keep quiet under threat of being killed. After the prosecutrix and defendant had walked some three doors from where she lived, they encountered another man. The two men turned into a garage and then blindfolded her with a handker-

chief. From there, with defendant and the other man on each side of her, they walked west on 48th Street to McKinley Avenue. During this time the men held her arms down and continued choking and cursing her. She offered them her purse, which they refused, and finally arrived at a school grounds where they compelled her to mount a box and with their assistance she climbed over the fence and walked up two flights of stairs in the school building. The prosecutrix continued to plead with her assailants not to harm her and their only answers were constant threats to kill her and continued pumeling of her with the blunt end of the knife. Over strenuous objections and resistance on the part of the prosecutrix and with the aid of his companion, the defendant removed a portion of the complainant's clothing and accomplished an act of intercourse. During the time the prosecutrix was with the defendant she remonstrated continuously against his advances and in answer to her plea that he do not molest her and thereby infect her with a venereal disease, he stated that he was a cook in Beverly Hills and in connection with that occupation was required to have a doctor's certificate as to his freedom from communicable venereal disease. This statement is important because as will appear, the defendant was subsequently apprehended in an establishment at Beverly Hills where he was employed as a cook. The prosecutrix was held prisoner for some two hours during which time the defendant ravished her three or four times. While during this time the blindfold was over the eyes of the prosecutrix, it did not entirely deprive her of her vision, and in response to inquiries made from time to time by defendant as to whether she could see, she answered in the negative and complained that the blindfold was drawn too tightly over her eyes and nose and that she couldn't breathe, as a result of which pleas defendant several times raised the blindfold and prosecutrix testified that as a matter of fact she could see under the blindfold. During the two-hour period of her captivity both of her captors smoked continuously and lighted their cigarettes with matches. The prosecutrix observed that the defendant had a piece of tape across the back of his left hand and a piece of tape on the ring finger of that hand. These are mentioned because of the testimony given by the police officer that on the day before this alleged assault when he drove the defendant in an automobile, there was a cut or injury on defendant's left hand. The complainant further testified that defendant was wearing a white shirt with blue stripes. The importance of this testimony lies in the fact that when the defendant was apprehended the next day while working at a lunch counter in Beverly Hills, he still had the tape across the back of his left hand and the tape on the ring finger of the same hand. At the time the complainant was identifying him, defendant attempted to put his left hand or both hands back of him and expressed a desire to talk to her alone. On that occasion the prosecutrix described the type of shoes the defendant had on at the time he assaulted her and when asked if he possessed such a pair of shoes, he replied in the affirmative and produced the shoes which were identified by the victim. In answer to the officers' inquiry about his having a brown coat, the defendant denied that he had such a garment. However, upon looking through a locker the brown coat was discovered. Defendant denied that it was his so the officers reached into the pockets and found an address book. As they started to look through the book the defendant said "Oh yes, that is my coat" and jerked the address book out of the officer's hand. When questioned about a blue striped shirt which the victim testified the defendant was wearing when he assaulted her, he denied possession of any such garment. However, again the officers searched the locker and were rewarded by finding such a blue striped shirt. The defendant admitted it was his but denied that he had worn it for some time. After perpetrating the aforesaid outrages upon the prosecutrix, her captors took her out on the school grounds, assisted her over the fence and started to walk with her in front of them, admonishing her, as she was blindfolded, that they would kill her if she made a sound or tried to get away. In the middle of the block between 47th and 48th Streets on McKinley Avenue, they turned her around and took the blindfold off. She immediately rushed to her home, arriving there about 2:45 a.m., called the police who took her to the Receiving Hospital for treatment. At the trial a police department chemist testified he had received slides taken from the prosecutrix for examination at the Receiving Hospital; that he had made microscopic examination of the two

slides and found each was impregnated with spermatozoa.

A neighbor of the prosecutrix testified that on the night of the assault around midnight she heard a loud scream which sounded like a woman's voice. Getting out of bed and going to the front porch, she saw a man and a woman. The man was holding the woman around the neck and she was stumbling along. Several hours latter she saw the prosecutrix and the latter was crying hysterically.

A police officer testified that at about 10 o'clock on the morning of July 21st he went to the aforesaid school grounds; that they were surrounded by an iron fence four feet eleven inches high. Next to the fence he found a milk box on the McKinley Avenue side, the dimensions of which box were about two feet eight inches high and approximately three feet wide. Upon the stairs of the school building the officer found nine matches and observed a few stains that to him appeared to be semen stains.

[1] The defendant took the witness stand in his own defense and denied having attacked any of the complaining witnesses. He testified that on the three nights in question he was at his home, 1315 West 36th Street, with his mother, his sister, niece and a Mr. Wilson. He admitted having the automobile conversation with the police officer on July 19th but denied any conversation with reference to his being at Gene Searles' place or relative to a woman stealing his wallet. The witness, Mr. Wilson, corroborated defendant's testimony as to his being home, as did defendant's sister and niece, and another acquaintance, William Morehead, who testified he was a frequent visitor to the home of defendant. However, with reference to the alibi testimony offered in behalf of defendant, we think it appropriate to quote from the remarks of the trial judge in connection therewith at the time the motion for a new trial was denied, wherein after reviewing some of the evidence, the court said, "An effort was made by the defendant to establish an alibi. However, one of the witnesses fixed an alleged time by relationship to something else, by a question put by the court—I do not even want to name the witness' name—which showed that the witness, putting it in the most favorable way, was very much mistaken. Another witness had the defendant living at his home at a time when he was still in San Quentin. So the testimony was not very reliable." Whatever may be said of the testimony in support of defendant's alibi, it is at once apparent that it served only to create a conflict in the evidence and therefore was a question for the jury to determine. They resolved this conflict against the defendant and we are not authorized to disturb their conclusion when there is, as here, substantial evidence, both direct and circumstantial, to support the conclusion arrived at by the triers of fact.

[2, 3] As his first ground of appeal it is contended by appellant that the evidence is insufficient to support the judgments of conviction. It is not denied—indeed it admits of no denial, that the evidence conclusively shows that on three occasions within as many weeks, in approximately the same vicinity in the city of Los Angeles, three women were brutally and fiendishly assaulted and raped. In each case the technique of the perpetrator was almost identical. In two cases he forced the victim from her home to a nearby place by threatening to kill her with a knife, and in the third case he did use the knife in severely injuring the complainant. Conceding that an appellate tribunal is without power to disturb the findings of the jury on the ground of claimed insufficiency of the evidence unless it be made to appear clearly that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the trial court, appellant nevertheless earnestly urges that the complaining witnesses did not have reasonable or adequate opportunity to observe, and therefore identify, their assailant and that their testimony in this regard challenges credulity. In this claim appellant can not be upheld. What was said by this court in People v. Hightower, 40 Cal.App.2d 102, 106, 104 P.2d 378, 381, is particularly pertinent here. "While the claimed inconsistencies in the testimony of the foregoing witnesses, such as the positions they were in at the time when they claimed ability to see and identify appellant, as well as other claimed weaknesses in their testimony, undoubtedly afforded grounds for a forceful argument to the jury, nevertheless they cannot avail appellant as grounds for a reversal, because the evidence identifying a defendant as the perpetrator of the crime charged need not be positive and uncontradicted. As stated in People v. Farrington, 213 Cal. 459, 2 P.2d

814, 815: 'The strength or weakness of the identification, the incompatibility of and discrepancies in the testimony, if there were any, and the uncertainties of witnesses in giving their testimony were matters solely for the observation and consideration of the jurors in the first instance, and for the consideration of the trial court on motion for a new trial. It has approved the finding of the jury, and on appeal this court may not disturb such finding and the action of the trial court unless we can say, as a matter of law, that there was no evidence to support the conviction.'"

[4-8] It is also urged that the testimony of the complainants is incredible because they failed to make an outcry, but in the case of one of such witnesses she testified she was gagged with a handkerchief while the others were menaced with a knife and threatened with death if they cried out for help. This and other claims of inherent improbability in the testimony of the prosecutrices is answered by the rule of law which declares that where there is evidence, circumstantial or otherwise, that a crime has been committed and that the defendant was the perpetrator thereof, the court on appeal will not attempt to determine the weight of the evidence, but will determine only whether from a consideration of the evidence it can be held that sufficient facts could not have been found existent therein by the jury to warrant the inference of guilt. It is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence; and before the verdict of the jury can be set aside on appeal on the grounds of insufficiency of the evidence, it must be made clearly to appear that upon no reasonable consideration whatever is there evidence of sufficient substantiality to support the trial court's conclusion. When the circumstances reasonably support or justify the jury's verdict, the belief or opinion of the reviewing court that those circumstances might also be reasonably reconciled with the innocence of the defendant, will not authorize or sanction interference with the determination arrived at by the jury (People v. Newland, 15 Cal.2d 678, 104 P.2d 778, and cases therein cited). In the recent case of People v. Roberts, 50 Cal.App.2d 558, 564, 123 P.2d 628, 632, this court enunciated the rule with reference to claimed improbability of the testimony and alibi evidence, when we declared "The ground advanced by appellant in support of the claimed inherent improbability in the testimony of his accusers is not the true test. Before testimony can be strictured as inherently improbable or unbelievable per se, it must appear therefrom that something has been done that it would not seem possible could be done under the circumstances described. Neither the direct nor the circumstantial evidence which we shall later discuss, nor the inferences deducible therefrom, can be thus indicted. While the arguments here advanced as to the improbability of the testimony identifying the defendant as the perpetrator of the assaults charged afforded opportunity for a persuasive argument to the jury, we find in them nothing that would justify a reviewing court in concluding that such testimony is per se unbelievable and that it was therefore the duty of the jury not only to wholly disregard it, but to accept the alibi evidence offered by the defendant, or at least find that the defendant's guilt had not been proved by the evidence to a moral certainty and beyond a reasonable doubt. As this court has often heretofore stated, reviewing judges are obviously in no position to determine the credit which should be accorded witnesses or to weigh their testimony. With undoubted recognition of this fact, and in accord with the constitutional provision, the legislature has declared that the jurors are the exclusive and final arbiters of the credibility of witnesses (Code Civ.Proc., sec. 1847), and are the judges of the effect and value of evidence addressed to them, except in those cases where it is ordained by the law that it shall be conclusive proof of the fact to which it relates. Code Civ.Proc., sec 2061." Furthermore, in the instant case the testimony of the victims of defendant's lust was amply corroborated by facts and circumstances which we have hereinbefore narrated in our epitome of the evidence offered by the prosecution. Under the facts here present and the decisions quoted herein, appellant's claim of inherent improbability in the testimony of the prosecuting witnesses must be held to be devoid of merit.

[9-12] Finally appellant urges that the court erred in its failure to give a cautionary instruction to the effect that charges such as the ones herein alleged are "easily made and difficult to disprove" and that the testimony of the prosecutrices "should be considered and examined with caution". In People v. Roberts, supra, 50 Cal.App. at

page 568, 123 P.2d 628, this court gave expression to its entire accord with the rule that in cases like the present one, where by the very nature of the offense corroboration is ordinarily precluded and therefore not required, it is not only proper but wholesome in the interests of justice that a cautionary instruction be given to the jury. However, the rule just enunciated is predicated upon another rule of law and that is the rule made necessary for the protection of the public, and which permits a conviction in this type of cases on the uncorroborated testimony of the prosecuting witness. It further follows that in a case where the reason for the rule, viz., a conviction on the uncorroborated testimony of the prosecutrix is not present, the rule does not apply. As was said in People v. Putnam, 20 Cal.2d 885, 892, 129 P.2d 367, 370, relied upon by appellant, "The circumstances of the case must determine whether the failure to instruct the jury constitutes prejudicial error". For instance, in the case of People v. Lucas, 16 Cal.2d 178, 105 P.2d 102, 130 A.L.R. 1485, a failure to give a cautionary instruction did not constitute reversible error where an examination of the record disclosed that the evidence clearly pointed to the appellant's guilt. That a judgment may be reversed because of error only when it appears from the record that it was prejudicial, caused substantial injury and that a different result would have been probable if the error had not occurred, is firmly established in our law by a legion of authority (People v. Lucas, supra). Because the testimony of the prosecuting witnesses in all counts of the information now before us was credibly and impressively corroborated by both direct and circumstantial evidence, the action of the trial court in not giving a cautionary instruction, when none was requested, can not be held to constitute prejudicial error, nor would we be warranted or authorized to direct a reversal of the judgment. Furthermore, the jury in the instant case was instructed that the defendant was presumed to be innocent and that his guilt must be established by competent evidence and beyond a reasonable doubt, and the meaning of such a doubt was defined by the court. In addition, the jury was admonished that they were to be governed solely by the evidence introduced at the trial and the law as expounded by the court. They were cautioned against being influenced against the defendant by passion, prejudice, public opinion or public feeling. The verdicts are amply supported by the evidence which points to the appellant's guilt.

[13] The attempted appeal from the verdicts is dismissed because no appeal lies therefrom, and for the reasons herein stated the judgments and the order denying defendant's motion for a new trial are, and each is, affirmed.

YORK, P. J., and DORAN, J., concur.



58 Cal.App.2d 215

PEOPLE v. FIERRO.

Cr. 3657.

District Court of Appeal, Second District, Division 3, California.

April 17, 1943.

1. Criminal law ⇐563, 680(2)

"Corpus delicti" is required to be proved by evidence outside defendant's declarations or admissions, but it is not necessary that corpus delicti be proved beyond reasonable doubt before other evidence is introduced which corroborates it or strengthens reasonable inferences drawn therefrom, and, if a prima facie case is presented that offense was committed, evidence is sufficient.

See Words and Phrases, Permanent Edition, for all other definitions of "Corpus Delicti".

2. Assault and battery ⇐92

In order to establish the corpus delicti in prosecution for assault with deadly weapon, it need not be proved that offense was committed by defendant.

3. Assault and battery ⇐92

In prosecution for assault with deadly weapon, evidence was sufficient to establish corpus delicti.

4. Assault and battery ⇐95
Criminal law ⇐1160

In prosecution for assault with deadly weapon, strength or weakness of identification of defendant, incompatibility of discrepancies in testimony, and uncertainties of witnesses are matters solely for jurors in first instance, and for trial court's con-

sideration on motion for new trial, and on appeal District Court of Appeal will not disturb finding unless it can say, as a matter of law, that there was no evidence to support conviction.

5. Assault and battery ⇐92

In prosecution for assault with deadly weapon, evidence as to defendant's identification was sufficient to sustain conviction.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Oscar Fierro was convicted of assault with a deadly weapon, and he appeals.

Affirmed.

Manuel Ruiz, Jr., of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant appeals from a judgment of conviction upon a charge of assault with a deadly weapon, a felony, and from the order denying his motion for a new trial. Trial was by jury. His contention on appeal is that the evidence was insufficient to justify the conviction, in that the testimony of the prosecuting witness relative to identification of defendant was inherently improbable.

The victim of the assault testified that he was a member of a group of boys which was known as the "Clanton Street Gang"; that on the afternoon of June 12, 1942, he and about 15 other members of his gang were spectators at a track meet in the Los Angeles Coliseum; that he saw, at the coliseum, about 10 or 12 members of another group of boys which was known as the "First Street Gang"; that a feud existed between the two gangs and it was a "standing proposition" to "beat up on each other" when they met; that a few minutes before the track meet was finished the members of his gang left the coliseum and waited near an entrance to the coliseum, intending to fight the other boys when they came out; that after his gang had waited at the entrance about 10 minutes, someone hollered "There they go," and then the boys of his gang ran after the other boys who were running out of another exit of the coliseum; that they ran after the other gang for a distance of about 60 feet, and then the others stopped, turned around, and stood in a line; that his gang stopped running when the others stopped and at that time the distance between the two gangs was about 40 feet; that the members of his gang then walked toward the other gang; that at that time about 1,500 of the spectators who had been at the track meet were leaving the coliseum and were about 25 feet to the rear of complainant; that when the other gang stopped, he saw the defendant fire a revolver; that the shot which defendant fired struck the complainant on the right side of his head about 4 inches above his ear and knocked him down; that he was conscious but weak; that he saw the gun in defendant's hand when defendant shot him and he saw the smoke from the gun; that when the shot was fired the boys of the other gang, except defendant, ran away; that after complainant had fallen he looked up and saw defendant standing where he was when he shot complainant; that defendant was wearing a brown leather jacket and tan pants, was bareheaded and had kinky black hair; that he saw defendant stand there and stare at complainant about 2 seconds, and then defendant turned and ran away; that complainant arose after 2 seconds and ran toward the crowd which was to the rear; that he (complainant) testified at the first preliminary hearing that he did not know who shot him (the complaint was dismissed at the first hearing when complainant did not identify defendant); that he so testified because he "was just going to drop the whole matter"; that after defendant confessed there was "no sense of me coming up here and tell a lie"; and that he saw defendant 2 days after the shooting when he (complainant) was in the hospital and the officers brought the defendant before him. Relative to identifying defendant at the hospital, complainant was asked the following question at the trial, "Was there any question in your mind as to who shot you?" and he answered, "when they brought him in I knew that it was him."

Police Officer Jesse testified that defendant said to him (witness) that he shot complainant at the coliseum, but he didn't mean to do it; that defendant said further that he (defendant) ran about 100 feet and then he stopped, turned around, and fired into the air in the direction of the crowd that he thought was chasing him; that as he was leaving the coliseum two colored boys were fighting and a gun that

one of them had in his hand was knocked to the ground and defendant picked it up; that two days later defendant said the gun was given him by another boy, whose name was Ramos, before defendant left the coliseum.

Defendant testified on direct examination that he was at the track meet and that he wore a green sweater and beige pants. He testified further that the reasons he told Officer Jesse he would confess everything were: That another officer (in the absence of Officer Jesse) had hit defendant several times and knocked him down; that Officer Jesse said he might be able to get him in the juvenile court if he would confess; that defendant's fingerprints were on the gun; that a ballistics expert said the gun was the one used in that shooting; that Ramos had admitted that he gave the gun to defendant and that if Ramos, his friend, had said he had given the gun to him defendant did not want to make a liar out of Ramos. On cross-examination he testified that he did not belong to any gang; that he went alone to the track meet; that he did not see anyone there he knew, and he was alone when he left the coliseum; that he did not notice any commotion and heard no shot; that the reason he told Officer Jesse that he saw two colored boys fighting and that one of them dropped the gun and he (defendant) picked it up was that the officers were going to make him confess and he had to say he got the gun from some place and that was the first thing that came to his mind; that the officers (not including Officer Jesse) kept beating him and he (defendant) said he would agree to anything; that he was struck on the nose (in the absence of Officer Jesse) and his nose bled; that soon after his nose started to bleed, Officer Jesse came in and talked to defendant about 5 minutes but the bleeding was not noticeable because defendant was "breathing in" and he kept the blood in his nose.

The officer, to whom defendant referred when he said he was beaten, testified that he did not strike defendant or use force upon him; that he told defendant that he had arrested a boy by the name of Larado and had found the gun in the back of his automobile, and Larado had said the gun belonged to defendant; that defendant said he did use the gun and that the reason he shot complainant was that he had "heard the Clanton Street Gang was there and they were going to get us" and "I pulled the gun out and I shot."

Another officer, who was present at the time defendant alleged he was beaten, testified in substance the same as the officer just mentioned.

Defendant argues that complainant was stunned and confused to such an extent by reason of the injury to his head that he did not have the mental capacity to comprehend sufficiently the appearance of the person who shot him and therefore he could not identify the person. As a part of the basis for that argument defendant refers to complainant's testimony as follows: "A. * * * after I got shot I got up and ran toward the crowd. Q. What crowd are you talking about now? A. The crowd, the people that was looking. I thought they were going to run toward me and kick me. That was why I ran." Defendant asserts that testimony indicates complainant's mental instability in that he had a hallucination that he was in danger of being kicked by the spectators. He ran toward the spectators, not away from them, and fell upon the ground again. The testimony as a whole shows that complainant was referring to the boys of the other gang and not to the spectators when he used the word "they" in stating that he thought "they were going to * * * kick me." The weight to be given complainant's testimony was a matter to be determined by the jury.

[1] Defendant argues further that the corpus delicti was not established without the admissions of defendant and, therefore, the evidence was insufficient to justify the conviction. The defendant made no objection to the testimony relative to the admissions when it was introduced. It was stated in the case of People v. Wiezel, 1940, 39 Cal.App.2d 657, at page 664, 104 P. 2d 70, at page 73: "However, regardless of his failure to object, there is no merit in the point, for while it is doubtless the law, as he contends, that the corpus delicti must be proved by evidence outside of declarations or admissions of a defendant, it is well settled that the prosecution is not required to establish it by proof to the same degree of certainty as is required to establish the fact of guilt. Slight or prima facie proof is all that is necessary; it may be proved by circumstances shown in evidence, or by inferences reasonably drawn therefrom; direct or positive evidence is not essential; nor is it necessary

that such evidence in itself connect the defendant with the perpetration of the offense." It is not necessary that the corpus delicti be proved beyond a reasonable doubt before other evidence is introduced which corroborates it or strengthens reasonable inferences drawn therefrom, and if a prima facie case is presented that a crime was committed, the evidence is sufficient. People v. Ives, 1941, 17 Cal.2d 459, 463, 110 P.2d 408.

[2, 3] Concerning the question whether the gun was fired deliberately toward human beings, there was evidence, other than the extra-judicial statements of defendant, that a feud existed between the two groups of boys and it was their custom to fight when they met; and that several boys of one gang were running and were being chased by several boys of the other group, and the boys who were being chased stopped suddenly, turned around, and one of them fired a revolver from a distance of 40 feet toward the other group of boys and toward several hundred persons who were about 25 feet to the rear of those boys. In order to establish the corpus delicti, it is not required that it be proved the crime was committed by the defendant. People v. Wilt, 1940, 40 Cal.App.2d 124, 127, 104 P.2d 387. Under the circumstances it was reasonable to conclude that the person who fired the gun did it with the intent to assault a human being. There was sufficient evidence to establish the corpus delicti.

[4, 5] As to the sufficiency of the evidence concerning identification, a statement applicable to the present case was made in the case of People v. Farrington, 1931, 213 Cal. 459, at page 463, 2 P.2d 814, at page 815, as follows: "The strength or weakness of the identification, the incompatibility of and discrepancies in the testimony, if there were any, and the uncertainties of witnesses in giving their testimony were matters solely for the observation and consideration of the jurors in the first instance, and for the consideration of the trial court on motion for a new trial. It has approved the finding of the jury, and on appeal this court may not disturb such finding and the action of the trial court unless we can say, as a matter of law, that there was no evidence to support the conviction." The complainant said he saw the defendant fire the gun. The defendant admitted that he was the person who shot the complainant. Several inconsistent statements were made by defendant. The weight of the evidence and the credibility of the witnesses were matters for the determination of the jury. People v. Santora, 1942, 51 Cal.App.2d 707, 711, 125 P.2d 606. The evidence as to identification of defendant was not inherently improbable, but on the contrary was sufficient to support the verdict of the jury.

The judgment and the order denying the motion for a new trial are affirmed.

SHINN, Acting P. J., and SHAW, Justice pro tem., concurred.



58 Cal.App.2d 168

HOLT v. HENRY et al.

Civ. 13969.

District Court of Appeal, Second District, Division 2, California.

April 14, 1943.

1. Appeal and error ⇐979(2)

When motion for new trial is granted upon ground of insufficiency of evidence to sustain the verdict, an appellate court will not disturb the ruling if the record discloses a conflict in the evidence even though the only conflict consists of different inferences of ultimate facts to be deduced from uncontradicted probative facts.

2. Appeal and error ⇐996

It is within the exclusive province of the trial judge to draw all inferences and deductions of fact, where the facts necessary to support a judgment do not naturally follow as a necessary sequence from the probative facts, but depend upon inferences to be deduced therefrom.

3. Negligence ⇐121(2)

When doctrine of "res ipsa loquitur" is applicable, such doctrine constitutes "evidence" which raises merely an inference, and not a presumption of negligence, and the doctrine may be overcome by other evidence.

See Words and Phrases, Permanent Edition, for all other definitions of "Evidence" and "Res Ipsa Loquitur".

4. Negligence ⇐136(6)

It is for the trier of fact to determine from all the evidence whether the inference of negligence arising from application of the doctrine of "res ipsa loquitur" has been met and rebutted.

5. Appeal and error ⇐1015(2)

On appeal from order granting defendants' motion for new trial on ground that evidence did not sustain verdict for plaintiff, where evidence was conflicting, District Court of Appeal was bound by trial court's determination that inference of negligence arising from application of the res ipsa loquitur doctrine had been overcome by the evidence and that there was insufficient evidence to sustain the verdict.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Charles Holt against James Q. Henry, doing business under the fictitious firm name of Pacific Coast Elevator Company and others for injuries sustained from a fall after a platform constructed by defendants collapsed. From an order granting defendants' motion for new trial, plaintiff appeals.

Affirmed.

Allen M. Williams, of Los Angeles, for appellant.

Crider, Runkle & Tilson, of Los Angeles, for respondents.

McCOMB, Justice.

From an order granting defendants' motion for a new trial on the ground that the evidence was insufficient to sustain the verdict of the jury, plaintiff appeals.

The record discloses that early in 1941 the County of Los Angeles purchased a ten story building at 800 North Spring Street, Los Angeles, to be used as an office building. The county entered into a contract with Mr. Nichols, a general building contractor, to modernize the structure. One phase of the work to be done by the general contractor was to cut a twin elevator shaft through all floors of the building. This work included the construction of forms for the pouring of concrete for the walls of the elevator shaft. After concrete is poured into the forms and has hardened the forms are removed. This process is called "stripping" the concrete.

Defendant James Q. Henry had an independent contract with the county to furnish and install two elevators in the shaft. Defendants Johnson and Watkins were in the employ of defendant Henry. Plaintiff was a laborer employed by Mr. Nichols, the general contractor.

The general contractor's work had progressed to the point where the concrete had been poured into the forms in the elevator shaft. Immediately thereafter defendants Johnson and Watkins, employed by defendant Henry, constructed in the east half of the elevator shaft at a point mid-way between the floor and ceiling of the tenth floor, a platform called a "grasshopper skip". This skip was constructed from lumber and nails lying about the premises. The lumber had been used previously by the general contractor for the construction of cement forms, and later stripped from the hardened concrete. The two main supports for this platform were two-by-fours, ten feet long. Prior to the accident hereinafter described, the platform had been used to support as many as four workmen on several occasions, and appeared to be safe.

On July 7, 1941, plaintiff's employer instructed him and another workman to strip the forms in the elevator shaft on the ninth and tenth floors. While performing this work plaintiff climbed upon the "grasshopper skip" above mentioned, and while removing one of the boards in the forms the platform upon which he was standing collapsed and he fell 106 feet to the bottom of the shaft, sustaining serious injuries.

After the accident the platform was hanging in a perpendicular position, and one of the supporting two-by-fours was broken.

This is the sole question necessary for us to determine:

Was the order of the trial court, granting defendants' motion for a new trial on the ground of insufficiency of the evidence to sustain the verdict of the jury and the judgment predicated thereon, erroneous?

This question must be answered in the negative, and is governed by these pertinent rules of law:

[1] (1) When a motion for a new trial is granted upon the ground of insufficiency of the evidence to sustain the verdict, an appellate court will not disturb the ruling of the trial court if the record discloses

a conflict in the evidence. (Sternbeck v. Valinder, 36 Cal.App.2d 346, 348, 97 P.2d 997.)

[2] (2) The foregoing rule is applicable even though the only conflict in the evidence consists of different inferences of ultimate facts to be deduced from uncontradicted probative facts. It is within the exclusive province of the trial judge to draw all inferences and deductions of fact, where the facts necessary to support a judgment do not naturally follow as a necessary sequence from the probative facts, but depend upon inferences to be deduced therefrom. (Cauhape v. Security Savings Bank, 118 Cal. 82, 84, 50 P. 310.) (Parker v. Brown, 13 Cal.App.2d 501, 504, 57 P.2d 183.)

[3] (3) When the doctrine of res ipsa loquitur is applicable to a case such doctrine constitutes evidence which raises merely an inference of negligence (not a presumption). It may be overcome by other evidence in the case. (Anderson v. I. M. Jameson Corp., 7 Cal.2d 60, 64 et seq., 59 P.2d 962.) (Michener v. Hutton, 203 Cal. 604, 610, 265 P. 238, 59 A.L.R. 480.) (Dowd v. Atlas T. & A. Service Co., 187 Cal. 523, 532, 202 P. 870.)

[4] (4) It is for the trier of fact to determine from all the evidence in the case whether the inference of negligence arising from the application of the doctrine of res ipsa loquitur has been met and rebutted. (Michener v. Hutton, supra, 203 Cal. 610, 265 P. 238, 59 A.L.R. 480.)

Applying the foregoing rules to the facts of the instant case and assuming, for the purpose of this opinion only, that the doctrine of res ipsa loquitur was applicable, it is evident that conflicting inferences might have been drawn from the evidence. For example the evidence discloses that:

(1) Plaintiff had cleaned the lumber which was used to build the "grasshopper skip" (presumably he discarded any pieces which were cracked or otherwise not fit for further use);

(2) From all appearances the skip appeared to be solid and safe;

(3) It had been used on previous occasions by other workmen without having given way; and

(4) In the opinion of one of the witnesses who built the skip it was safe for the purposes for which it was intended.

From these facts the trial judge might have inferred either that:

(a) The inference of negligence arising from the application of the doctrine of res ipsa loquitur had been overcome by the evidence, or

(b) The inference of negligence arising from the application of such doctrine had not been overcome by the evidence.

[5] Therefore, applying rules (1) and (2), supra, we find that the evidence was conflicting, and thus we are bound by the trial court's determination that the inference of negligence arising from the application of the doctrine of res ipsa loquitur had been overcome by the evidence, and that there was insufficient evidence to sustain the verdict and judgment thereon.

In view of the conclusions we have reached, it is unnecessary to discuss the other problems presented by counsel.

The order is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.



57 Cal.App.2d 1007

SHARP v. CONTI.

Civ. 12278.

District Court of Appeal, First District, Division 2, California.

April 7, 1943.

1. Accord and satisfaction ⇐1, 10(1) Compromise and settlement ⇐5(2), 6(2)

Where on day buyer notified seller that buyer would not accept further deliveries, and before seller made claim for any amount due on account of undelivered part of the goods, buyer sent seller check marked "paid in full to date", for exact amount due for prior deliveries under contract and for an overdue account, which items were undisputed, and seller had check certified and notified buyer of his refusal to accept check as payment of the money due under the contract, and neither party then treated the transaction as a full accord and satisfaction of the sale contract, there was no "accord and satisfaction";

intent of the parties and existence of dispute being lacking.

See Words and Phrases, Permanent Edition, for all other definitions of "Accord and Satisfaction".

2. Appeal and error ⇐1033(9)

In seller's action for breach of contract to purchase flour, where plaintiff pleaded the liquidated damage clause of the contract and also the difference between the contract price and market price and proof was made of both elements, the entry of judgment for amount shown to have been the difference between contract and market price in accordance with statute, which was less than judgment would have been had it been based upon contract clause, was not prejudicial to defendant. Civ.Code, § 1784.

3. Sales ⇐371

In seller's action to recover for breach of contract to purchase flour, where contract provided that shipments were to be made only upon directions of buyer and buyer failed to give shipping instructions and notified seller that he would not accept any further deliveries, seller was not required to make tender of delivery as a condition to recovery.

Appeal from Superior Court, Santa Clara County; William F. James, Judge.

Action by Charles Benjamin Sharp against Fred Conti for breach of contract to purchase flour. From a judgment for plaintiff, defendant appeals.

Affirmed.

W. E. Foley, James W. Foley, and George Stepovich, all of San Jose, for appellant.

Louis Oneal and Duncan Oneal, both of San Jose, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued and recovered judgment on a contract for the sale and delivery of flour.

The contract obligated the plaintiff to deliver the flour to the defendant in San Jose, California, deliveries to begin on January 1, 1938, in accordance with shipping instructions which were to be given by defendant. In April, 1938, defendant accepted a partial delivery, and, on June 10, 1938, notified the plaintiff that he would not accept further deliveries. The contract provided that, upon failure of the defendant to furnish shipping instructions, the contract would be automatically extended "until Buyer furnishes shipping instructions." On June 10, 1938, the plaintiff received from the defendant a check for $318.50 upon which was written the words "Paid in full to date." The plaintiff did not cash the check, but upon observing this notation, he had it certified and thereupon notified the defendant that he would not accept the check as payment of the money due under the contract.

In addition to his general denials of the allegations of the complaint, the defendant set up two special defenses—one pleading a failure of consideration because the flour was defective, the other pleading an accord and satisfaction because of the check transaction of June 10th. The trial court found against both of these defenses, and found in favor of the allegations of the complaint, fixing the damages at the difference between the contract price and the market price of the flour on the date of the breach of the contract.

[1] In appealing from the judgment the appellant raises three points which we will take in order. It is first argued that the trial court erred in finding that there was no accord and satisfaction. The undisputed evidence is that at the time the check was delivered the appellant owed the respondent $145 on an overdue account covering government processing taxes, and that the balance of the check—$173.50—represented the exact amount due for flour theretofore delivered under contract. There was evidence that there was no dispute over either of these items; there was evidence indicating that the appellant thought there was a complete settlement; there was no evidence that respondent had made a claim for any amount due on account of the undelivered part of the flour, or that the parties had any dispute on that score; but there was also evidence supporting the finding that neither party at the time treated the transaction as a full accord and satisfaction of the sale contract. The trial court accepted respondent's testimony that the check was given merely in payment of the invoice for flour delivered and for the unrelated item of processing taxes. Thus there is absent the essential elements of an accord and satisfaction—the existence of a dispute as to the amount due and the intention of the parties that the amount paid is to be accepted in extinction of the amount due. Section 1521, Civil Code; Whepley Oil Co.

v. Associated Oil Co., 6 Cal.App.2d 94, 112, 44 P.2d 670; 1 Cal.Jur. p. 136.

[2] The appellant argues that the court erred in allowing damages for the breach computed pursuant to a liquidated damage formula inserted in the contract. The argument is weakened by an examination of the record. The respondent pleaded the liquidated damage clause of the contract. He also pleaded the difference between the contract price and the market price. Proof was made of both of these elements and the judgment went for the amount shown to have been the difference between the contract and market price, in accordance with section 1784 of the Civil Code. The amount claimed under the clause of the contract would have been $400 more than the judgment. Thus the appellant cannot complain since, if error occurred, it resulted in his benefit.

[3] Finally, appellant argues that recovery cannot be had because the respondent made no tender of delivery within the time specified in the contract. Again the record fails to support appellant. The contract provided "Time of Shipment: On directions to be furnished by Buyer shipment is to be made as follows: Jan. 1st, 1938." It also provided for an automatic extension of the time of delivery until such shipping instructions were given. It is conceded that no directions for shipment were furnished by the buyer, except for the small quantity which was delivered on April 11, 1938, and paid for. Appellant cites as authority for the point Battaglia v. Winchester Dried Fruit Co., 32 Cal.App.2d 436, 90 P.2d 111. In that case an attempt was made to vary by parol the written terms of the contract relating to time of delivery. Here the time is fixed in the written contract—shipments were to be made only upon directions of the buyer. When appellant failed to give such shipping instructions and, on June 10th, notified respondent that he would not accept any further deliveries no tender was necessary. The fact that the contract was written on a form designed for use between millers of flour and buyers has no significance since the conceded facts clearly show that these particular provisions were intended to cover this particular transaction.

The judgment is affirmed.

SPENCE, J., and DOOLING, J., pro tem., concurred.

58 Cal.App.2d 204

JOHNSON v. WARE et al.

Civ. 13669.

District Court of Appeal, Second District, Division 2, California.

April 16, 1943.

1. Appeal and error ⇐927(3)

On appeal from judgment granting defendant's motion for a nonsuit, the evidence was viewed most favorably to plaintiff.

2. Deeds ⇐94

Where a provision in a deed is certain and unambiguous, it prevails over an inconsistent provision in a contract of purchase pursuant to which the deed was given.

3. Deeds ⇐94

In absence of reformation of deed, the nature of title which grantees acquired in property they purchased was determined by language in deed and not by statements in agreement of purchase.

4. Limitation of actions ⇐173

Generally, the plea of the statute of limitations is a "personal privilege", but the rule does not extend to subsequent property rights over which the prior owner has no control.

See Words and Phrases, Permanent Edition, for all other definitions of "Personal Privilege".

5. Limitation of actions ⇐173

Where two brothers entered into written agreement to purchase realty as joint tenants but deed conveyed the property to the two brothers without restriction, in surviving brother's suit to reform deed to show that the property was deeded to the brothers as joint tenants, the deceased brother's widow was not barred from asserting the defense of statute of limitations. Code Civ.Proc. § 338, subd. 4.

6. Limitation of actions ⇐179(2)

Where mistake alleged as foundation for a cause of action occurs more than three years prior to the filing of the complaint, it is essential to allege facts from which court can determine that by reasonable diligence plaintiff could not have discovered mistake at an earlier date, and to meet requirements of such rule it is not enough for plaintiff to allege that he did not discover the mistake prior to a designated date. Code Civ.Proc. § 338, subd. 4.

7. Limitation of actions ⇐179(2)

Where deed conveyed land to two brothers without restriction, action was instituted more than 13 years after recordation of deed for reformation thereof to show that property was deeded to the brothers as joint tenants and complaint alleged that plaintiff brother had no knowledge or notice of alleged mistake until certain date but no facts were alleged or proved which would have justified finding that the plaintiff brother was excused for not having sooner learned of the alleged mistake, the cause of action was barred by three years statute of limitations. Code Civ.Proc. § 338, subd. 4.

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by Elliott I. Johnson against Budell Ware, Odeal M. Johnson and others for reformation of a deed. From a judgment granting motion of Odeal M. Johnson for a nonsuit, the plaintiff appeals.

Affirmed.

Charles E. Taintor, R. R. Sleeper, and Raymond A. Nelson, all of Los Angeles, for appellant.

Robert G. Johnson and Harold B. Pool, both of Los Angeles, for defendants and respondent.

McCOMB, Justice.

From a judgment in favor of defendant Odeal M. Johnson, predicated upon the granting of defendant's motion for a nonsuit, in an action for the reformation of a deed on the ground of mistake, plaintiff appeals.

[1] Viewing the evidence most favorable to plaintiff as we must in reviewing a judgment predicated upon the granting of a motion for a nonsuit (Burt v. Baker, 22 Cal.App.2d 501, 71 P.2d 335), the material facts are:

November 4, 1925, plaintiff and his brother, Cornelius A. Johnson, entered into a written agreement to purchase a parcel of real property located in the City of Los Angeles for the sum of $2,600. $300 was paid upon the execution of the contract and the balance was payable in installments. The agreement provided that the property was being purchased by "Elliott I. Johnson [plaintiff] and Cornelius A. Johnson, as joint tenants". All payments were made according to the terms of the contract, each of the vendees contributing a substantial amount to the purchase price.

On or about March 10, 1927, an attorney for the vendor prepared a grant deed to the property which recited that the property was granted to "Elliott I. Johnson and Cornelius A. Johnson". This deed was duly placed on record in the recorder's office of Los Angeles county April 15, 1927.

March 9, 1940, Cornelius A. Johnson died leaving a widow, Odeal M. Johnson, defendant herein.

June 25, 1940, pursuant to section 640 of the Probate Code, the probate court of Los Angeles county entered a decree adjudging that defendant Odeal M. Johnson was the owner of an undivided one-half interest in the property theretofore deeded, as above described, to plaintiff and Cornelius A. Johnson.

August 19, 1940, plaintiff filed the present suit alleging that there was a mistake in the deed above mentioned and praying that the deed be reformed to show that the property described therein was deeded to plaintiff and Cornelius A. Johnson as "joint tenants".

Plaintiff relies for reversal of the judgment on three propositions which will be stated and answered hereunder seriatim.

First: Since the terms of the contract, by which the property was purchased, provided that the purchase was made by "Elliott I. Johnson and Cornelius A. Johnson, as joint tenants", the title vested as thus limited rather than under the deed which granted the property to "Elliott I. Johnson and Cornelius A. Johnson" without restriction.

[2, 3] This proposition is untenable. The law is established that when a provision in a deed is certain and unambiguous it prevails over an inconsistent provision in a contract of purchase pursuant to which the deed was given. Riley v. North Star Mining Co., 152 Cal. 549, 556, 93 P. 194; Sisk v. Caswell, 14 Cal.App. 377, 387, 112 P. 185. In view of the foregoing rule, in the absence of a reformation of the deed, the nature of the title which plaintiff and his brother each acquired in the property they purchased, was determined by the language in the deed and not by the statements in the agreement of purchase.

Second: Defendant Odeal M. Johnson is barred from asserting the defense of the statute of limitations, since such defense,

being a personal privilege, was available only to her predecessor in interest.

[4, 5] This proposition is likewise untenable. It is the general rule that the plea of the statute of limitations is a personal privilege. However, the rule does not extend to subsequent property rights over which the prior owner has no control. (Brandenstein v. Johnson, 140 Cal. 29, 32, 73 P. 744; see also McCarthy v. White, 21 Cal. 495, 502, 82 Am.Dec. 754). It is obvious that in the present case defendant Johnson's predecessor in interest has no control over the property which is the subject of the present litigation. Therefore, defendant Johnson was not barred from asserting the defense of the statute of limitations.

Third: That plaintiff's cause of action was not barred by the statute of limitations, section 338, subdivision 4, of the Code of Civil Procedure, since plaintiff did not know of the mistake until less than three years prior to the filing of the present action.

[6] This proposition is also untenable, and is governed by the following pertinent rules of law:

1) Where the mistake alleged as the foundation for a cause of action occurs more than three years prior to the filing of the complaint, it is essential to allege facts from which the court can determine that by reasonable diligence the plaintiff could not have discovered the mistake at an earlier date. (Lillis v. Silver Creek, etc., Water Co., 21 Cal.App. 234, 240, 131 P. 344. Since for the purposes of section 338, subdivision 4, of the Code of Civil Procedure, "fraud" and "mistake" are in the same category, see also Reilly v. Richardson, 18 Cal.App.2d 352, 353, 63 P.2d 1180, and cases therein cited).

2) To meet the requirements of the foregoing rule, it is not enough for plaintiff to allege that he did not discover the mistake prior to a designated date. (Bradbury v. Higginson, 167 Cal. 553, 558, 140 P. 254; Montgomery v. Peterson, 27 Cal.App. 671, 675, 151 P. 23).

[7] In the present case the only allegation in the complaint, touching upon plaintiff's failure to sooner discover the alleged mistake, is as follows: "* * * that the plaintiff had no knowledge or notice of said mistake or that the said mistake had been made or that any defendant claimed any title or interest in the said premises until on or about the 14th day of May, 1940 * * *."

The evidence introduced by plaintiff, prior to the granting of the motion for a nonsuit, failed to disclose any other facts which would excuse plaintiff for failing to sooner discover the alleged mistake. Therefore, since more than thirteen years elapsed between the recording of the deed and the filing of the complaint in the present action, and facts were not alleged or proved which would have justified the trial court in finding that plaintiff was excused for not having sooner learned of the alleged mistake, plaintiff's alleged cause of action was barred by the statute of limitations, section 338, subdivision 4, of the Code of Civil Procedure.

For the foregoing reasons, the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.



58 Cal.App.2d 133

In re SCHERER'S ESTATE.

KELLY v. COTTER.

Civ. 13865.

District Court of Appeal, Second District, Division 1, California.

April 13, 1943.

Hearing Denied June 10, 1943.

1. Appeal and error ⇐801(1)

The law looks with favor upon the determination of litigation upon the merits of the controversy rather than upon technical grounds.

2. Executors and administrators ⇐501

Where attorney expressly claimed that fund in probate court belonged to widow and it was agreed that attorney's statement might be considered testimony, it could not be said that widow had claimed no interest in fund and was not an "aggrieved party" so as to be entitled to appeal from orders allowing executor commissions for extraordinary service payable from such fund.

Probate Code, §§ 1001, 1233; Code Civ. Proc. § 938.

See Words and Phrases, Permanent Edition, for all other definitions of "Aggrieved Party".

3. Executors and administrators ⇐501

An executor could not raise question of interest of widow in estate for first time on appeal from order allowing extraordinary commissions, and dismiss widow's appeal on ground that she was not an "aggrieved party". Probate Code, §§ 1001, 1233; Code Civ.Proc. § 938.

4. Executors and administrators ⇐501

An order of probate court settling second and final account of executor and directing executor to pay himself the sum of $8,000 as extraordinary commissions and distribution, was an "appealable order" and appeal was properly taken therefrom so far as the allowance of extraordinary commissions was concerned. Probate Code, § 1240.

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

5. Executors and administrators ⇐501

Where sole question for decision was whether executor was entitled to commissions for extraordinary services, finding that allegations of executor's petition were true except that $20,850 was an unreasonable fee and that $8,000 was a reasonable fee for extraordinary services rendered, and finding that widow's answer to petition for extraordinary fees was not well taken and was overruled, supported order allowing executor $8,000 for commissions for extraordinary services.

6. Trial ⇐395(3)

General findings such as that the allegations of the defendant's answer are false are characterized as "omnibus findings" but are sufficient.

See Words and Phrases, Permanent Edition, for all other definitions of "Omnibus Finding".

7. Executors and administrators ⇐494

Where an executor, administrator or testamentary trustee is himself a practicing lawyer and elects to act as his own attorney in performance of legal services incident to administration of estate, he will not be permitted to receive an allowance against the estate for professional services in absence of some statutory provision entitling him thereto.

8. Executors and administrators ⇐494

An executor who is an attorney at law cannot refrain from employing an attorney and then charge for professional services under the guise of rendering them in the capacity of an executor.

9. Executors and administrators ⇐497

Evidence sustained award of $8,000 for extraordinary services rendered by executor as such in management of five corporations, although executor was also an attorney. Probate Code, § 902.

10. Executors and administrators ⇐501

On appeal from an award for extraordinary services rendered by an executor as such, all intendments are in favor of award. Probate Code, § 902.

11. Executors and administrators ⇐501

Where $20,850 was claimed for extraordinary services rendered by executor as such and court allowed only $8,000, it could not be assumed on widow's appeal that the reduction did not exclude all compensation for so-called legal services. Probate Code, § 902.

12. Executors and administrators ⇐501

Finding that allegations of executor's petition for extraordinary services except as to value thereof were true, was an "implied finding" adverse to widow's claim that most if not all of the services rendered were legal in nature. Probate Code, § 902.

See Words and Phrases, Permanent Edition, for all other definitions of "Implied Finding".

13. Executors and administrators ⇐501

Where any further findings by court as to nature of services performed by executor, and value thereof, would have been adverse to widow, failure of court to find further on the issue was no ground for setting aside the order made. Probate Code, § 902.

14. Executors and administrators ⇐497

The allowance of extraordinary fees to an executor is a matter in the discretion of the trial court, and not to be interfered with on appeal except for abuse. Probate Code, § 902.

15. Executors and administrators ⇐497

Trial court's discretion in allowance of extraordinary fees to executor includes

power to determine whether the character of the service is such as to warrant extra compensation, and the amount thereof. Probate Code, § 902.

16. Executors and administrators ⇐497

Allowance of $8,000 for performance of extraordinary services by executor as such although executor was an attorney did not impinge upon rule prohibiting an attorney-executor from recovering extraordinary commissions for legal or professional services. Probate Code, § 902.

17. Executors and administrators ⇐497

Allowance of $8,000 for extraordinary services performed by executor as such was not so excessive as to constitute an abuse of discretion on part of the probate judge. Probate Code, § 902.

18. Executors and administrators ⇐91

It is executor's duty with or without an order of court to take charge of property of an estate and to maintain and preserve it in as good condition as is reasonably possible during administration. Probate Code, § 572.

19. Executors and administrators ⇐93(2)

An exception to the general rule that it is not the duty of an executor ordinarily to carry on the business of testator during administration of his estate, exists where the will of the testator expressly creates the power to do so, or where the carrying on of the business would be cast upon the executor as a necessary means for preservation of the estate. Probate Code, § 572.

20. Executors and administrators ⇐501

On appeal from order allowing executor $8,000 for performance of extraordinary services as such in carrying on of testator's businesses, where will was not in the record and there had been no objection to carrying on of business by widow or other beneficiaries, it could not be assumed that the will did not authorize the carrying on of such businesses by the executor. Probate Code, § 572.

21. Executors and administrators ⇐93(2)

Where probate court was clothed with power to authorize the executor to conduct testator's business, such court possessed power to ratify action on part of executor conducting the business without a previous court order. Probate Code, § 572.

22. Executors and administrators ⇐501

In absence of bad faith on part of executor or an abuse of discretion by trial court in awarding extraordinary commissions for performance of services, appellate court would not be warranted in interfering with action of trial court. Probate Code, § 902.

23. Executors and administrators ⇐501

Where extra compensation is allowable for extraordinary services by executor, it is within sound discretion of probate judge to fix amount thereof and his action will not be disturbed on appeal unless the award clearly appears to be excessive. Probate Code, § 902.

24. Executors and administrators ⇐501

It could not be held as a matter of law that trial court abused its discretion in allowing executor $8 000 for performance of extraordinary services. Probate Code, § 902.

Appeal from Superior Court, Los Angeles County; B. J. Scheinman, Judge.

On rehearing.

Order appealed from affirmed.

For prior opinion, see 131 P.2d 617.

Elmer P. Bromley, H. E. Lindersmith, and Frank E. Carleton, all of Los Angeles, for appellant.

Edward J. Cotter, of Los Angeles, for respondent.

WHITE, Justice.

A rehearing was granted in this case that we might give further consideration to respondent's claim that the appeal should be dismissed for the asserted reason that appellant has neither an interest in the subject-matter of the appeal, nor is she an aggrieved party within the contemplation of the code section designating those entitled to appeal from an order or judgment; and the further claim that appellant has no standing in any proceeding to reverse or modify the decision or order. Probate Code, § 1233; Code of Civil Procedure, § 938.

The controversy with which we are here concerned centers about respondent executor's claim for extraordinary commissions. It appears that the estate of the decedent consisted of numerous corporations, all actively engaged in business transactions consisting in the main of a loan and finance business, in the conduct of which by decedent during his lifetime the executor of his will acted as the former's attorney, and in conjunction with decedent managed, operated and controlled such corporations

prior to the death of decedent, who owned them. Although the will is not before us, it is conceded that such testamentary document named two children of decedent by a former marriage as sole legatees, and to his widow he made certain bequests. During the course of administration, the widow of the decedent purchased the interests of both children, through which purchase she became vested with 100% of the corporate stock of all five of the corporations belonging to the estate. On December 13, 1937, the widow sold such corporate stock to National Funding Corporation. On the last named date, pursuant to an order of partial distribution made by the probate court, the estate delivered to National Funding Corporation all the aforementioned stock. Pursuant to the provisions of section 1001 of the Probate Code, and in accordance with the court's order for partial distribution, National Funding Corporation deposited with the executor of decedent's estate the sum of $60,000 in lieu of a bond provided for in the last cited section; this sum to be utilized as directed in the court's order for the "liquidation of claims, taxes, fees and kindred estate liabilities." Pursuant to the terms of section 1001, supra, whatever remained of the aforesaid deposit made by the distributee, National Funding Corporation, after the express purposes and uses for which said fund was to be used had been accomplished, the balance remaining, and which constituted all of the cash remaining in the estate, should be, as the court directed, returned to such distributee. When this was done there remained for distribution to the widow, appellant herein, only 200 shares of certain mining stock, appraised as having no value whatever, and one piece of realty having an appraised value of $25.

By his second and final account and petition for distribution respondent executor sought an allowance of extraordinary commissions for services allegedly rendered by himself as executor in the sum of $20,850, but the probate court found that the sum of $8,000 was a reasonable fee for the claimed extraordinary services, and directed the payment of such last named amount to the executor. By way of answer to the executor's petition, appellant widow, while challenging the executor's claim for extraordinary commissions, did not contest the distribution of the estate as prayed for. Appellant widow's answer alleged that the executor had entered into an agreement whereby he consented to accept the sum of $1,000 in full payment of whatever extraordinary services he had rendered the estate, and further alleged that the sum of $20,000 was an inordinate amount for the services actually performed, and prayed that an allowance for such commissions be made to him in an amount not exceeding the sum of $1,000 allegedly agreed upon.

[1] After additional study of the record herein and a review of the cases cited, we are persuaded that respondent's motion to dismiss the appeal must be denied. Bearing in mind the rule which declares that the law looks with favor upon the determination of litigation upon the merits of the controversy rather than upon technical grounds, we are impressed that the record upholds appellant in her claim that she did assert her interest in the money of the estate in the lower court, at least to the extent of apprising the court and respondent of such claimed interest upon her part. During the hearing in the probate court, the record discloses that one of appellant's attorneys stated that she was unable to be present by reason of her being in Honolulu, whereupon respondent himself stated "No question about any right you have to appear and represent her". Thereupon appellant's counsel concluded a statement he was making to the court by saying: "Under that partial distribution, they paid about $60,000 in cash and that was retained by the estate and as the property of the estate, it is the property of Mrs. Scherer. Now, the question arises as to what extra services Mr. Cotter has rendered, and we are not attempting to tell the court that he has not earned extra compensation". Another of appellant's attorneys then inquired "May the statement of Mr. Bromley (also one of appellant's counsel) be considered as testimony in the case?"; to which respondent replied "certainly". In view of the foregoing, a statement made by appellant in her reply brief that "The record is silent upon the subject", can not fairly he held to be an admission that the record is barren of proof upon the question of her actual interest in the $60,000 deposited with the executor, but that it was rather a concession that the record was "silent" upon the subject of an agreement referred to in the brief, between the appellant and her assignee, the Funding Corporation. It may be said with certainty that the record discloses that in the lower court respondent made no objection to the appearance of appellant in the pro-

ceeding, and no claim was there made that she had no interest in the estate. Respondent seeks, for the first time on appeal, to raise the question of the interest of appellant in the estate; whether or not she is an aggrieved party or has no standing in a proceeding to reverse or modify the order. This, respondent is not permitted to do. Estate of Miller, 16 Cal.App.2d 141, 153, 60 P.2d 492, and cases therein cited. Respondent's claim that the evidence given by one of appellant's counsel that the $60,000 paid into the estate by the Funding Corporation "is the property of Mrs. Scherer" is "the sheerest of conclusions and hence not entitled to consideration" finds an answer in the fact that respondent himself at the hearing suggested that the statement be received in evidence, and did not dispute its verity or cross-examine the witness who so testified.

[2-4] Respondent's second contention that the order appealed from is not an appealable order is without merit. Section 1240 of the Probate Code authorizes an appeal from an order "settling an account of an executor or administrator," etc. The notice of appeal herein specifically states that the same is taken "from the order settling the second and final account of Edward J. Cotter, Executor, and directing said executor to pay himself the sum of $8,000 as extraordinary commissions and for distribution". Manifestly, the court must determine what is left in the estate to distribute before it can order distribution, and until the amount of executor's fees are definitely and finally determined, the order of distribution can not be made. This appeal was, therefore, properly taken from the order "settling the second and final account" of the executor, insofar as such order related to the allowance to said executor of $8,000 as extraordinary commissions, Estate of McAllister, 134 Cal.App. 349, 350, 25 P.2d 507.

[5, 6] As a first ground of appeal, it is urged by appellant that the findings do not support the order. The two findings under attack are "that the allegations of the petition for allowance of extraordinary fees to executor are true except that $20,850 is an unreasonable fee for the extraordinary services so rendered, but that the sum of $8,000 is a reasonable fee for the extraordinary services so rendered"; and "that the answer of Gloria Scherer to the petition for extraordinary fees for the executor are not well taken and are overruled". Appellant contends that the finding as to the answer is in the form of a negative pregnant, implying the truth of at least some of the allegation therein contained, without showing which ones, if any, are untrue. Austin v. Harry E. Jones, Inc., 30 Cal.App.2d 362, 86 P.2d 379. We do not so view the questioned findings. To us it clearly appears that one of them negatives the allegations of appellant's answer insofar as the only contested issue before the court was concerned. We find from the record that when the court inquired as to whether appellant had "Any objection to the settlement of this account;" one of her counsel replied "No, Your Honor, our answer objects to the extraordinary fees only". While general findings have sometimes been criticized, a finding that "the allegations of the defendant's answer are false", while characterized as an omnibus finding, has been held sufficient. Cohn v. Kelly, 132 Cal. 468, 64 P. 709; County of San Diego v. Seifert, 97 Cal. 594, 32 P. 644; Fritz v. Mills, 170 Cal. 449, 150 P. 375. Findings such as the ones with which we are here concerned, while often criticized, are nevertheless supported by too strong an array of authority to be now overthrown. The petition averred that the services rendered in the aggregate were worth a certain sum, while the answer alleged that the services in question were not extraordinary or that if they were, the same possessed no value or were of little value to the estate. It is equally clear that the findings determined that all of the allegations of the petition were true except that instead of being worth the sum claimed by the executor they were of the reasonable value of a lesser sum. Such a finding of itself necessarily implies that the allegations of the answer in denial thereof were untrue.

[7, 8] Appellant next contends that the order can not be sustained because the allowance covers legal services rendered by the executor who acted as his own attorney. The weight of authority in this state supports the rule that where the executor, administrator or testamentary trustee is himself a practicing lawyer, and elects to act as his own attorney in the performance of the legal services incident to the administration of the estate, in the absence of some statutory provision entitling him thereto, he will not be permitted to receive an allowance against the estate for his professional

services. Estate of Parker, 200 Cal. 132, 135, 251 P. 907, 49 A.L.R. 1025. This doctrine is founded on reasons of public policy set forth at length in a carefully prepared and well considered opinion authored by Mr. Justice Finlayson in the just cited case. It is the duty of courts to uphold this sound and wholesome doctrine, by the terms of which an attorney-executor who himself performs the legal and professional services relating to his trust shall not be allowed to charge for his own professional services. Therefore an attorney-executor should not be permitted to do indirectly what the law forbids him to do directly, viz., refrain from employing an attorney and then charge for professional services under the guise of rendering them as executor services. However, as we view the instant proceeding, such was not the case here. While some of the work done by the executor might, strictly speaking, be classified as legal or professional services, the vast majority of the work done was in the category of the ordinary duties of an executor which embraced the conservation, management and preservation of the estate. It would unduly prolong this opinion to here set forth in detail the services rendered by the executor for which he sought extraordinary commissions. Suffice it to say that the executor herein had been the friend and legal advisor of decedent since about 1904, until the latter's death in 1935. At the date of the testator's demise he controlled and operated five business corporations, the principal business of which was lending money. For several years prior to the death of the testator, he and the executor herein controlled and managed the affairs of the aforesaid corporations. Upon the death of the decedent the executor took personal charge of four of such corporations and, to use the language of his petition herein, "was constantly and continuously conferring with corporation department managers regarding the business policies of the various corporations; did control 100% of the voting stock of each of said corporations. * * * That during the major part of said time the Pacific Southwest Discount Corporation discounted its loans with the Seaboard National Bank of Los Angeles and during the time petitioner was controlling said corporations, said corporation's discount open account was increased from $150,000 to approximately $700,000, and your petitioner did devote a portion of each day for more than a year after death of decedent to said management.

Your petitioner did further devote his time and talents unstintingly to negotiations with the management of said corporations, with the minor children of and widow of deceased and their attorneys, to the end that none of them interfered with the active management of said corporations.

That he did, in consultation with said minor children through their attorneys, agree to continue to dominate said corporations through vote control over nominal directors to the exclusion of the personal desires of each heir or beneficiary.

That he did negotiate with the Seaboard National Bank, with the children of and widow of deceased through their attorney to the end that Seaboard National Bank would continue to discount loans created by said corporations or until the stock held by the estate might be sold provided your petitioner would not change the management of any of said corporations and would continue to dominate all of said corporations. That in June, 1937, the widow, Gloria Scherer, who, by mesne assignments acquired the total, of the distributive shares of said children of deceased, became the owner of said estate, and sold her rights to distribution to all of the shares of stock in the various corporations to National Funding Corporation.

That during, and while said corporations were operated under the stewardship of petitioner, the value of the stock so held by petitioner increased in value from $298,-793.23, the appraised value, to approximately $500,000.00."

In addition to the foregoing, the executor averred in his petition that he negotiated for the extension of mortgages; appeared in a controversy that arose with the Department of Internal Revenue of the Federal government and the State Inheritance Tax Department. It is also set forth in the executor's petition and was found by the court to be true, that as a result of the extraordinary services rendered by the executor "there has been a possible saving to said estate generally" a sum approximating $82,500.

[9] Section 902 of the Probate Code authorizes a just and reasonable award of extraordinary commissions for most, if not all of the work performed by the executor as set forth in his petition. Even though we exclude certain services objected to by

appellant as constituting legal services, such as "negotiated a novation"; signed "stipulation to set aside original inheritance tax report and order" as "attorney for executor"; conferred with other attorneys and "checking at the law library", we can not say that an award of $8,000 was unjust or unreasonable for the services performed which come within the purview of an executor's duties.

[10-13] While it is true as contended by appellant that the court did not make a specific finding as to what portion of the services rendered were executor services and what part was in the category of legal services, nevertheless it is apparent from what we have herein stated that when all of the services which might be characterized as "legal" were eliminated there still remains within the sphere of "executor" services a sufficient amount of work done by the executor in conserving and preserving the estate for which an award of $8,000 as made can not be considered unjust or unreasonable. All intendments being in favor of the judgment rendered on the order made we can not assume that in reducing the claimed amount of $20,850 for extraordinary commissions to $8,000 the court did not exclude all so-called "legal" services. Furthermore, if in addition to its findings that the allegations of the executor's petition for extraordinary services, save and except as to the claimed value thereof, were true, which was an implied finding adverse to appellant's claim that most if not all of the services rendered were "legal" and not "executor" in character, the court had made more complete findings on the issue of what were "legal" and what were "executor" services, such findings would under the evidence have been adverse to the contention of appellant that the "executor" services performed by respondent were not reasonably or justly worth the reduced amount of $8,000 allowed by the court. That being so, the failure of the court to find further than it did on this issue is not a ground for setting aside the order made. Goff v. Goff, 52 Cal.App.2d 23, 30, 125 P. 2d 848, and cases therein cited.

[14, 15] The allowance of extraordinary fees is a matter of discretion with the trial court and is not to be interfered with on appeal except for abuse. Such discretion not only invests the trial court with the power to determine whether the character of the services is such as to warrant extra compensation, but to determine the amount. In Estate of Pomin, 33 Cal.App.2d 544, 546, 92 P.2d 479, 480, it was said "We are of the opinion a probate judge, who has before him all of the proceedings of an estate, together with evidence of the exact nature of extraordinary services performed incident to probating it, is not bound to fix the compensation therefor, under Section 902 of the Probate Code, at the estimated value testified to by expert witnesses produced by the executor, even though no witness is called to dispute their opinions in that regard. It is the province of the trial judge, under such circumstances, in the exercise of sound discretion, to determine the weight of the evidence and the value of the services performed and to allow the executor or attorney such sum 'as the court may deem just and reasonable for any extraordinary services.' Sec. 902, Probate Code".

In Estate of Keith, 16 Cal.App.2d 67, 70, 60 P.2d 171, 172, which involved an appeal from an order allowing extraordinary fees, it was held "In a probate matter, it is particularly within the power of the trial judge, who has all of the records before him, to fix and determine what fees are proper. Estate of Vaughan, [14 Cal.App. 2d 594], 58 P.8d 742. Section 910 of the Probate Code provides that attorneys for executors shall be allowed such amount as the court 'may deem just and reasonable for extraordinary services.' It is the duty of the court to determine whether or not services denominated 'extraordinary' were necessarily required in the administration of the particular estate, and if so, to decide what would be a just and reasonable allowance. In making its order fixing such fees, the court has a large discretion, and when the court has made its determination in respect thereto, its judgment will not be interfered with on appeal, except only in the face of a plain abuse of discretion. 11–B Cal.Jur. 506, § 1056; Estate of Parker, 186 Cal. 671, 200 P. 620; Estate of Iser, 52 Cal.App. 405, 198 P. 1014."

[16, 17] Under the circumstances presented by the record before us, it can not be held as a matter of law that the award herein impinged upon the rule prohibiting an attorney executor from recovering extraordinary commissions for legal or professional services, nor that the allowance was so excessive as to constitute an abuse of discretion upon the part of the probate judge.

[18-24] Finally appellant urges that no award of extraordinary fees to the executor for controlling, managing and operating the various business corporations of decedent after the latter's death can be made for the reason that no court order authorizing a continuance of decedent's business was procured in compliance with section 572 of the Probate Code. We think it may be said authoritatively that it is the duty of an executor, with or without an order of court, to take charge of property of an estate and to maintain and preserve it in as good condition as is reasonably possible during administration. Estate of King, 19 Cal.2d 354, 358, 121 P.2d 716, 720. In that case it was said "Where a continuation of the business of a deceased person during administration results in a profit to the estate, it has frequently been said the executor is entitled to extra compensation therefor, even though he voluntarily assumes to perform that service." The petition for extraordinary fees herein, the allegations of which, except as to the amount claimed therefor, the court found to be true, shows that the business corporations of the testator were conducted by the executor at a profit to the estate. Furthermore, there is an exception to the general rule that it is not the duty of an executor ordinarily to carry on the business of the testator during the administration of his estate. That exception exists, said the court in Estate of King, supra, "Where the will of the testator expressly creates the power so to do, or where the carrying on of a business would be cast upon the executor as a necessary means for the preservation of the estate." See also Riedy v. Bidwell, 70 Cal.App. 552, at page 555, 233 P. 995. The will of decedent is not before us, and in view of the action of the court in allowing extra fees for the conduct of testator's business by the executor, coupled with the absence of objection upon the part of appellant or other beneficiaries under the will, we can not assume that the will did not contain such authorization. In any event, it appears from the executor's petition for such fees that preservation of the estate required a continuance of the various enterprises conducted by decedent in his lifetime. Certainly, there is no showing to the contrary. It must be conceded that the probate court was clothed with power to authorize the executor to conduct testator's business. Therefore the court possessed the power to ratify such action on the part of the executor, done without a previous court order. Estate of Maddalena, 42 Cal.App.2d 12, 19, 108 P.2d 17. Especially is this true where the carrying on of the business was a necessary means to preserve the estate. In the absence of bad faith upon the part of the executor or an abuse of discretion by the trial court in awarding extraordinary commissions for the performance of such services, the appellate court would not be warranted in interfering with the action of the trial court. Estate of Maddalena, supra. Where extra compensation is allowable for services of this kind, it is within the sound discretion of the probate judge to fix the amount thereof, and his action will not be disturbed on appeal unless the award clearly appears to be excessive. Estate of King, supra. In the circumstances presented by the record herein, it can not be held as a matter of law that the trial court abused its discretion either in allowing compensation for these extraordinary services as executor services or in fixing the value thereof at $8,000.

For the foregoing reasons the order appealed from is affirmed.

YORK, P. J., and DORAN, J., concur.



58 Cal.App.2d 60

McGOUGH v. HENDRICKSON et al.

Civ. 12211.

District Court of Appeal, First District, Division 1, California.

April 9, 1943.

As Modified May 3, 1943.

Hearing Denied June 8, 1943.

1. Automobiles ⇐216

Pedestrians have a right to travel anywhere upon a public highway in a residence district.

2. Automobiles ⇐245(72)

Whether pedestrian injured by automobile while walking on right side of highway was struck in residence district as defined by Vehicle Code, and hence had legal right to walk on either side of high-

way, was for jury. Vehicle Code, § 90, St.1935, p. 99, and § 90.1, St.1939, p. 2106.

3. Automobiles ⇐245(72)

Under Vehicle Code section defining a "residence district" as portion of highway and contiguous property within quarter-mile distance if occupied by 13 dwellings or "business structures", whether cleaning and dyeing establishment, run as a single business under a single ownership consisting of two buildings joined by driveway over which an overhead was constructed, constituted two business structures within the Code section so as to permit a pedestrian struck by an automobile in such district to walk on either side of the highway without being guilty of contributory negligence, was properly submitted to the jury. Vehicle Code, §§ 90, 564, 758, St.1935, pp. 99, 188, 243, and § 90.1, St.1939, p. 2106; Vehicle Code, § 465 et seq., St.1935, p. 165.

See Words and Phrases, Permanent Edition, for all other definitions of "Business Structure" and "Residence District".

4. Automobiles ⇐245(72)

Where the nature of a district, such as whether it is business or residential within Vehicle Code section so as to permit a pedestrian to walk on either side of the highway without being guilty of contributory negligence if struck by an automobile, is in dispute, the trial court should submit the issue as to its character to the jury. Vehicle Code, §§ 90, 564, 758, St.1935, pp. 99, 188, 243, and § 90.1, St.1939, p. 2106; Vehicle Code, § 465 et seq., St.1935, p. 165.

5. Automobiles ⇐218

Where section of Vehicle Code at time of automobile accident required a speed limit sign to be posted at entrance to residential district, and pedestrian was injured by an automobile within area covered by a speed limit sign, and jury found only 12 separate structures within the area, and, under another section of Vehicle Code, thirteen structures were necessary to constitute the area a residence district, jury was justified in finding that speed limit sign was not erected at the entrance to a residence district. Vehicle Code, § 90, St.1935, p. 99, and § 465 et seq., St.1935, p. 165.

6. Automobiles ⇐11

Expression at the "entrance" in section of Vehicle Code requiring speed limit sign to be constructed at the entrance to a residential district is synonymous with expression at the "boundary" of the district used in older section of Vehicle Code. Vehicle Code, § 468, St.1939, p. 2107.

See Words and Phrases, Permanent Edition, for all other definitions of "Boundary" and "Entrance".

7. Automobiles ⇐11

Where a provision of Vehicle Code requires a speed limit sign to be posted at the entrance to a residence district, a sign not posted at the boundary or entrance to a residence district is not one posted as required by law. Vehicle Code, § 468, St.1939, p. 2107.

8. Automobiles ⇐218

Where pedestrian was not able to show required 13 structures in zone within one-fourth mile of entrance as required by the Vehicle Code, zone could not be declared a "residence district" so as to permit pedestrian to walk on either side of highway without being guilty of contributory negligence when struck by automobile, by showing ratio of more than 13 structures for area between two signposts, since "ratio" provision in the Code merely means that failure of properly marked residence district to have required number of structures at certain point would not prevent entire district from being a residence district. Vehicle Code, § 90, St.1935, p. 99.

See Words and Phrases, Permanent Edition, for all other definitions of "Ratio".

9. Automobiles ⇐218

Vehicle Code section providing that a residence district may be longer than one-fourth mile if the "ratio" of 13 structures exists the length of the highway, does not mean that by signposting a municipality can include in a residential district an area on the edge thereof that does not comply with the statutory requirements, but means that once a residential district properly starts and ends with proper signs, the fact that in between there might not be the requisite number of structures at a particular point will not prevent the entire district from being a "residence district". Vehicle Code, § 90, St.1935, p. 99.

10. Automobiles ⇐246(30)

Giving instruction that pedestrians have right to travel anywhere upon a public highway in a residence district "and it is

therefore not negligence in them to do so. This is the common law rule and our Legislature has not changed or modified it", but eliminating the quoted part, was not error.

11. Automobiles ⇐218

Instruction that jury was to consider whether pedestrian failed to exercise ordinary care in not walking on left-hand side of highway if available to him, or any sidewalk available to him at the time he was struck by automobile, was proper as simply stating elementary law in that even if pedestrian had legal right to walk on right-hand side of highway, the exercise of that right might under the facts be negligence.

12. Evidence ⇐150

Evidence of experiment made at place of automobile accident to show injured pedestrian was plainly visible to motorist was inadmissible where experiment was made at 9:30 p.m. in October, the accident having occurred at 2:30 a.m. in May, and no foundation was laid as to whether the conditions existing in October were substantially similar to those existing in May.

13. Evidence ⇐150

Before evidence relating to an experiment is admissible it is incumbent on the one offering the evidence to show the facts surrounding the experiment and to show that the circumstances were substantially similar with those existing at the time of the accident, and the sufficiency of the evidence of the similarity rests largely in the discretion of the trial court.

14. Automobiles ⇐244(58)

Evidence was sufficient to support finding either that negligence of both pedestrian and motorist was proximate cause of pedestrian's injury or that proximate cause was contributory negligence of pedestrian, so that pedestrian was not entitled to recover for injuries sustained when struck by automobile while walking on right side of highway.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by B. L. McGough against Helen Hendrickson and others, to recover for injuries suffered when struck by automobile driven by defendant. From a judgment for defendants, plaintiff appeals.

Affirmed.

Wm. H. Mackay, of San Francisco, for appellant.

Myrick & Deering and Scott, of San Francisco, and Martinelli & Gardiner, of San Rafael, for respondents.

PETERS, Presiding Justice.

Plaintiff brought this action to recover damages for injuries received by him when struck by an automobile driven by defendant Helen Hendrickson, and owned or controlled by the other defendants. From a judgment for defendants based upon a jury verdict plaintiff prosecutes this appeal.

The accident occurred at about 2:30 a. m. on May 25, 1941. Appellant was walking towards San Rafael from San Anselmo on Fourth Street. He was walking easterly on the highway on the south side thereof, that is to say, on the right-hand side of the highway facing towards San Rafael. The highway is 32 feet wide and is asphalt, except for a cement strip one foot ten inches wide bordering the south edge of the highway. A wide gravel strip borders the cement strip to the south, then there is a gutter, then a row of tall trees and ther a gravel walk. There are no houses or business structures on the south side of the highway, the gravel walk being bordered by a railroad right-of-way. On the north side of the highway is a cement sidewalk which starts at San Anselmo and continues at least a quarter of a mile east towards San Rafael beyond the point where the accident occurred. The accident happened within the city limits of San Rafael opposite a house numbered 2154. Plaintiff testified that he was walking on the cement strip when hit from behind by the car driven by defendant Hendrickson. Mrs. Hendrickson was driving toward San Rafael at about 20 to 25 miles per hour. The headlights of her car were on the low beam. She, and the two occupants of the car, testified that the trees bordering the road to the south created deep shadows on the highway at the point of the accident. They testified that plaintiff was walking partially on the asphalt part of the highway. Mrs. Hendrickson testified that she did not see plaintiff until the instant before the accident; that at the instant of the accident she was partially blinded by the headlights of a car coming from San

Rafael; that she did not blow her horn when she saw plaintiff because she did not have time to do so. She stopped within a car's length of the point of impact. Plaintiff testified he had no warning of the approach of the car coming from behind him, stating that no light was cast on the highway by the headlights of the on-coming vehicle. Defendants, in addition to denying their negligence, pleaded that the accident was proximately caused by the contributory negligence of plaintiff.

[1, 2] From this brief recital of the facts it is apparent that the case was a typical fact case in which the evidence, and the reasonable inferences therefrom, would support a verdict either way. On this appeal the principal contention of appellant is that the court committed prejudicial error in refusing to give an instruction offered by him to the effect that the place of the accident, as a matter of law, was within a residence district, and that therefore he had the legal right to walk on either side of the highway. The court instructed that whether the district was a residence district or not was a question of fact. Accordingly, it instructed, in accordance with well-settled law, that "pedestrians have a right to travel anywhere upon a public highway in a residence district. It also instructed in the language of section 564 of the Vehicle Code that "No pedestrian shall walk upon any roadway outside of a business or residence district otherwise than close to his left hand edge of the roadway," and further (in the then language of section 758 of the Vehicle Code), that "Every highway shall be conclusively presumed to be outside of a business or residence district unless its existence within a business or residence district is established by clear and competent evidence as to the nature of the district and unless such district is duly signposted when and as required by this code." It gave the jury the statutory definition of a "residence district" as set forth in section 90 of the Vehicle Code. That section provides that a "'Residence district' is that portion of a highway and the property contiguous thereto, other than a business district, (a) upon one side of which highway, within a distance of a quarter of a mile, the contiguous property fronting thereon is occupied by 13 or more separate dwelling houses or business structures, or (b) * * A residence district may be longer than one-quarter of a mile if the above ratio of separate dwelling houses or business structures to the length of the highway exists."

Another section should be here mentioned. Section 90.1 of the Vehicle Code provides that

"In determining whether a highway is within a business or residence district, the following limitations shall apply and shall qualify the definitions in sections 89 and 90:

"(a) No building shall be regarded unless its entrance faces the highway and the front of the building is within 75 feet of the roadway.

* * * * *

"(c) In determining the existence of a business or residence district, all churches, apartments, hotels, multiple dwelling houses, clubs and public buildings, other than schools, shall be deemed to be business structures.

"(d) A highway or portion of a highway shall not be deemed to be within a business or residence district regardless of the number of buildings upon the contiguous property when there is no right of access to the highway by vehicles from the contiguous property."

Section 465 of the Vehicle Code and those sections immediately following provide for the signposting of the various districts.

[3, 4] Appellant maintains that the evidence established without contradiction that the district in which he was walking was a "residence district," and that he was therefore walking lawfully on the right side of the highway. He urges that the court committed prejudicial error in allowing the jury to determine the nature of the district rather than directing them, as a matter of law, that it was a residence district. The jury found that appellant was guilty of contributory negligence, and appellant urges that the jury may have found that the district was not a residence district and that therefore he was guilty of negligence per se in walking on the right-hand side of the highway.

The appellant proved that the accident occurred opposite house numbered 2154; that 103 feet west of that house on the south edge of the highway was a highway sign physically complying with statutory requirements, stating that the speed limit was 25 miles per hour; that there were no structures at all on the south side of the

highway in the quarter of a mile easterly from the signpost; that in the 1320 feet (one-quarter of a mile) easterly from the signpost on the north side of the street there were exactly thirteen structures facing Fourth Street and within 75 feet of the roadway; that within 1320 feet from the west wall of No. 2154 easterly there were thirteen structures on the north side of the street, plus most of another structure. Included in both computations is a cleaning and dyeing establishment numbered 2138 and 2134. Plaintiff counts these structures as two separate buildings. If, as a matter of fact, this property constitutes but one building or structure within the meaning of the statutory provision, there would be but twelve structures on one side of the street in the quarter of a mile easterly from the signpost and twelve plus easterly from and including No. 2154. Appellant urges that, as a matter of law, No. 2138 and No. 2134 are two structures. The respondents contend, and this was the theory of the trial court, that whether the cleaning and dyeing establishment was one or two structures was a question of fact. There was considerable evidence introduced on this issue, including a photograph of the property (Defendants' Ex. 8-Q). From that evidence it appears that the cleaning and dyeing establishment is run as a single business under a single ownership; that a brick building (No. 2134) was constructed many years ago and run as a cleaning and dyeing business; that subsequently, within 10 or 12 feet of the first building, a second building was constructed; that between the two buildings is a driveway; that over the driveway the two buildings are joined together; that each building has a separate entrance facing on Fourth Street; that both buildings have been so constructed as to architecturally constitute one unit; that the newer building is run as the office and receiving portion of the business and the older building as the cleaning plant. We have studied the evidence on this issue, including the photograph, and we are convinced that the trial court correctly held that it was a question of fact for the jury to determine as to whether that establishment constituted one or two structures within the meaning of the appropriate provisions of the Vehicle Code. While the evidence on the issue was uncontradicted, the possible reasonable inferences therefrom were conflicting. It is, of course, well settled that when the nature of the district is in dispute, the trial court should submit the issue as to its character to the jury. Hill v. Fresno County, 140 Cal.App. 272, 35 P.2d 593; see, also, 2 Cal.Jur.Supp., p. 275, § 182.

[5-7] It will be noted that none of the sections dealing with the definition of a residence district expressly states where the quarter of a mile is to start. Section 468 of the Vehicle Code, as it read at the time of this accident, required the speed limit sign to be constructed "at the entrance" to a residence district. That expression is obviously synonymous with at the "boundary" of the district used in the older section of the code. A sign not posted at the boundary or entrance to a residence district is not one posted as required by law. Cavalli v. Luckett, 40 Cal.App.2d 250, 104 P.2d 708. Inasmuch as the jury impliedly found on conflicting inferences that there were but twelve structures within a quarter of a mile of the signpost, the jury found, and was justified in so finding, that this signpost was not erected as required by the section. If the sufficiency of the signposting is to be disregarded, and the quarter of a mile is to start at the point of the accident, we find from the diagram and from the evidence that, included within the fourteen buildings claimed to exist in that distance from the west wall of No. 2154 is the cleaning and dyeing establishment included as two, and all of No. 2154 (although the accident occurred about the center of that building) and all of No. 2028, although all of that building is not within the quarter mile distance. It seems obvious, therefore, that whether the point of impact was or was not within a residential zone, was a fact question for the jury, and that the trial court correctly so instructed. This conclusion makes it unnecessary to pass upon the proper interpretation of section 90.1(d), supra, added to the Vehicle Code in 1939.

[8, 9] Appellant urges that even if the jury correctly determined that the first quarter of mile of the disputed zone was not within section 90(a) of the Vehicle Code, it nevertheless was a residence zone as a matter of law within the meaning of the last sentence of section 90 which reads as follows: "A residence district may be longer than one-quarter of a mile if the above ratio of separate dwelling houses or business structures to the length of the

highway exists." Appellant proved that 1.7 miles easterly from the signpost under discussion was another signpost for westbound traffic, and that within the total area there were 128 structures, which means an average of well over eighteen for each quarter mile. It is quite apparent that the sentence above quoted does not mean that, by signposting, a municipality can include within a residential district an area on the edge thereof that does not comply with the other statutory requirements. Obviously, the "ratio" rule enunciated in that sentence simply means that once a residential district properly starts and ends with proper signs the fact that in between there might not be the requisite number of structures at a particular point will not prevent the entire district from being a residence district. The obvious purpose of the amendment was to prevent isolated spots within a total zone from being classified as not included therein because a particular quarter of a mile did not happen to have the requisite number of structures. But that provision does not qualify or restrict the other provisions of the code requiring thirteen structures within a quarter of a mile from the "entrance" of the zone before a particular zone can be classified as residential.

[10] Appellant next urges that the court erred in refusing to give the italicized portion of the following instruction: "It is settled law that pedestrians have a right to travel anywhere upon a public highway in a residence district *and it is, therefore, not negligence in them to do so. This is the common-law rule and our legislature has not changed or modified it.*" The first part of the instruction was given, and the italicized portion omitted. There was no necessity for the trial court to state "and it is, therefore, not negligence in them to do so." That naturally follows from the instruction that was given. The sentence relating to the common law was obviously immaterial.

[11] Appellant also objects to instruction 27 which reads as follows: "You may also consider whether plaintiff failed to exercise ordinary care for his own safety in not walking upon the left-hand side of the highway, if said left-hand side of the highway was open and unobstructed. You may also consider whether plaintiff failed to exercise ordinary care for his own safety in not walking upon any sidewalk available to him and open and unobstructed at the time and place of the accident involved." Appellant contends that the instruction is erroneous for the reason that it tells the jury that it "could find plaintiff negligent *solely* in using the right instead of the left-hand edge of the roadway." (App. Op. Brief, p. 16.) The appellant has misconstrued that instruction. It simply states that even if the appellant had the legal right to walk on the right-hand side of the highway, the exercise of that right might, under the facts, be neggence. That is elementary law. The court told the jury in that and several other instructions that even if appellant had the legal right to walk on the right-hand side of the highway, in determining whether he exercised due care it should consider all the facts. That correctly stated the law.

[12, 13] Appellant next complains of the exclusion of evidence relating to an experiment. He offered the testimony of the witness McNaught concerning an experiment supposed to have been made at the place of the accident for the purpose of showing that a pedestrian in appellant's position would have been plainly visible to an autoist proceeding from the west as were respondents at the time of the accident. The witness testified that he made the alleged experiment at 9:30 p. m. on the evening of October 22, 1941, the accident having occurred at 2:30 a. m. on May 25, 1941. No foundation was laid as to whether the conditions existing in October were substantially similar to those existing in May. On this ground the evidence was excluded. The evidence was obviously inadmissible. Before such evidence is admissible it is incumbent on the one offering the evidence to show the facts surrounding the experiment, and to show that the circumstances were substantially similar with those existing at the time of the accident. People v. Halbert, 78 Cal.App. 598, 248 P. 969; People v. Woon Tuck Wo, 120 Cal. 294, 52 P. 833. The sufficiency of the evidence of similarity rests largely in the discretion of the trial court. The wisdom of the trial court's ruling in the present case was demonstrated when appellant admitted that the circumstances existing in May were dissimilar with those existing in October in that the foliage on the trees was much heavier in May than in October, thus creating deeper shadows.

[16] Appellant makes other points concerning some of the instructions, concern-

ing some of the rulings on the admissibility of evidence and concerning some of the remarks of the trial judge. We have examined each such assignment of error, and find that none of them is well taken. Certainly it cannot be successfully urged that, even if there were some minor errors on such rulings, any one of them alone, or considered as a group, was prejudicial. The record shows that the case was carefully and fully tried, and that the jury was properly instructed. The jury found either that the proximate cause of the accident was the negligence of both appellant and respondents, or that such proximate cause was the contributory negligence of appellant. The evidence amply supports either finding, and either finding is fatal to appellant's appeal.

The judgment appealed from is affirmed.

KNIGHT and WARD, JJ., concurred.



58 Cal.App.2d 76

THOME v. MACKEN.

Civ. 6746.

District Court of Appeal, Third District, California.

April 9, 1943.

1. Constitutional law ⇐207(1)
Courts ⇐511

Court may without violating doctrine of "comity" or constitutional guaranty to citizens of each state of all the "privileges and immunities" of citizens in the several states, refuse to take jurisdiction of a cause of action given by a foreign statute which is in direct conflict with the statute or policy of the law of the forum. U.S.C.A. Const. art. 4, § 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Comity" and "Privileges and Immunities".

2. Constitutional law ⇐207(1)

Under constitutional provision that citizens of each state shall be entitled to "privileges and immunities" of citizens in the several states, a citizen of any foreign state or country may maintain an action at the forum where under similar circumstances a citizen of its own jurisdiction could maintain such an action. U.S.C.A. Const. art. 4, § 2.

3. Constitutional law ⇐207(1)

Each state may determine the limits of the jurisdiction of its courts and the character of controversies that shall be heard therein, provided that constitutional provision that citizens of each state are entitled to privileges and immunities of citizens in the several states is not violated. U.S.C.A.Const. art. 4, § 2.

4. Courts ⇐8

The state policy determines whether and to what extent a state will entertain in its courts transitory actions where the causes of action have arisen in other states.

5. Courts ⇐8

The "public policy" of the forum may be found in the decisions of its courts where there is no statutory or constitutional provision directly in point, but where the lawmaking power speaks upon a particular subject, public policy in such a case is what the statute enacts.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Policy".

6. Courts ⇐8

Statute providing that no cause of action arises for alienation of affection is an expression of "public policy" so that court properly declined to accept jurisdiction of action for alienation of affection arising in another state that recognized a right of action for such tort. Civ.Code, § 43.5.

Appeal from Superior Court, Siskiyou County; James M. Allen, Judge.

Action by William Thome against Arthur W. Macken for alienation of affection. From a judgment for defendant entered after his demurrer to the complaint had been sustained without leave to amend, plaintiff appeals.

Judgment affirmed.

Fred O. Small, of Klamath Falls, Or., and J. Everett Barr, of Yreka, for appellant.

David R. Vandenburg, of Klamath Falls, Or., and Tebbe & Correia, of Yreka, for respondent.

ADAMS, Presiding Justice.

Appeal from a judgment sustaining a demurrer without leave to amend.

Plaintiff, a resident of the State of Oregon, brought this action in the Superior Court of Siskiyou County, charging that defendant, in the State of Oregon, wilfully and wrongfully intending to injure plaintiff and deprive him of the affection, comfort, society, aid and assistance of his wife, and to destroy the affections of said wife for plaintiff, and to alienate her affections from plaintiff, did, at divers times during the month of May, 1939, to and including the 15th day of July, 1940, alienate and destroy the affections of plaintiff's wife, and did entice and abduct her from plaintiff, whereby plaintiff has wholly lost and been deprived of the assistance, comfort, society and aid of his said wife, to plaintiff's damage in the sum of $25,000.

To said complaint defendant demurred on the ground that it does not state facts sufficient to constitute a cause of action, that it is barred by section 341.5 of the Code of Civil Procedure of California, and that the court has no jurisdiction of the subject matter of the action.

Section 43.5 of the Civil Code of California, enacted in 1939, provides that no cause of action arises for alienation of affection. Section 341.5 of the Code of Civil Procedure enacted at the same time fixed a limitation of 60 days after the effective date of said section for the commencement of any cause of action for alienation of affections. Both sections became effective September 19, 1939. This action was not instituted until September 6, 1940, so if the latter section applies, the suit was barred by its provisions. However, we do not consider a determination of its applicability necessary to a determination of the case.

[1-4] The real question is whether the courts of California will entertain an action for damages for a tort committed in another state, when the positive law of the forum forbids the prosecution of an action for such tort.

In Hudson v. Von Hamm, 85 Cal.App. 323, 259 P. 374, wherein it was sought to hold the father of a minor child liable for a tort committed by said minor child in Hawaii, in conformity with the law of Hawaii but in conflict with the law of this state, the court said, 85 Cal.App. at page 326, 259 P. at page 376: "The action in the instant case, which is based upon an extraterritorial tort, is transitory in its nature, and if the statutes, or established law of California and Hawaii, concurred in holding a father liable for the torts of his minor child, or in the absence of established law in California conflicting with that of the foreign territory, under proper pleadings, our state courts would assume jurisdiction, and try the cause. 5 Cal.Jur. 483, § 52; Ryan v. North Alaska Salmon Co., supra [153 Cal. 438, 95 P. 862]; McManus v. Red Salmon Canning Co., 37 Cal. App. 133, 173 P. 1112. But where the statute of the foreign state or territory is in absolute conflict with the statute or the policy of the law of the forum, there is no violation of the doctrine of comity in refusing to accept jurisdiction to try the cause at the lex fori."

Also 85 Cal.App. at pages 327, 328, 259 P. at page 377: "There is no violation of the inhibition of the federal Constitution against special privileges and immunities in refusing to accept jurisdiction where the law of the forum is in direct conflict with the foreign law relied upon. Article 4, § 2, of the United States Constitution provides that: 'The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states.' Pursuant to this federal guaranty, a citizen of any foreign state or country may maintain an action at the forum, where under similar circumstances a citizen of its own jurisdiction could maintain such an action. In the case of Chambers v. Baltimore & O. R. Co., 207 U.S. 142, 28 S.Ct. 34, 52 L.Ed. 143, Mr. Justice Moody says: 'The state may determine the limits of the jurisdiction of its courts, and the character of the controversies which shall be heard in them. The state policy decides whether and to what extent the state will entertain in its courts transitory actions, where the causes of action have arisen in other jurisdictions. Different states may have different policies, and the same state may have different policies at different times. But any policy the state may choose to adopt must operate in the same way on its own citizens and those of other states. The privileges which it affords to one class it must afford to the other. Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from the citizens of other states is void, because in conflict with the supreme law of the land.'"

The court also quoted from 5 Ruling Case Law 911, section 5, as follows: "In the recognition and enforcement of foreign laws the courts are slow to overrule the positive law of the forum, and they will

never give effect to a foreign law when to do so would prejudice the state's own rights or the rights of its citizens, or when the enforcement of the foreign law would contravene the positive policy of the law of the forum whether that policy be refuted in statutory enactments or not."

And the court added, 85 Cal.App. at page 331, 259 P. at page 378: "While there may appear to be some confusion of authorities due to a natural difficulty in construing laws or statutes, and in applying the doctrine of the law of comity, the decisions of the courts of America seem to be in harmony to the effect that, when the positive law of the forum, represented by its Constitution, statutes, or current decisions, is in substantial conflict with the law of the foreign state, country, or territory, upon the subject-matter in controversy, the courts of the forum will decline to accept jurisdiction without violation of the doctrine of the comity of nations."

It is conceded by appellant that entertainment of this action by a California court would be merely a matter of comity, and that if the maintenance of such actions is contrary to the public policy of this state no relief should be granted. He argues, however, that section 43.5, supra, is not an expression of the public policy of this state but is "merely the suspension of certain types of action in the state;" that "the mere suspension of the type or kind of action is not in itself an expression of public policy." He submits that the only reason for the enactment of the section was to prevent persons within the state from permitting or encouraging conduct for the purpose of creating a lawsuit, but that it is no concern of this state if a sister state wishes to allow such a cause of action to arise within its own borders, and that when such cause has there arisen this state should not assist the offending party to escape liability by coming within its borders; and he quotes from Loranger v. Nadeau, 215 Cal. 362, 10 P.2d 63, 84 A.L.R. 1264. It is true that in that case the court held that the application of the common-law rule permitting a recovery on the part of a guest based on the ordinary negligence of the operator of an automobile, which prevailed in Oklahoma where the tort for which recovery was sought was committed, was not precluded by the statute of this state requiring proof of gross negligence.

The court said, 215 Cal. at pages 366, 367, 10 P.2d at page 65, 84 A.L.R. 1264: "The state of Oklahoma follows the common-law rule and permits a recovery on the part of a guest based on the ordinary negligence of the operator of the car. Prior to the enactment of section 141¾ of the California Vehicle Act in 1929 the law of this state was the same. Did the requirement of proof of gross negligence foreclose here the enforcement of the right which arose in Oklahoma? We are persuaded that it did not. The liability of a host to his guest for negligent injuries existed in both states. The trial court assumed jurisdiction of the subject-matter of the action and acquired jurisdiction of the parties, both residents of this state. It cannot be said that in doing so the court violated any fundamental principle of justice or public policy of this state, and no question of good morals would seem to be involved. [Citing cases.] The case of Hudson v. Von Hamm, 85 Cal.App. 323, 259 P. 374, is not applicable or controlling. There it was held in effect that the law of the foreign jurisdiction was so fundamentally opposed to the public policy of this state as to justify the trial court in refusing to assume jurisdiction of the cause."

Reliance is also had upon the case of Biewend v. Biewend, 17 Cal.2d 108, 109 P.2d 701, 132 A.L.R. 1264, wherein it was sought by a divorced wife, who had remarried, to collect alimony payments accrued within five years under a decree of a Missouri court, the laws of Missouri allowing the continuance of alimony payments after the remarriage of the wife, although California statutes do not. The court there said that upon the basis of comity, California courts have in numerous cases ordered that a foreign decree for future payments of alimony be established as the decree of the California court with the same force and effect as if it had been entered in this state; but that such rule of comity is subject to the principle that foreign laws will not be given effect when contrary to the settled public policy of the forum, but that it must be clear that the enforcement of the right obtained under the laws of another state would be prejudicial to recognized standards of morality and to the general interests of the citizens in the state of the forum. It went on to say that the right to receive future installments of alimony though at variance with section 139 of our Civil Code is not perforce inharmonious with local public policy; that it offers no threat to either the moral standards or the general interests of the citizens of this state.

We find nothing in those decisions in conflict with the decision in Hudson v. Von Hamm, supra, nor do we believe that they compel a conclusion that the action before us must be entertained by our courts. In Loranger v. Nadeau the court pointed out that the liability of a host for his guest for negligent injuries existed in both states. The difference was only one of degree of negligence necessary for recovery. And in the Biewend case our court was enforcing a judgment of a sister state, and not authorizing the prosecution of a tort action the prosecution of which is forbidden by our laws.

While the legislature of this state in enacting section 43.5, supra, did not expressly declare that the actions proscribed thereby are contrary to public policy, we doubt not that they constitute such a declaration.

It is said in 12 Am.Jur. 668, regarding the sources of public policy, that "Where there are constitutional or statutory provisions, they govern as to what is the public policy. Where the lawmaking power speaks on a particular subject over which it has constitutional power to legislate, public policy in such a case is what the statute enacts."

[5] The United States Supreme Court said in United States v. Trans-Missouri Freight Association, 166 U.S. 290, 340, 17 S.Ct. 540, 559, 41 L.Ed. 1007: "The public policy of the government is to be found in its statutes, and, when they have not directly spoken, then in the decisions of the courts * * * but when the lawmaking power speaks upon a particular subject * * * public policy in such a case is what the statute enacts."

Statutes abolishing actions for alienation of affections have been enacted in several states since 1935, to wit: Alabama (General Laws 1935, No. 356, p. 780); Colorado (Laws 1937, c. 111, p. 403); Illinois (Laws 1935, p. 716, Smith-Hurd Stats. c. 38, § 246.1 et seq.); Indiana (Laws 1935, c. 208, p. 1009); Michigan (Acts 1935, No. 127, p. 201); New Jersey (Acts 1935, c. 279, p. 896, N.J.S.A. 2:39A–1 et seq.); New York (Laws 1935, c. 263, p. 732, Civil Practice Act, § 61-a et seq.); Pennsylvania (Laws 1937, No. 441, p. 2317, 48 P.S. § 170); Nevada (Stats.1943, c. 53). In the enactment of several of these statutes the legislatures have stated their purpose to be to declare and carry into effect the public policy of the state. For instance, the Legislature of New Jersey stated: "Whereas, The remedies herein provided for by law for the enforcement of actions based upon alleged alienation of affections, criminal conversation, seduction and breach of contract to marry have been subjected to grave abuses, causing extreme annoyance, embarrassment, humiliation and pecuniary damage to many persons wholly innocent and free of any wrongdoing, who were merely the victims of circumstances, and such remedies having been exercised by unscrupulous persons for their unjust enrichment and such remedies having furnished vehicles for the commission or attempted commission of crime and in many cases have resulted in the perpetration of frauds, it is hereby declared as the public policy of the state of New Jersey that the best interests of the people of the state will be served by the abolition of such remedies. Consequently, in the public interest, the necessity for the enactment of this article is hereby declared as a matter of legislative determination."

Colorado, New York and Nevada made similar declarations. The Illinois act is entited "An Act in relation to certain causes of action conducive to extortion and blackmail * * *" and the Indiana and Pennsylvania statutes are entitled acts "to promote public morals." The recent Nevada statute is entitled "An act to promote public morals by abolishing civil causes of action for breach of promise to marry, and alienation of affections. * * *"

While the Legislature of Alabama made no declaration, the Supreme Court of that state, in Young v. Young, 236 Ala. 627, 184 So. 187, 190, in affirming a judgment sustaining a demurrer to a complaint in an action for alienation of affections, said: "The well known reason for striking down the causes of action named in the act, all growing out of relations between the sexes, was in response to a public sentiment, after wide discussion, to the effect that such actions had been so abused, made the means of exploitation and blackmail, that the existence of such causes of action had become of greater injury than of benefit to society."

In A. B. v. C. D., D.C., 36 F.Supp. 85, 87, an action for breach of promise to marry, the court said regarding the statutes of New York and Pennsylvania: "It seems to me that there is a policy enunciated by these enactments abolishing breach of promise actions which is broader

than their letter. The legislatures evidently have been prompted by concern for the public morals. * * * The evil sought to be overcome was reasonably deemed serious enough to justify a denial of the judicial process to those asking relief from real as well as fictitious wrongs. Cases based on averments similar to those here alleged had in many instances been supported by perjured testimony and consequently brought discredit on the courts. Further, actions of this sort have been declared a menace to the marriage institution, which is a vital concern of the various states. See the declaration of policy prefacing the above-cited New York enactment." Also, "The breach of promise occurred in New York, and under the New York Statute no cause of action arose 'either within or without' New York. The Pennsylvania Statute is similar. Furthermore, Pennsylvania has declared that no suits for breach of promise shall be begun or prosecuted in this state. 48 P.S. § 173. I deem the instant action to be essentially one for a breach of promise to marry and within the prohibition of the Pennsylvania Statute. It is clear that such a cause of action, even if it arose in a state other than New York or Pennsylvania, and even if it were valid where it arose, would not be enforced by the Pennsylvania courts."

In Hanfgarn v. Mark, 274 N.Y. 22, 8 N.E.2d 47, in sustaining the constitutionality of the New York statute in so far as it abolished actions for alienation of affections, the court said that at common law the rights which a husband had in the affection and society of his wife were frequently denominated a property right, and that the same statement had often been reiterated in comparatively late judicial opinions, but that in view of the broad and almost unlimited extension of the rights of married women brought about by statutory enactments and social advancement no court in that state would decide that the rights which a husband has by virtue of the marriage relation constitute property rights; and that a wife is no longer the property of her husband in the eyes of the law and by general acceptance of society.

This court cannot ignore what it knows to be the fact, that the abolition by the legislature of this state of causes of action for alienation of affections was a recognition of the changing social and legal status of women, and a declaration of the broad social trend of opinion that the abolition of such actions would tend to improve public morals and serve the best interests of the people of the state.

[6] We therefore conclude that section 43.5 of the Civil Code constitutes an expression of public policy, and that the courts of this state properly may decline to accept jurisdiction of causes of action for alienation of affection arising in other states.

The judgment is affirmed.

PEEK and THOMPSON, JJ., concurred.



57 Cal.App.2d 991

MATTESON v. STATE BOARD OF EDUCATION et al.

Civ. 12198.

District Court of Appeal, First District, Division 1, California.

April 7, 1943.

Hearing Denied June 3, 1943.

1. Schools and school districts ⇐141(5)

Provisions of School Code prescribing procedure to be followed in case of dismissal of teacher indicate legislative intent that no teacher, and especially one holding permanent tenure, should be deprived of credential to teach in any public schools of state without charges being filed and without being afforded the right of trial on such charges, so that teacher may defend himself against such charges. School Code, §§ 5.381, 5.382, 5.390–5.394, 5.420, 5.500, 5.650–5.652, 5.654.

2. Schools and school districts ⇐130

Rule adopted by State Board of Education, declaring that teacher's credentials may be issued for two years and may be renewed thereafter for periods of five years upon verification of at least "five months of successful teaching experience" in public schools of state, requires a showing of five months' teaching during the five year period of the credentials without charges of unfitness or incompetency ever having been filed against the teacher and does not permit the State Commission on credentials to deny an application ex

parte because some unknown person sends in a communication that the teacher has not during the five preceding years had five months of successful teaching experience; the word "successful" having a broad and extensive meaning. School Code, §§ 5.381, 5.382, 5.390–5.394, 5.420, 5.500, 5.650–5.652, 5.654.

See Words and Phrases, Permanent Edition, for all other definitions of "Five Months of Successful Teaching Experience" and "Successful".

3. Mandamus ⇐168(3)

Where, during five-year period preceding dismissal of school teacher who held requisite teaching credentials and permanent tenure under state law, no charges of incompetency or unfitness were filed against teacher, evidence introduced by state and local Boards of Education in mandamus proceeding by teacher to compel boards to renew teacher's state teaching credentials, tending to prove that during such five-year period teacher had been incompetent was irrelevant. School Code, §§ 2.1383, 5.381, 5.382, 5.390–5.394, 5.420, 5.500, 5.650–5.652, 5.654.

4. Schools and school districts ⇐130

Where, during five years preceding date of expiration of state teaching credential of teacher who held requisite teaching credentials and permanent tenure under state law, teacher taught continuously in public schools of state and no charges of incompetency or unfitness to teach were filed against teacher, teacher was entitled to renewal of state teaching credential. School Code, §§ 2.1383, 5.381, 5.382, 5.390–5.394, 5.420, 5.500, 5.650–5.652, 5.654.

5. Schools and school districts ⇐141(5)

Where action of State Commission of Credentials in refusing to renew credential of school teacher was illegal, subsequent summary action of local board, based on Commission's action, was illegal. School Code, §§ 2.1383, 5.381, 5.382, 5.390–5.394, 5.420, 5.500, 5.650–5.652, 5.654.

6. Schools and school districts ⇐141(6), 144(3)

Where State Commission of Credentials illegally refused to renew credentials of school teacher, and local board, on basis of Commission's action, illegally dismissed teacher without charges or trial, teacher was entitled to be restored to her position with full salary from date of dismissal. School Code, §§ 2.1383, 5.381, 5.382, 5.390–5.394, 5.420, 5.500, 5.650–5.652, 5.654.

WARD, J., dissenting.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Mandamus proceeding by Amy Matteson to compel the State Board of Education and another to renew petitioner's teaching credentials. Judgment for respondents, and petitioner appeals.

Reversed.

Walter H. Duane, of San Francisco, for appellant.

John J. O'Toole, City Atty., Walter A. Dold, Chief Deputy City Atty., and Irving G. Breyer, all of San Francisco, for respondents.

Earl Warren, Atty. Gen., and T. A. Westphal, Jr., Deputy Atty. Gen., amici curiæ on behalf of respondents.

KNIGHT, Justice.

This is an appeal from a judgment in favor of respondents in a proceeding in mandamus, the basic question involved being whether the State Commission of Credentials in the exercise of the authority conferred upon it by a rule adopted by the State Board of Education to renew state teaching credentials may bring about the summary dismissal of a teacher holding requisite teaching credentials and permanent tenure under the state law, and thus deprive her of the right to teach anywhere in California, by refusing, ex parte, to renew her state credential; or whether such teacher is entitled to the protection of those provisions of the School Code which declare in effect that a teacher's credentials may not be revoked by the state or the county board of education, nor may a teacher holding permanent tenure be dismissed from her employment, unless specific charges are filed against her and she is afforded a trial thereon.

The essential facts are these: Prior to the month of August, 1929, appellant successfully completed the teacher's training course prescribed by the State Board of Education, and thereupon, pursuant to the provisions of the California School Code, became entitled to and there was issued to her by the State Commission of Credentials a general secondary school credential,

which gave her the right to teach in the schools of that type and grade in California. About the same time there was issued to her a similar credential by the Board of Education of the City and County of San Francisco, to teach in the San Francisco schools. Thereafter and during the month of August, 1929, and continuously up to November, 1940, she was employed by the San Francisco School Department as teacher, librarian, and a teacher of English in a senior high school of said city. Meanwhile and during the month of August, 1931, by virtue of the provisions of section 5.500 of the School Code and section 135 of the city charter, she acquired tenure as a permanent employee of the Board of Education of said city. In June, 1935, the State Board of Education adopted certain rules with relation to the issuance and renewal of teachers' credentials, among which was a rule declaring that credentials "may be issued for a period of two years and may be renewed thereafter for periods of five years upon verification of at least five months of successful teaching experience in the public schools of California"; and in November, 1935, appellant applied for and was granted a renewal of her teaching credential for a period of five years. Prior to the expiration of that period and in September, 1940, she again applied for a renewal of said credential, and on November 20, 1940, her application was denied.

In connection with such denial the record shows the following: On October 21, 1940, the secretary of the Commission of Credentials wrote to the Deputy Superintendent of Schools of San Francisco in charge of personnel, informing him of appellant's application for renewal, and asking, "Will it be possible for you to verify to us the length and success of her teaching experience?" On October 22 said deputy replied by mail stating that appellant had "been employed as a teacher in the San Francisco Public Schools since August 19, 1929." Under date of November 8 the commission's secretary again wrote to said deputy, and referring to the latter's letter of October 22 stated: "In this letter you made no reference to the success of Miss Matteson's experience. The Commission of Credentials is unwilling to grant renewal of a credential for a five year period unless the applicant submits definite verification of successful experience. We are, therefore, requesting you to give us additional information indicating the success of the experience secured by Miss Matteson since 1935." In response to that letter the deputy superintendent of schools forwarded to the secretary of the state commission a letter written to said deputy on November 12 by the principal of the high school in which appellant had been teaching; also a transcript of part of an interview which is purported to have taken place on June 10, 1940, between a different deputy superintendent of schools and appellant. In the high school principal's letter he stated, without giving any reasons therefor, that appellant's "work has been entirely unsatisfactory," and that "her work in this school is, in general, not satisfactory nor successful"; and it appears from the transcript of the interview of June 10 that the deputy superintendent of schools with whom the interview was had told appellant at that time that her work was "entirely unsatisfactory"; but so far as the transcript shows he did not specify any reasons upon which he based that statement. Appellant was unaware that these communications had been sent to the state commission, nor was she informed of the contents thereof nor given any opportunity to deny the statements made therein. The commission simply notified her by letter dated November 25, 1940, that since she had "failed to verify at least five months of successful teaching experience secured in the public schools of California" her application for the renewal of the credential was denied; and thereupon and on November 30, 1940, the Board of Education of San Francisco sent her by mail a copy of a resolution passed by said board to the effect that "in compliance with section 5.420 of the School Code" her services as a teacher in the San Francisco schools had been discontinued.

At no time during the eleven years of her employment as a teacher were any charges ever preferred against her for any cause whatsoever, nor at any time during that period was she ever suspended from duty for any cause or subjected to any disciplinary measures of any kind; and it is conceded by all parties that the effect of the refusal of the state commission to renew her teaching credential, if legal, not only completely nullifies the statutory permanent tenure she had acquired under the state law, but deprived her of the right to teach school anywhere in California.

Claiming that the action of the state commission in thus refusing ex parte to renew her teaching credential, and that of the city board of education in summarily

dismissing her from her position as a permanent employee, were illegal, she brought this proceeding in mandamus in the superior court, asking that she be restored to her position with back salary from the date of the alleged illegal dismissal. The complaint was filed on December 9, 1940. The State Board of Education, its individual members, the State Superintendent of Public Instruction, and the members of the State Commission of Credentials, were made parties, but the demurrer filed in their behalf was sustained without leave to amend, and judgment thereon was entered in their favor, so that the proceeding went to trial on the merits against the remaining parties, consisting of the Superintendent of Schools of San Francisco, the members of the Board of Education of said city, and a principal of one of the high schools. However, at the end of the trial, the court in its decision expressly found that "It was stipulated by all parties to the action that the respondents [naming the state boards and the state officials] may be dismissed without prejudice, upon the understanding that said respondents so dismissed would recognize any order of reinstatement of petitioner that may be made against the remaining respondents." On February 18, 1942, judgment was entered in favor of the remaining respondents, from which the appeal herein was taken.

It is our conclusion that under the facts stated the action of the state commission in thus denying appellant's application for a renewal of her credential, and the subsequent action of the local board in summarily dismissing her as a permanent employee of the district, was in violation of her rights as a teacher under the state law.

To be eligible to teach in the public schools of California a person must have two teaching credentials, one from the state and the other from the district in which the teaching service is performed. The state credential is issued by the State Board of Education, through the Commission of Credentials; the other by the local board of education; and the state school law confers upon each board the power to revoke or suspend for certain causes, including incompetency and unfitness for service, the credential so issued by them, but only after charges are filed, notice is given to the accused teacher, and an open trial had on those charges.

With regard to state credentials, section 5.381 of the School Code provides that the State Board of Education shall have power and it shall be its duty to revoke or suspend for immoral or unprofessional conduct, or for persistent defiance of, and refusal to obey, the laws regulating the duties of persons serving in the public school system, or for evident unfitness for service, credentials issued in accordance with the provisions of the code, and to adopt such rules for said revocation or suspension as it may deem expedient or necessary. But the next section provides that whenever the holder of any credential issued by the state board is charged with having committed any of the acts enumerated in section 5.381, the state board may, in its discretion, "after notifying the teacher so charged of its intention to do so," require the county board of education of the county in which such person is teaching, "to give notice of, and conduct, a hearing of such charges in the manner prescribed by law for the hearing of charges for the revocation or suspension of a teacher's certificate by a county board of education"; that "the county board of education, after such hearing, shall report to the state board * * * its findings, and a summary of the evidence and shall make a definite recommendation concerning the revocation or suspension * * *"; and that upon "receipt of a copy of such findings, summary of evidence and recommendation, the state board * * * may suspend or revoke" the state credential, or order the charges dismissed.

As to credentials issued by local boards, the school law provides that they too may be revoked or suspended by the local board for immoral or unprofessional conduct, evident unfitness for teaching, or persistent defiance or a refusal to obey the laws regulating teachers, but "no certificate shall be revoked or suspended * * * until after a hearing before the county board of education, and then only upon the affirmative vote of at least four members of the board" (Secs. 5.390 and 5.391, School Code), and that all such charges shall be presented to the board in writing and shall be verified under oath; that notice of the time of hearing and a full and complete copy of the charges shall be furnished to the accused at least ten days before the hearing; that the "accused shall be given a fair and impartial hearing and shall have the right to be represented by counsel." (Secs. 5.392 to 5.394, School Code.)

The procedural set up required to be followed in the case of dismissal of teachers

holding permanent tenure is much more rigid. In this connection the pertinent provisions of the School Code declare: "No permanent employee shall be dismissed except for one or more of the following causes: * * * incompetency, evident unfitness for service, physical or mental condition unfitting him to instruct and/or associate with children, persistent violation of or refusal to obey the school laws of California, or reasonable regulations prescribed for the government of the public schools, by the State Board of Education or prescribed by the governing board of the school district employing said employee * * *." (Sec 5.650.) "Upon the filing of written charges, duly signed and verified by the person filing the same, with the governing board of the school district, or upon a written statement of charges formulated by the governing board, charging that there exists a cause or causes, for the dismissal of a permanent employee of said district, the governing board may, upon majority vote, except as hereinafter provided, if it deems such action necessary, give notice to the said permanent employee of its intention to dismiss him at the expiration of thirty days from the date of service of such notice, unless said employee demands a hearing as hereinafter provided. * * * A copy of the charges filed together with a copy of this Article shall be attached to the notice. * * *" (Sec. 5.651.) "Governing boards of school districts shall not act upon any charges of incompetency other than incompetency due to physical or mental disability unless during the preceding term or half school year prior to the date of the filing of such charge, and at least ninety days prior to the date of such filing, the board or its authorized representative shall have given the employee against whom the charge is filed, written notice of such incompetency, specifying the nature thereof with such particularity as to furnish the employee an opportunity to correct his faults and overcome his incompetency." (Sec. 5.652) "When any employee who has been served with notice of the governing board's intention to dismiss him, shall demand such hearing, the governing board shall have the option either to (1) rescind its action, or (2) file a complaint in the superior court of the county in which the school district or the major part thereof is located, setting forth the charges against such employee and asking that the court inquire into such charges and determine whether or not such charges are true, and if true, whether or not they constitute sufficient grounds for the dismissal of such employee, under the provisions of this code, and for judgment pursuant to its findings. If the board elects to file a complaint such complaint must be filed within thirty days from the date of the employee's demand for hearing. If the complaint be not filed within such period the board's action shall be deemed to be rescinded and all charges dismissed. * * *" (Sec. 5.654.) Then follows an elaborate system of procedure which must be adhered to in filing, hearing and determining the proceeding in the superior court, including the form of pleadings, appointment of referees, the hearing of the exceptions to the referee's report, the form of judgment, and the right of appeal. And among the provisions included therein is the following: "Should the cause be incompetency due to physical or mental disability, in lieu of dismissal the judgment may require the employee to take a leave of absence for only such period as may be necessary for rehabilitation from such incompetency, such leave of absence not to exceed two years; in which event such employee shall be entitled to the benefits provided or authorized by this code to employees of school districts absent from their duties on account of sickness."

[1] From the foregoing it is quite obvious that it was the legislative intent that no teacher and especially one holding permanent tenure should be deprived of his credential to teach in any of the public schools in this state without some sort of charges being filed against him, and without being afforded the right of trial thereon, so that he may defend himself against such charges.

[2] In support of the trial court's judgment it is argued that the rule of the State Board of Education which gives rise to this controversy should be construed to mean that despite the fact that the teacher has taught continuously throughout the five year period, and that notwithstanding during that time no charges whatever have ever been preferred against him for incompetency, unfitness for service, or any other cause, his application nevertheless must be denied unless someone—the rule does not specify whom —verifies that for at least five months out of the five year period his teaching has been "successful"; and that in any event

the commission has the power to deny his application for renewal ex parte if unknown to the teacher some person connected with the local school department—not necessarily the local board itself—sends in a communication to the effect that in his opinion the teacher has not during the five preceding years had five months of "successful" teaching experience.

We are unable to agree to such construction. In view of the mandatory provisions of the School Code hereinabove set out relating to the procedure that must be followed before a teacher's credentials may be revoked or suspended, or before a teacher holding permanent tenure may be dismissed, the words "five months of successful teaching experience" as employed in said rule, reasonably construed, must be taken to mean a showing of five months teaching during the five year period of the credential without charges of unfitness or incompetency ever having been filed against the teacher. It is conceded in the amicus curiae brief filed in behalf of the State Board of Education that the rule is susceptible of the foregoing construction, but it is argued that in order to give it such, little if any meaning is given to the word "successful." However, that is not true, because admittedly the word "successful" has a broad and extensive meaning; and it is far more reasonable to suppose that it was the intention to give the rule the construction above mentioned than to say that the action of the commission in the exercise of the authority conferred upon it by said rule is to be controlled by the mere ex parte opinion of some one employed in the school or district as to whether the teaching experience of the teacher has been successful. Moreover, if the rule be given the interpretation contended for by respondents, it would be clearly inconsistent with the statutory provisions above set forth relating to revocation, tenure and dismissal, and therefore void, for the reason that the school law expressly declares that the rule-making power vested in the State Board of Education by section 2.-1383 of the School Code pursuant to which the rule herein was adopted, is limited to rules "not inconsistent with the laws of this state."

It is argued also that the power of revocation of a state teaching credential is distinct from the power to deny a renewal of it, and that therefore the law governing the exercise of the former can have no application in governing the exercise of the latter. But even though such distinction may be drawn, the exercise of either power brings about the same result—the teacher is not only ousted from his position, but is deprived of the right to teach anywhere in California; and as above shown, that may be accomplished only after charges are preferred and trial had thereon.

[3] At the trial of the present action respondent sought to justify the ex parte refusal to renew appellant's credential and her summary dismissal by the local board by introducing evidence which they contended proved that throughout the entire five year period preceding her dismissal she had been an "incompetent" teacher and "unfit for service." However, during that entire five year period no charges of incompetency or unfitness were ever filed against her. Both remedies for her removal as a teacher on those grounds were at all times available to the school department, but nothing was ever done. On the contrary she was continued in her employment as a teacher, and paid full salary for her services. Therefore, even though it be assumed that such evidence would have been legally sufficient to warrant the revocation of her teaching credential and her dismissal as a permanent employee such evidence has no bearing upon the issue with which we are here dealing.

[4-6] Summarized, our conclusion may be stated as follows. (1) Since is admitted that for the full five years preceding the date of the expiration of appellant's state teaching credential she taught continuously in the public schools of this state and that during that period no charges of incompetency or unfitness to teach were ever filed against her, she was entitled to a renewal of her state teaching credential, and therefore the action of the commission in denying such renewal was illegal; (2) the action of the commission being illegal, the subsequent summary action of the local board, based thereon, in dismissing appellant without charges or trial was likewise illegal; (3) the action of both boards being illegal, she was entitled to be restored to her position with full salary from the date of her dismissal.

The judgment is therefore reversed.

PETERS, P, J., concurred.

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting.

WARD, Justice.

I dissent. For convenience I will designate the original respondents as the state board and the county board respectively.

To teach in the general secondary public schools of this state, it is essential that a teacher, unless he or she has a life diploma (School Code, secs. 5.270 to 5.281), be the holder of a credential, verifying successful teaching experience (School Code, sec. 5.420). In the procurement of such certificate or credential, the burden of proof in that regard is upon the applicant. The trial court found that the credential herein was denied not only because petitioner failed to have verified the necessary period of successful teaching experience, but that she did not have the required qualifications, as borne out by an investigation by officials and employees of the county board and by her personal appearance before a committee. The trial court further specifically found "that said statements disclosed the inefficiency of said petitioner which statements were true in fact." In the conclusions of law the following appears: "That said respondent Board of Education of the City and County of San Francisco could not legally employ said petitioner as a public school teacher subsequent to the expiration of her teaching credential. That the report made by the respondent Board of Education of the City of San Francisco to the State Board of Education of the State of California that the teaching experience of the said petitioner was unsuccessful was a true statement based upon true facts and was not arbitrary, discriminatory, or capricious."

There is ample evidence to support the conclusion of the trial court, and no evidence was introduced to the contrary. The majority opinion reverses the judgment and directs that petitioner be restored with full salary from the date of her "dismissal." There is no order of dismissal by the county board—merely a notice of discontinuance of service. It is true that the findings, in at least one instance, use the word "dismissal," but the date referred to is actually that of termination of service.

The majority opinion contains no order directing the state board to issue to the county board a credential or certificate, and the county board under the law is prohibited from employing petitioner without one. (School Code, sec. 5.420.) If the majority opinion may be construed as impliedly directing the issuance of such certificate, the order would be enforceable. The state board is not a present party to this proceeding.

It seems to have been stipulated that the state board would be bound by any finding of the trial court that petitioner was efficient. No such finding was made, and the majority opinion does not so hold unless the language to the effect that five months of continuous teaching during a period of five years without the filing of formal charges of unfitness or incompetency is proof of successful teaching experience, may be so construed.

If the majority opinion may be interpreted to mean that the local board should verify to the state board the required period of successful teaching experience by petitioner, so that the state in turn might issue a certificate to be used by the county board, the latter would be required to perform an act—that of issuing a false verification—which in good conscience it should not do except upon the theory advanced in the majority opinion that continuous service is successful service.

The theory of the majority opinion is that the acts of both boards were illegal—not that the state board was unjustified in finding in effect "inefficiency." The majority opinion holds "even though it be assumed [which assumption is proved not only by a preponderance of the evidence but beyond all reasonable doubt] that such evidence would have been legally sufficient to warrant the revocation of her teaching credential and her dismissal as a permanent employee, such evidence has no bearing upon the issue with which we are here dealing." In other words, the majority opinion, unfortunate in effect, holds that it is immaterial whether an inefficient teacher is foisted upon the young pupil; that the real question is—whether the procedure taken to relieve the pupil of inefficient teaching is proper.

The aim of the Teachers' Tenure Act is to enable schools to obtain a permanent staff by which to accomplish their real purpose—that of efficient teaching. Fresno City H. S. Dist. v. De Caristo, 33 Cal.App. 2d 666, 92 P.2d 668. Tenure should not depend upon the caprice of the members of governing boards, but the existence of arbitrary, opinionated determination does not appear from the record in this case.

In the past, teachers' tenure laws have protected both teacher and pupil; but the

most ardent advocate of teachers' tenure never contemplated that the stringent rules for the protection of the teacher should be used in the defense of an incompetent instructor to the detriment of the pupil. "The entire school system is provided in the interest of the school children and not otherwise." Steele v. Board of Trustees, 121 Cal.App. 419, 420, 9 P.2d 217. After all, the public is interested in the protection of the pupil rather than the "tenure" of an inefficient teacher. This brings us to a consideration of the technical grounds for the "reversal," which may well be met by both legal and practical considerations.

There is a distinction between a life diploma and a credential. A teacher with tenure rights must have one or the other. There does not appear to be anything unreasonable in the statutory requirement that after the probationary period a teacher must continue to demonstrate efficiency in order to be entitled to a life diploma. The life diploma is issued for an indefinite period in that it is issued for life. Prior to the granting thereof a credential may be issued, but "No certificate granted upon a credential issued by the state board of education for a limited period shall be renewed or extended unless the credential upon which such certificate was issued has been renewed or extended, and then only for the period of such renewal or extension of the state board credential." (School Code, sec. 5.314.) The state board has adopted certain rules—one being to the effect that until a teacher is entitled to a life diploma a certificate may be issued upon proof of "successful teaching experience" within certain periods.

In particular I cannot agree with my associates in the definition of "successful teaching efficiency." The opinion states "(1) Since it is admitted that for the full five years preceding the date of the expiration of appellant's state teaching credential she taught continuously in the public schools of this state and that during that period no charges of incompetency or unfitness to teach were ever filed against her, she was entitled to a renewal of her state teaching credential * * *." Thus the test is based upon the mere filing of charges.

Assuming that the state board, not a present party to this "reversal", should voluntarily adopt the views expressed in the majority opinion, it would require a departure from the rulings and precedents established for over fourteen years as appears from the brief of amicus curiae. I suggest with deference that the majority opinion has failed to differentiate between a teacher's tenure and the necessity of having a state diploma or credential as well as a county certificate in order to teach in the public schools, and that it has failed to differentiate between revocation and renewal. In order to continue teaching a teacher with tenure rights must have a teaching credential or a life diploma.

Petitioner does not hold a life diploma, but was merely teaching with "permanent tenure" through the assistance of a "credential certificate." Permanent tenure is not so inviolate that the Legislature may not control its existence, at least in the interest of school children. School Code, sec. 5.406; Taylor v. Board of Education, 31 Cal.App.2d 734, 89 P.2d 148.

A permanent teacher may be discharged without the filing of charges pursuant to section 5.650 and may be reduced to a probationary status. School Code, sec. 5.-711; Davis v. Gray, 29 Cal.App.2d 403, 84 P.2d 534. A teacher, acting and in fact a "principal" for twenty years and then demoted to high school teacher, is not a permanent classroom teacher. Griffin v. Los Angeles, etc., School Dist., 53 Cal. App.2d 350, 127 P.2d 939.

The evidence presented to the trial court shows without contradiction or explanation that petitioner neglected reports important to her work; that she was unable to control students; that she was shifted from one department to another and that the head of the department "found this teacher's classes in such a state of standstill that he took one class every day for two weeks to prepare them for the English essentials test, the teacher being in the room all the time. There simply was no progress being made and the teacher was unable to put over any instruction."

Petitioner contends that "successful teaching experience" means uninterrupted, i. e., continuous teaching; in other words, that a board's action in the matter of recommendation is controlled by the single factor of the time of actual employment. There seems to be no discretion given the state board relative to the issuance of a credential upon the presentation of a preliminary requisite diploma. (School Code, sec. 5.120.) It may, however, adopt rules not inconsistent with the laws of the state for the government of specified schools.

(School Code, sec. 2.1383.) Subsequently the Legislature provided that the credential might be revocable (Stats.1937, p. 1711, School Code, § 5.120) if not renewed or extended. (School Code, secs. 5.314, 5.315.) Even a life diploma may not be issued except upon the submission of a "valid teaching certificate" by a county board of "successful professional service." (School Code, sec. 5.263.)

In applying this rule, "successful" has reference to something more than attendance, etc., even continuous attendance in the classroom. The Supreme Court of this state has adopted this view in Richardson v. Board of Education, 6 Cal.2d 583, 586, 587, 58 P.2d 1285, 1287, where the court said: "'Plaintiff's further contention that he was successfully employed for three complete years because a contract subsisted throughout each year is untenable. It would be violative of the clear purpose of the law and of the terms of the contract of employment, as well, to allow one holding a contract as a probationary teacher for three successive years to acquire the status of a permanent teacher without having rendered the *successful service* which furnishes the reason for the probationary period. Neither can we agree that substantial as distinguished from full compliance with the terms of his contract is sufficient to bring plaintiff within the classification he seeks.'" (Italics added.)

Upon this question the brief of amicus curiae, filed by the attorney general, says: "* * * the situation is comparable to a city attorney with civil service status under a city charter provision. He has a right to a continuance of employment by virtue of his civil service standing. However, he must hold a valid license to practice law in order to practice his profession. Therefore, if his State license were revoked, or if he failed to renew it annually, he would not be eligible to function as an attorney in the City Attorney's office." Would there be anything illegal in requiring a licensee of the healing art at stated intervals to produce proof of efficiency as a matter of protection to the sick and afflicted until the issuance of a "life diploma" if the nature of the proof were reasonable?

When it is a question of revocation during the five-year period, trial under the tenure act provisions may be appropriate, but there is nothing unreasonable in requiring a teacher of the classification of petitioner to obtain a certificate of successful teaching. The majority opinion does not hold to the contrary.

Petitioner has had her day in court and the right to defend herself and her position. School boards are not above the law; neither are teachers. Petitioner was accorded a personal hearing before the credential committee of the state board ten days prior to the expiration date of her credential, at which hearing the contemplated action of the board was communicated to her. Following such hearing she was formally advised that her application for the removal credential had been denied. No arbitrary action was taken by the state board, and, as stated, the decision was reached after investigation and hearing. Petitioner made no demand that the matter be referred to the county board for disposition, or that formal charges be filed by the county board, or that such charges, if brought, should be heard in the superior court. Ten days after the expiration date of her credential the present petition was filed. No request for a trial on the issue of efficiency was made. On the contrary, objection was strenuously interposed to such a hearing in the superior court. Section 2.1383 of the School Code is "not inconsistent with the laws of this state."

To my mind the only difference in filing charges under the Teachers' Tenure Act and the present proceeding lies in the fact that under the tenure act she would have been given ninety days to correct her inefficiency. The record discloses that approximately one hundred eighty days prior to the order of discontinuance the deputy superintendent of high schools made inquiry of petitioner whether there was anything that could be done to overcome her "inefficiency." Petitioner's only reply was the suggestion that she might be removed to a higher grade school.

It might be contended that under the tenure act petitioner could be required, upon the demand of the trial court, to take a two-year leave of absence on account of sickness. (School Code, sec. 5.654.) The majority opinion restores her to service after the two-year period, with the right to back pay. On the record in this case, a judgment ordering a leave of absence for the purpose of rehabilitation in face of the repeated warnings to petitioner would be an abuse of discretion.

As stated, the reversal directed in the majority opinion is not based upon the is-

sue of efficiency, but upon a question of procedure. No judgment should be reversed on the ground of error in procedure unless in the opinion of the appellate court, upon consideration of the entire record, the error has resulted in a miscarriage of justice. Cal.Const., art. VI, sec. 4½. Petitioner was accorded a fair trial upon a proceeding instituted by her, in which records were introduced and witnesses examined and cross-examined, as the result of which the tribunal having jurisdiction reached the conclusion that the petitioner was justly chargeable with inefficiency.

In my opinion, the judgment should be affirmed.



HORSTMAN v. KRUMGOLD et al.

Civ. 13940.

District Court of Appeal, Second District, Division 1, California.

April 15, 1943.

Hearing Granted June 10, 1943.

1. Appeal and error ⇐927(7)

Upon appeal from a judgment entered upon a directed verdict for defendant, the facts must be determined by viewing testimony in light most advantageous to plaintiff, resolving all conflicts in her favor and giving to her the benefit of every fact pertinent to the issues involved which can reasonably be deduced from the evidence.

2. Appeal and error ⇐417(1)

The policy of the law is to liberally construe notices of appeal to the end that appeals may be determined upon their merits and not by technical objections.

3. Appeal and error ⇐419(1)

That notice of appeal from judgment in favor of defendant and against plaintiff erroneously stated purported date of entry of judgment did not invalidate appeal in the absence of any showing of prejudice.

4. Automobiles ⇐181(2)

Payment by automobile occupant formerly unknown to motorist for half of gasoline and oil used on trip in which the parties had no common interest other than to reach destination so they could visit their respective relatives did not constitute "compensation" within automobile guest statute so that occupant was a "guest" and required to establish motorist's gross negligence to recover and not a "passenger", though she assisted in driving which, however, was not made a condition of the transportation. Vehicle Code, § 403, St.1935, p. 154.

See Words and Phrases, Permanent Edition, for all other definitions of "Compensation", "Guest" and "Passenger".

DORAN, J., dissenting.

Appeal from Superior Court, Los Angeles County; Georgia Bullock, Judge.

Action by Ruth Toal Horstman against Joseph Krumgold and Sarajo Krumgold for injuries sustained by plaintiff when automobile in which she was riding and which was being operated by last-named defendant left the highway and turned over. A verdict was rendered for defendants and from the judgment entered thereon, plaintiff appeals.

Judgment affirmed.

Harry Rabwin and Monroe R. Rubin, both of Los Angeles, for appellant.

Lasher B. Gallagher, of Los Angeles, for respondent.

WHITE, Justice.

This action was commenced by plaintiff to recover damages for injuries sustained by her when an automobile in which she was riding and which was being operated by defendant Sarajo Krumgold left the highway and turned over. The accident occurred in the State of Nebraska on the 11th day of July, 1940. Prior to leaving Los Angeles County on the automobile trip, the destination of which was New York City, plaintiff and defendant Sarajo Krumgold were strangers to each other and they had agreed to share the expenses of the gas and oil used en route. By her complaint plaintiff set forth two causes of action, the first of which was based on the theory that plaintiff was a passenger for compensation and that the above-mentioned defendant was guilty of negligence in the operation of the vehicle;

while the second cause of action was predicated upon the theory that plaintiff was a guest in the automobile, and that the defendant driver was guilty of gross negligence as that term is defined by the automobile guest statute of the State of Nebraska, Comp.St.Supp.1941, § 39-1129.

During progress of the voir dire examination of the first twelve prospective jurors at the opening of the trial, defendant offered a motion to the court asking that plaintiff be required to make an election between the first and second causes of action. This motion was granted whereupon plaintiff elected to proceed to trial on the first cause of action based upon the theory that she was a passenger for compensation and charging defendant driver with ordinary negligence in the operation by her of the automobile. On defendant's motion the court then dismissed the second cause of action. At the conclusion of all the evidence, defendant moved for a directed verdict on the ground that plaintiff, as a matter of law, was not a passenger for hire but was at most a guest in defendant's automobile. This motion was granted and judgment for the defendants was accordingly entered thereon January 7, 1942.

On January 12th plaintiff served and filed a notice of intention to move for a new trial and on March 6th an order was entered by the court granting plaintiff's motion for a new trial "as to the second cause of action in plaintiff's complaint only". Defendants appealed from the order granting a motion for new trial as to the second cause of action based on the "guest" theory. Such order was affirmed by this court. Horstman v. Krumgold, 55 Cal.App. 296, 130 P.2d 721.

Plaintiff now prosecutes this appeal from the judgment entered upon the directed verdict as to the first cause of action based on the theory that she was a passenger for compensation.

[1] Because this appeal comes before us from a judgment entered after an order directing a verdict, it becomes necessary to epitomize the facts of the case, reciting the testimony thereof in a light most advantageous to the plaintiff, resolving all conflicts in her favor and giving to her the benefit of every fact pertinent to the issues involved which can reasonably be deduced from the evidence. Stated in conformity with the rule just announced, we find in the record substantial evidence that plaintiff first met defendant Mrs. Krumgold at the latter's home July 6, 1940. Upon that occasion plaintiff was introduced to defendant Mrs. Krumgold by the former's daughter who at that time made known her own identity and relationship to plaintiff. Entering defendant's home and after some preliminary conversation about generalities, plaintiff and her daughter commenced to speak about defendant Mrs. Krumgold's contemplated trip and the latter said to plaintiff, "I am glad you will be able to come. I understand your son is to be married tomorrow and I have been wanting to start but I will be willing to wait for a day or so; I am packed up ready to go but I can wait. I had hoped that we could go tomorrow morning but since your son is being married tomorrow we will wait until Tuesday". Plaintiff thereupon remarked, "That will suit me much better" and inquired "What arrangements are we going to make?" to which defendant Mrs. Krumgold replied, "We will share expenses". Plaintiff then said, "What do you mean by sharing expenses?" to which Mrs. Krumgold replied, "If you will pay half of the gas and oil". Plaintiff then said, "That is perfectly satisfactory to me". There is also testimony in the record that the parties agreed that each would pay for their respective meals and lodging. An agreement was then made that defendant Mrs. Krumgold would drive to plaintiff's house, which she did on July 9th, and the trip was commenced about 5 o'clock that morning. Defendant Mrs. Krumgold was driving the car and when they arrived at Victorville, California, it became necessary to purchase fuel, whereupon plaintiff said to defendant Mrs. Krumgold, "Here is $10; you had the tank all filled when you started and I haven't paid anything toward it so we will take it out of this until my share is paid. Defendant Mrs. Krumgold accepted the $10 and made a notation of its receipt in a little book. When they left Victorville plaintiff drove the car for some two hours and the two women alternated in driving throughout the trip until the time of the accident when defendant Mrs. Krumgold was driving. During the trip both women followed their agreement to pay for their respective meals and lodging except on one occasion at Rawlings, Wyoming, where defendant purchased dinner for plaintiff. An explanation for this departure from their agreement was given when plaintiff testified that defendant insisted upon pay-

ing for this meal because on that evening when it was plaintiff's turn to pay for the night's lodging the cost exceeded what they had expended the preceding night.

So far as the purposes of the trip were concerned, it appears that defendant Mrs. Krumgold was going to New York to join her husband and that the object of plaintiff was to visit her mother in Binghampton, New York. Neither plaintiff nor defendant had any business in common with each other nor any common objective other than to reach New York for the respective purposes just narrated.

We deem it unnecessary to here set forth the evidence of occurrences immediately preceding the happening of the accident because the main, if not the sole, question presented to us on this appeal is whether the court erred in holding that under the facts hereinabove set forth appellant was not a passenger for hire but was at most a guest in the automobile.

[2, 3] We shall first give consideration to respondent's contention that this court is without jurisdiction over the subject matter of this action. This claim is based on the fact that the notice of appeal filed by plaintiff states that she appeals "from that portion of the judgment made and entered in the superior court on March 7, 1942 in favor of the defendant and against the plaintiff" while the record definitely shows that the only ruling made by the trial court on or about March 7, 1942, in favor of defendant and against the plaintiff was the ruling denying plaintiff's motion for a new trial as to the first cause of action. While it is true the judgment as to plaintiff's first cause of action was entered January 6, 1942, and not on March 7th as set forth in the notice of appeal, nevertheless there is no showing of prejudice to defendant by reason of the confusion as to dates, and the policy of the law is to liberally construe notices of appeal to the end that appeals may be determined upon their merits rather than by technical objections. In the instant case there is but one judgment in favor of defendant and against plaintiff and that was the judgment rendered January 6th. Such being the case and defendant not claiming any prejudice, it must be held that the inadvertence in the notice of appeal as to the date of the judgment does not invalidate the appeal herein. Chinnis v. Pomona Pump Company, 36 Cal.App.2d 633, 636, 98 P.2d 560.

We come now to a consideration of the main question presented, viz., did the court err in its ruling that as a matter of law plaintiff was not a passenger in the automobile who gave compensation in return for the ride. As was stated by our supreme court in Whitechat v. Guyette, 19 Cal.2d 428, 431, 122 P.2d 47, numerous cases decided since the enactment of the "guest law" in 1929 have enunciated certain general rules which may be used as a guide, but whether the circumstances presented bring the case within the intent and purpose to be accomplished and the evils sought to be remedied by the adoption of the "guest law"; as well as whether the plaintiff was within the language of the statute, is dependent upon the particular facts involved in the case under consideration. In the same case it is also pointed out that while for the purpose of distinguishing a person carried for hire or reward from one transported gratuitously the terms "passenger" and "guest" have been conveniently used, the courts should, however, chiefly concern themselves with the meaning of the phrase "without giving compensation" as that term is used in section 403 of the Vehicle Code, St.1935, p. 154, rather than with a definition of the term "guest". We, therefore, undertake a consideration of the question whether the facts and circumstances here in evidence warranted the trial court in concluding as a matter of law that plaintiff accompanied defendant in the latter's automobile "without giving compensation" in return for such transportation. Here we are confronted with a factual situation wherein the brother of the defendant, who was a friend of plaintiff's daughter, telephoned the latter that his sister was going on a trip to New York, and in the course of such conversation plaintiff's daughter mentioned that her mother was desirous of making a similar trip. Defendant's brother then said "Well, maybe some arrangements could be made", and plaintiff's daughter then arranged with defendant's brother to call on his sister the following morning. Upon that occasion, as heretofore set forth in this opinion, plaintiff and her daughter did call on defendant at which time the latter expressed herself as pleased at the prospect of plaintiff accompanying her on the trip. To an inquiry by plaintiff as to

"What arrangements are we going to make?" defendant replied, "We will share expenses". Pressed for an explanation as to what defendant meant by "sharing expenses" the latter replied, "If you will pay half of the gas and oil". To all intents and purposes this was the policy pursued on the trip. In view of the respective objectives of plaintiff and defendant as disclosed by the evidence, it can not be said that as between them, the trip was an integral part of a business venture for their mutual advantage. As we view the evidence in the case at bar, the relationship between plaintiff and defendant can be characterized as one of a social nature similar to that existing in the case of McCann v. Hoffman, 9 Cal.2d 279, 70 P.2d 909, and in Rogers v. Vreeland, 16 Cal.App. 2d 364, 60 P.2d 585, wherein the parties were on pleasure trips. Judging the facts of the instant case in the light of the holding of our supreme court in the cases of Whitechat v. Guyette, supra, and Druzanich v. Criley, 19 Cal.2d 439, 122 P.2d 53, we are persuaded that the benefit received by defendant from plaintiff does not as a matter of law measure up to the sufficiency required by section 403 of the Vehicle Code in order to be termed "compensation" within the meaning of such section. In the Whitechat v. Guyette case, supra, it was held that because of a conflict in the evidence concerning a cash payment to the defendant driver and the purpose and intent of such payment, it was within the province of the jury to determine whether such payment was merely a payment to share expenses or was in fact compensation.

[4] However, in the instant case we are impressed that different minds could not reasonably differ upon that question and that the testimony herein points unerringly to the fact that, as a matter of law, the promised benefit from plaintiff to defendant amounted merely to an agreement or promise to share expenses. The case of Druzanich v. Criley, supra, is equally and as readily distinguishable from the case with which we are here concerned. In that case it was held that the conversations prior to commencement of the trip showed that the offer to transport plaintiff was conditioned upon the latter sharing in the driving and that this "was just as much payment for transportation as a railroad fare"; that plaintiff's promise was the "special tangible benefit" which was "the motivating influence for furnishing the transportation" referred to in the McCann case, supra. In the case before us it is true that both plaintiff and defendant would be benefited socially by taking the trip to New York to visit their respective relatives, but the presence of one in New York was not necessary for the enjoyment of the benefits of such eastern visit contemplated by the other. Whatever sharing in the driving occurred on the trip, in the case at bar, can be said at most to amount only to a "courtesy of the road", for the record shows without contradiction that the offer of transportation made to plaintiff was not conditioned upon her sharing in the driving. It must, therefore, be held as a matter of law under the decision in McCann v. Hoffman, supra, that plaintiff was a "guest" and not a "passenger" and that the consideration or benefit passing from plaintiff to defendant was merely a promise to share expenses and not compensation.

For the foregoing reasons the judgment entered herein on January 6, 1942, is affirmed.

YORK, P. J., concurs.

DORAN, Justice.

I dissent.

Not only am I of the opinion that appellant was not a guest within the meaning of section 403 of the Motor Vehicle Code but I am also of the opinion that the decisions relied on in the prevailing opinion are the product of falacious reasoning as a result of which, by construction, the comprehensive purpose of section 403 is defeated.

For example, in Whitechat v. Guyette, 19 Cal.2d 428, 122 P.2d 47, 49, the court has placed special emphasis on the meaning of the word "compensation" and in doing so appears to have disregarded the fact that the word "compensation" has not "acquired a peculiar and appropriate meaning in law", that it is not a technical word and hence should be "construed according to the context and the approved usage of the language". (Sec. 16, Code Civ.Proc.) In that connection it should be noted that there is nothing in the context that gives to the term "compensation" any special

significance. On the contrary, it clearly appears to have been used in its ordinary acceptation. Nevertheless, in the Whitechat case appears the following: "As a starting point reference might be made to a situation in which a person driving along a highway picks up a hitchhiker. It is clear that the pleasure derived from the doing of such an act of kindness is not a benefit sufficient to be considered compensation, and, in fact, the only tangible benefit is enjoyed by the hitchhiker. Nor is there any question of compensation involved if a driver of a car takes another to some social event which both desire to attend or to some other point of common destination solely for the pleasure deriver from the taking. It is equally clear that the benefits of hospitality, companionship or goodfellowship accruing to the owner or operator of an automobile as the result of a simple pleasure trip are not benefits that may be considered compensation. Even if there is something tangible in the way of a contribution of money from the occupant to the driver, a sharing of expenses, or even in some cases full payment of gas and oil by the occupant, there is no benefit sufcient to be termed compensation if the trip is of a purely social nature."

It is at this point that the reasoning of the Supreme Court, in my opinion, went astray. By basing the meaning and interpretatoin of "compensation" on the distinction between a trip of a purely social nature or for pleasure and a trip not for such a purpose, a false premise was established. There is nothing either in the context of section 403 or in the meaning of the term "compensation" that warrants such an assumption. The result is an amendment by judicial interpretation that effectively limits the scope of the section.

And why should such a distinction be resorted to? In terms of dollars and cents, is money any the less compensation because it is spent for pleasure or for purposes of a social nature? It is noteworthy in this connection that, as a matter of common knowledge, great stadiums have been erected throughout the country exclusively for pleasure purposes. The United States maintains its national parks for such purposes. Indeed virtually every man, woman and child in the country spends money for pleasure and social purposes. How then can it be argued successfully that money so spent is not "compensation"? If this is true, then how can the legislature have intended to give any different meaning to the word "compensation" than the meaning accepted in the "approved usage of the language"?

In order to determine the nature of compensation as contemplated by the statute, the more appropriate basis for deduction would appear to be that employed in determining the nature of consideration for a contract. It is reasonable to assume that when the statute speaks of compensation, the reference is to a benefit conferred in the nature of a payment of money, or its equivalent. For example, if two persons decide to take a pleasure trip in the car of one, the other to pay half the expenses, a benefit has very definitely been conferred upon the owner of the car, in the nature of compensation for the use of his car, the wear and tear thereon and the consumption of gas and oil. Moreover, the transaction amounts to a definite contract or agreement on the part of the guest to pay one half the expenses of the trip if the car owner will drive his car to the desired destination. To proceed a step further, if in return for being driven to San Diego on a pleasure trip one week, the quest premises to drive the car owner to Santa Barbara in the guest's car the next week, a benefit has been conferred and the car owner has been compensated in no less degree than if he had been paid for driving the guest to San Diego; and the transaction again amounts to a contract.

Section 403 of the Vehicle Code says nothing about the nature of the ride being taken by the guest. The section merely speaks of the giving of compensation for the ride. It cannot be successfully or validly argued that the compensation referred to in the statute is different from the type of benefit which constitutes good consideration for a contract; nor can it be any more successfully argued that a contract is any less a contract because the purpose thereof happens to be one of pleasure. Rather than make the determination of the question of whether compensation was given for the ride depend upon whether the ride was for social or business purposes, a sounder basis for such determination appears to lie in ascertaining whether the benefit, if any, conferred in exchange for the ride was such as to constitute good consideration for a contract to undertake the

trip in question. Such construction does no violence to the "approved usage of the language" and leaves to the legislature the determination of limiting or extending the operation of the statute by amendment, where, under the law, it properly belongs.



58 Cal.App.2d Supp. 903

GALBAVY v. CLEVELIN REALTY CORPORATION.

Civ. A 5436.

Appellate Department, Superior Court, Los Angeles County, California.

April 13, 1943.

1. Evidence ⇐158(26)

The corporation minute book is not the only competent evidence to prove passage of resolutions by board of directors, since oral evidence is permissible for that purpose.

2. Corporations ⇐432(12)

In action to recover real estate salesman's commission allegedly due to plaintiff's assignor from brokerage firm, plaintiff could not defeat defendant's right to set-off for value of land conveyed to salesman on the ground that no authority on part of those executing the deed for defendant corporation was shown, where the deed had been delivered, and no objection was made to testimony of officer that a resolution conferring such authority had been passed. Gen.Laws 1937, Act 112, §§ 2, 18.

3. Brokers ⇐39

That the land which real estate salesman sold for brokerage firm, and for which sale commission was claimed, was owned by the brokerage firm, did not bar salesman from recovering commission under the Real Estate Act. Gen.Laws 1937, Act 112, §§ 2, 18.

4. Statutes ⇐181(2)

In construing a doubtful statute, court may take into consideration any great inconvenience which may result from a given construction.

5. Statutes ⇐181(2)

Where a statute is ambiguous, the court may look beyond the law itself and consider the consequences of a particular construction and give the statute a construction which will make the statute practically operative with the least injury to those upon whom it spends its force, so that a statute designed to regulate will not be construed as to so destroy.

6. Evidence ⇐20(1)

It is common knowledge that subdivisions of land for the purpose of sale are often promoted and placed on the market by real estate brokers who own them or have some interest in them beyond the mere expectation of earning broker's commissions by their sale. Gen.Laws 1937, Act 112, §§ 2, 18.

7. Appeal and error ⇐1177(6)

In action to recover real estate salesman's commission from brokerage firm, where there was substantial evidence in support of cross-complaint filed by defendant for damages and the questions arising on cross-complaint had not been discussed, judgment for plaintiff would not be modified and affirmed by deducting set-off to which defendant was entitled, but the case would be remanded for new trial. Gen.Laws 1937, Act 112, §§ 2, 18.

Appeal from Municipal Court of Los Angeles; Edwin L. Jefferson, Judge.

Action by O. J. Galbavy against Clevelin Realty Corporation to recover compensation allegedly due to plaintiff's assignor while acting as real estate salesman for defendant, wherein defendant filed a cross-complaint based upon alleged fraud of plaintiff's assignor in connection with sales made for defendant. From a judgment for plaintiff on the complaint and cross-complaint, defendant appeals.

Reversed and remanded.

David B. Larimer, of Los Angeles, for appellant.

A. S. Goldman, of Los Angeles, for respondent.

SHAW, Presiding Judge.

Plaintiff's assignor, Landfield, was a real estate salesman, licensed to act as such under the defendant, Clevelin Realty Corporation, which was a licensed real estate

broker, and this action is brought to recover compensation claimed to have been earned by Landfield while acting as such salesman. The defendant filed a cross-complaint against Landfield, alleging that he had been guilty of fraud in making some of the sales for which plaintiff claims compensation, and that defendant had been compelled by reason of such fraud to make settlements and adjustments with the purchasers, and had been damaged thereby. The same matter was pleaded in the answer as an offset to plaintiff's claim. The defendant appeals from a judgment against it on both complaint and cross-complaint.

The testimony given by defendant's treasurer, Schultz, is sufficient to support the implied finding that the sum of $561.17, awarded plaintiff by the judgment, was due to Landfield from defendant for commissions. But the evidence also shows without dispute that defendant is entitled to have $300 deducted from that amount for the price of land conveyed to Landfield by defendant. The agreement for the purchase of this land by Landfield from defendant is admitted by plaintiff, as is the receipt of the deed. The agreement provides that the price, $300, is to be a charge against Landfield's contingent commission account and to be retained by defendant from moneys received by it against that account.

[1, 2] Plaintiff now objects to that deed on the ground that the authority of those who executed it for defendant is not shown. Schultz testified that a resolution conferring such authority had been passed by the board of directors. It is true the minute book and the original resolution were not produced, but a corporation minute book is not the only competent evidence to prove the passage of resolutions by its board of directors. Oral evidence is permissible for that purpose. Boggs v. Lakeport, etc., Ass'n, 1896, 111 Cal. 354, 357, 43 P. 1106; Michaels v. Pacific S. W. Laundry, 1930, 104 Cal.App. 349, 362, 286 P. 165, 1071. Oral proof of the contents of the resolution might have been subject to the best evidence rule, but no objection to the evidence on that ground appears. No evidence in disproof of the authority to execute the deed was given. Nothing appeared, therefore, to authorize the belated attempt to rescind this transaction because of nonperformance by defendant, made by plaintiff rather than Landfield, at the hearing of the motion for a new trial, even if rescission could properly be had at that stage of the proceedings.

[3] It appears without dispute that the land which plaintiff's assignor, Landfield, sold for defendant and for sale of which compensation is claimed, was owned by defendant. On this fact a doubt arose whether plaintiff's claim was not barred by the provisions of the California Real Estate Act, Deering's General Laws 1937, Act 112, Stats.1919, p. 1252 as amended, and re-argument was allowed on this question. We have concluded that the action is not so barred. The statute above mentioned provides for licensing real estate brokers and real estate salesmen, a salesman's license authorizing him to act only under the particular broker by whom he is employed when it is issued. Section 2 defines the term "real estate broker" so as to include "a person, copartnership or corporation who, for a compensation" does any of a series of acts which may be characterized generally as negotiating real estate transactions, "for another or others". It defines "real estate salesman" so as to include "one who for a compensation is employed by a licensed broker" to do any of the acts which are included in the definition of a broker. The definition of a salesman does not include the words "for another or others," appearing in the definition of a broker, or any other words which expressly limit the acts of a salesman to those done for principals other than the broker by whom he is employed. We see no reason to read such limitation into the definition of a salesman, by implication.

Section 2 does, it is true, further provide that the statute—except sections 19a and 20a to 20*l*, which relate to approval of subdivisions of land by the Real Estate Commissioner and are of no consequence here —"shall not apply to anyone who shall directly perform any of the acts aforesaid with reference to his own property," or in case of corporate owners to their regular officers performing such acts without special compensation. Defendant being a corporation, its regular officers could act under this provision without licenses, but the provision does not purport to provide what sort of license its other employees must hold in order to act for it. Section 2 further provides that "one act, for a compensation of buying or selling real estate of or for another," etc., shall constitute the person doing so "a real estate broker

or salesman within the meaning of this act." The salesman selling his employer's land acts "for another," but it is consistent with the provision last quoted that he remain merely a salesman when doing so.

Section 18 makes it unlawful for a licensed broker to pay "compensation for performing any of the acts herein specified"—the reference by "herein" apparently being to the act as a whole—"to any person who is not a licensed broker, or a salesman licensed under the broker paying the compensation," and forbids a real estate salesman to "accept compensation from any person other than the broker under whom he is at the time licensed." These provisions are also consistent with plaintiff's right to recover for the acts done by Landfield here. The first of them is broad enough to include acts which would, except for plaintiff's position as salesman, be those of a broker; and neither contains any words which limit the compensation which may be paid by a broker to his salesman to transactions in which the broker is acting as such. Section 18 further provides that it is a misdemeanor "for any person, firm or corporation, whether obligor, escrow holder or otherwise, to pay or deliver to anyone a compensation for performing any of the acts specified in section 2 hereof, who shall not be known to be, or present evidence to such payor that he is a regularly licensed real estate broker at the time such compensation is earned." This reference to section 2 is broad enough, if it stood alone, to include acts as a salesman, but its context, both in this sentence and in the provisions of section 18 previously referred to, show that it does not intend to deal with payments made by a licensed broker to a salesman licensed under him.

[4, 5] A possible objection to the conclusion we have stated is that it renders the words "licensed broker", in the definition of a salesman, to a considerable extent a mere description of the person who employs the salesman, rather than a designation of the field in which the salesman acts for him. However, this is a reasonably possible interpretation of the words used, which are ambiguous in this respect, and it is to be preferred because of the very inconvenient results of a contrary interpretation. "In construing a doubtful statute, no doubt the court may take into consideration any great inconvenience which may result from a given construction." 23 Cal.Jur. 768; Reithardt v. Board of Education, 1941, 43 Cal.App.2d 629, 633, 111 P.2d 440. Where a statute is ambiguous, the court "may look beyond the law itself and take into consideration the consequences of a particular construction or interpretation, and if the language used permits, give to the statute a construction which is in harmony with sound sense and wise policy—one which will make the statute practically operative with the least injury to those upon whom it spends its force so that a statute designed to regulate will not be so construed as to destroy." In re La Belle, 1940, 37 Cal.App.2d 32, 38, 39, 98 P.2d 778, 781.

[6] It is a matter of common knowledge, and no doubt the legislature when it enacted this statute was aware, that subdivisions of land for the purpose of sale are often promoted and placed on the market, at least in part, by real estate brokers who own them or have some interest in them beyond the mere expectation of earning broker's commissions by their sale, and that in many other cases brokers own or have such an interest in the land which they sell. It would be a matter of great inconvenience if in such cases the brokers could not set the salesmen employed by them at the work of selling such land, but must employ other brokers for that purpose. Upon the salesman would be placed the burden of ascertaining before entering into a transaction whether his employer had any interest in the land involved, or taking the chance of working for nothing if such interest existed. These results would necessarily follow from the provisions of section 18, unless a salesman may be regarded as acting in that capacity when he sells his employing broker's own land. Construing the statute according to the rule of convenience above stated, we think he may be so regarded. The act itself suggests no reason for not so construing it. Its purpose is to require honesty and fair dealing on the part of those engaged in the real estate business, and this purpose is to be carried out by requiring proof of honesty and good reputation before a license to engage in that business, either as broker or salesman, can be issued, secs. 9a, 9b, and providing for revocation of a license to act in either capacity for dishonesty or fraud, sec. 12. A salesman selling his employer's own property stands in no relation to the public with whom he deals substantially different from that of a

salesman selling, in behalf of his employer, the property of others. Under our construction of the statute the sanctions of the statute, intended to ensure his honesty, will apply to a salesman equally in either case, and thus its purpose will be as fully carried out as if the owning and selling broker were to employ another broker, instead of his own salesman, to sell for him.

[7] We do not find it proper to modify the judgment by deducting from it the sum of $300 herein discussed, and thereupon to affirm it, because of defendant's cross-complaint and the offset pleaded in the answer. Defendant offered substantial evidence in support of its allegations, and we would not be warranted in passing upon the weight of this evidence, as we must do in order to make a finding here on the amount, if any, to be awarded plaintiff. The questions arising on this cross-complaint and offset have not been discussed, so we express no opinion upon them, but suggest that if this matter is urged on a new trial more attention be given to the question of measure of damages than it appears to have received heretofore.

The judgment is reversed, and the cause is remanded to the Municipal Court for a new trial, appellant to recover its costs of appeal.

FOX, J., and KINCAID, Judge pro tem., concurred.



57 Cal.App.2d Supp. 1028

PEOPLE v. WORST.

Cr. A. 1946.

Superior Court, Appellate Department, Los Angeles County, California.

March 31, 1943.

1. Poisons ⇐2

The statute regarding economic poisons must be read as a whole, rather than by individual sections, in order to properly ascertain what it was intended to cover. St.1933, p. 237 et seq., as amended, §§ 1061 to 1079; St.1935, p. 1156, § 1061(a).

2. Poisons ⇐4

The statute prohibiting the sale of "economic poisons" without obtaining license from state department of agriculture does not include a growing bush represented as a repellent to gophers. St.1933, p. 237 et seq., as amended, §§ 1061 to 1079; St.1935, p. 1156, § 1061(a).

See Words and Phrases, Permanent Edition, for all other definitions of "Economic Poison".

3. Poisons ⇐4

Where defendant treated bushes with certain vitamins to develop root growth and without obtaining license from state department of agriculture sold bushes for represented purpose of repelling gophers through natural underground root odors, defendant did not violate statute regulating "economic poisons" defined as including any substance or mixture of substances intended to be used for repelling rodents. St.1933, p. 237 et seq., as amended, §§ 1061 to 1079; St.1935, p. 1156, § 1061(a).

Appeal from Municipal Court of Los Angeles; Ben Rosenthal, Judge.

Carl Worst was convicted of violating section 1071 of the Agricultural Code of California, and he appeals.

Reversed with directions.

Ralph W. Swagler, of Burbank, for appellant.

Ray L. Chesebro, City Atty., W. Jos. McFarland, Asst. City Atty., and Roger Arnebergh, Deputy City Atty., all of Los Angeles, for respondent.

KINCAID, Judge pro tem.

The defendant is charged with the violation of Section 1071 of the Agricultural Code of California, St.1933, p. 239, as amended, in that he sold an economic poison, to wit, a growing bush which he represented was repellent to gophers, without having first obtained a license from the Department of Agriculture of California so to do. This section of the Agricultural Code is a part of Division 5, Chapter 7, Article 3 of such code, dealing with the subject, "Economic poisons," and includes Sections 1061 to 1079, St.1933, p. 237 et seq., as amended. Section 1061, subdivision (a), St.1935, p. 1156, defines "Economic poisons" as including "any substance, or mixture of substances intended to be used

for preventing, destroying, repelling, or mitigating any and all insects, fungi, bacteria, weeds, rodents, predatory animals or any other form of plant or animal life which is, or which the director may declare to be, a pest, which may infest or be detrimental to vegetation, man, animals or households, or be present in any environment whatsoever." Section 1071 provides generally that every manufacturer or dealer in economic poison shall first be required to obtain a license from the Department of Agriculture before such products are offered for sale; shall file names of brands and the correct name and percentage of each active ingredient and each inert ingredient contained therein; or in lieu of the latter there may be delivered to the director a sample of not less than one pound of each economic poison desired to be registered. A violation of such provisions is made a penal offense.

The case was tried and is on appeal on a written stipulation of facts. From such stipulation, it is conceded that defendant has been engaged in the business of growing, advertising and selling plants or bushes for the represented purpose of repelling gophers through the natural underground root odors contained in such plant or bush; that the defendant in the course of growing and producing such bushes treated them with certain vitamins for the purpose of causing the roots to become larger than is usual to the bush in its normal condition; that said bush has never been registered as an economic poison nor has the Department of Agriculture ever issued a license to defendant under the above code provisions, and that the Bureau of Chemistry of California, by whom such code provisions are administered, has not taken jurisdiction of traps or devices used for the trapping of rodents. The sole question to be determined on this appeal is whether, by the production and sale of such bush, the defendant is producing and selling an economic poison within the purview of such Agricultural Code section.

[1-3] Counsel for the prosecution contends that because a bush may be construed to be a "substance," as referred to in Section 1061, subdivision (a), defining "economic poisons," and because it was represented that said bush would repel gophers, that it constitutes an economic poison. With this contention we cannot agree. This chapter on economic poisons must be read as a whole, rather than by individual sections, in order to properly ascertain what it was intended to cover. Such a study leads us to the conclusion that this law was never intended to, and does not, include a growing bush of the character here under consideration. The references therein to "preparations," "drugs," "chemicals," "in package form," "inert ingredients," "percentages of the active and inert ingredients," "every separate lot, * * * sealed or closed container or package of economic poisons * * * [shall have attached to it a] label," "sales of economic poisons in any other than * * * sealed or closed container or package are prohibited," "the director shall take samples of economic poisons, make analyses or examinations thereof," all indicate that a growing bush of the kind here in question was never intended to be included within these legal prohibitions. The active ingredient in the bush here under consideration is an odor, and is produced by nature and not by chemicals or other artificial means, excepting so far as the introduction of vitamins thereto might tend to enlarge the roots and thereby enhance the root odor. The bush was never represented as being a poison, or as being physically injurious to the gopher, or to be eaten by him, but only as being so obnoxious to his sense of smell as to discourage his presence in the immediate vicinity. An odor is not even a "substance, or mixture of substances." A gopher trap is a substance most surely, and it is produced and sold for the purpose of destroying gophers, yet it is conceded that no attempt has been made to assume jurisdiction over such traps under the economic poison law. It is argued that because defendant fed vitamins to the bush to develop its root growth, it is therefore chemically treated and thus becomes an economic poison. If this is true, as "weeds" are listed along with "rodents" in Section 1061, one could not, without first complying with Section 1071, grow a lawn clover, with the aid of a fertilizer, and sell it under the representation that it is more rugged than devil grass and will prevent the growth of the latter when planted in a lawn. We cannot agree that this law was ever intended to be, or is, so inclusive.

The defendant, by his acts herein, has not violated the provisions of the laws with which he is charged and stands convicted.

The judgment of conviction is hereby reversed, and the cause is remanded to the Municipal Court, with directions to dismiss the complaint.

SHAW, P. J., and FOX, J., concur.



57 Cal.App.2d Supp. 1032

PEOPLE v. CHURCH.

No. 111359

Appellate Department, Superior Court, San Diego County, California.

April 3, 1943.

Rehearing Denied April 12, 1943.

1. Stipulations ⇐14(1)

In action by state against lessee of property condemned for highway purposes, to recover value of equipment removed by lessee, wherein attorney for state, when it was sought to introduce lease in evidence, stated it would be stipulated that property was personal property of landlord and tenant with further permission to read lease showing right of tenant to remove fixtures, there was no stipulation that, as between lessee and state, equipment was personal property which would be tantamount to stipulating that state had no case.

2. Eminent domain ⇐318

Admitted circumstances that, as between landlord and tenant, equipment on real property condemned for highway purposes was property of tenant under terms of lease was not necessarily conclusive as to right to such equipment as between tenant and state, which never became landlord, but was rather purchaser of leasehold interest at the same time that it became purchaser of landlord's reversion.

3. Fixtures ⇐1

The term "fixture" has a well-ascertained meaning as something affixed to realty and means those things which are so attached to realty as to be considered in law a part thereof.

See Words and Phrases, Permanent Edition, for all other definitions of "Fixture".

4. Eminent domain ⇐318

In determining tenant's right to fixtures under terms of lease as against state condemning property for highway purposes, transaction if a sale would be a "forced sale", and therefore contrary to general rule prevailing between vendor and vendee, and as against condemnor, term should be strictly construed.

See Words and Phrases, Permanent Edition, for all other definitions of "Forced Sale".

5. Fixtures ⇐14

In litigation between landlord and tenant, the latter's intent in making annexation is generally treated as controlling test as to whether or not chattel annexed has become a "fixture".

6. Eminent domain ⇐318

In condemnation suit involving question as to right of tenant to fixtures placed on property, intent with which fixtures were placed thereon is of great importance in spite of fact that condemnor cannot have been party to such intent.

7. Eminent domain ⇐318

"Intent" of tenant, in annexing personal property to land leased which as between himself and condemnor of leasehold can be recognized as bearing on character of such annexed property, is not so much intent that tenant may have expressed as it is intent which the sort of property involved and character of annexation apparently implies.

See Words and Phrases, Permanent Edition, for all other definitions of "Intent".

8. Fixtures ⇐7, 29

Growing trees, shrubs, and other plants are generally considered a part of "realty" to which they are attached by their roots and continue to be such until they are severed when for the first time they become personal property.

See Words and Phrases, Permanent Edition, for all other definitions of "Realty".

9. Fixtures ⇐15

As between landlord and tenant, various types of appurtenances of oil filling stations amount to "trade fixtures" and may therefore be removed by tenant while still in possession of leased premises.

See Words and Phrases, Permanent Edition, for all other definitions of "Trade Fixture".

10. Eminent domain ⇐318

Title to land acquired by condemnation for highway purposes vests in the public only an "easement" or right of way together with the necessary incidents for the construction, maintenance, and reasonable enjoyment of the same.

See Words and Phrases, Permanent Edition, for all other definitions of "Easement".

11. Eminent domain ⇐133

State in condemning land for highway purposes was bound to pay for such permanent improvements as would lose a substantial part of their value in consequence of their removal, such as buildings that were on property when it was condemned.

12. Appeal and error ⇐1010(1)

In action by state against lessee of property condemned for highway purposes to recover value of filling station equipment removed by lessee, whether such equipment had become part of realty so as to be included within award in condemnation proceeding was a "question of fact" for the trial court, whose conclusion could not be disturbed unless appellate court could say as a matter of law that the evidence did not sustain it. Code Civ.Proc. § 1248, subd. 1; Civ.Code, §§ 658, 660.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

13. Eminent domain ⇐318

Gasoline and kerosene pumps on filling station property readily unscrewed from their connection with underground tanks and automobile hoist which, though resting on concrete footing, was not attached to footing and could be removed with little damage, constituted "personal property" and not included in the "improvements pertaining to the realty" for which jury was required to award compensation in condemnation proceedings so as to render lessee of property, who removed equipment, liable to the state on ground that equipment belonged to the state by virtue of condemnation decree as part of the realty. Code Civ.Proc. § 1248, subd. 1; Civ.Code, §§ 658, 660.

See Words and Phrases, Permanent Edition, for all other definitions of "Improvement Pertaining to Realty", "Personal Property", and "Realty".

KELLY, J., dissenting.

Appeal from Municipal Court of San Diego; Eugene Daney, Jr., Judge.

Action by the People, acting by and through the Department of Public Works, against Walter Church, to recover value of certain property removed by tenant after property was condemned. Judgment for defendant, and plaintiff appeals.

Affirmed.

Holloway Jones, Clifford D. Good, George C. Hadley, Lincoln V. Johnson, and Francis J. Carr, all of San Francisco, for appellant.

Irve C. Boldman and Bertrand L. Comparet, both of San Diego, for appellee.

HAINES, Presiding Judge.

In a certain cause numbered 106244 heretofore tried in the Superior Court of San Diego County, the People of the State of California sought to condemn for right-of-way purposes incident to the widening of a public highway certain lands, which included those known as lots 2 to 6, both inclusive, of West Atlantic Street Addition, in the City of San Diego. Among the defendants in that action were one Jane P. Joslyn, the owner of the five lots, and one Walter Church, the defendant and respondent in the instant case. The latter was lessee under a lease from said Jane P. Joslyn running by its terms from March 20, 1939, to and including March 19, 1944, and occupied the premises, consisting of the five lots, under such lease. He was engaged in the business of operating a service station in connection with which he had installed on the property certain equipment which forms the subject of the present action, to wit, one Tokheim Kerosene Pump, two Wayne Automatic Computing Gas Pumps, three Red Seal Automatic Computing Gas Pumps, one Aqua System Automatic Computing Gas Pump and one pneumatic auto hoist. He also had on the premises an air compressor originally in-

cluded in the description in the complaint of the property here involved but as to which appellants abandoned at the trial any claim. There were also on the premises certain buildings belonging to the lessor and occupied by the tenant, with which we are not here concerned, and certain iron kerosene and gasoline tanks buried in the ground which are not involved in the instant case.

In said former action 106244 a judgment of condemnation was entered as against both Mrs. Joslyn and Church, the lessee, pursuant to the verdict of a jury which awarded compensation for the real property and "improvements" but did not further describe the latter or specify the equipment. The amount of the compensation awarded for the property taken was by written stipulation between the said Jane P. Joslyn and the said Walter Church apportioned between them. Before relinquishing possession of the leased property Church removed the said pumps and pneumatic hoist and claims that he was entitled to do so as their owner, whereas apparently the People of the State of California claim that this property was carried by the condemnation decree as part of the realty and have brought the present action in claim and delivery to recover the same or its value, the amount of which is admitted by the pleadings to be $1,745. Judgment was given by the trial court for the defendant and this appeal follows.

What are referred to in the record as the kerosene and distillate pumps were while on the premises set on wooden blocks which rested on the ground but were not fastened to these blocks. Neither were the blocks fastened to the ground (unless by pipes, as hereinafter described). The record, however, only identifies one of the pumps as a kerosene pump and so far as can be ascertained from it if there were any distillate pumps they are not involved in this present action. Except the one kerosene pump, all of the pumps mentioned in the complaint are therein referred to as "gas pumps," which we understand to mean gasoline pumps. These rested of their own weight on cement islands between two driveways on the property but were not bolted to the islands. However, there were holes in the islands of twelve inch diameter, through which pipes ran loosely, connecting the pumps with the iron tanks hereinbefore referred to buried in the ground below. The tanks contained the gasoline. One of the pumps which was operated by electricity was also equipped with a pipe through which the electrical current was conducted. In the case of each gasoline pump the pipe connecting it with its tank was of one and one-half inch diameter and screwed to the pipe within the pump by a single screw joint or "union" which was enough to hold the pump "pretty rigid." The pumps could be removed by unscrewing this joint and were removed and replaced by others at intervals of something like three months.

The record speaks of one or more kerosene tanks as well as those containing gasoline, buried in the ground, so it is probably inferable that the one kerosene pump above referred to was also connected by piping with its tank.

The pneumatic hoist consisted of a metal cylinder thirteen inches in diameter supporting a platform on which cars could be raised. It was when used elevated by compressed air from the above mentioned compressor with which it was connected. Respondent described the manner of installation of the hoist as follows: "We dug a round hole and right at the bottom of the hoist we put just a bed of cement. We set the hoist just on top of that cement and then we put a collar around that. I think that was fourteen inches and it was twelve inches thick, and just put a collar around and we tamped it down with loose dirt. * * * The hoist is on cement. The hoist is just about seven feet, between six and seven feet. When we let the hoist go to the bottom, the base of that cement, it just rested on the concrete, on the collar, and it raised right off from the bottom. * * * There was no collar from the bottom of the hoist up to the top. There was fourteen square blocks fourteen inches away from the hoist on each side. I think that is the size of it." He testified further that at the bottom of the hole he laid this cement block or base and set the hoist right down on top of it, that the cylinder was really the whole hoist and that when it was pulled out it merely left a hole which respondent filled up. Counsel, however, have explained in the argument that the hoist really included two cylinders, a solid center one working up and down within a hollow outer one. The "hole" referred to by the defendant was left when both were pulled out.

Section 1248 of the Code of Civil Procedure (subdivision 1) requires that in an

eminent domain proceeding there be ascertained and assessed "the value of the property sought to be condemned, and all improvements thereon pertaining to the realty * * *."

It must, therefore, be taken as true that in the amount awarded in said cause 106244 for the property condemned, was included just compensation not only for the bare land involved but also for "all improvements thereon pertaining to the realty," and the question to be now decided is whether the equipment described in the complaint (exclusive of the compressor) did or did not constitute improvements "pertaining to the realty."

There are also to be considered in the determination of that question sections 658 and 660 of the Civil Code which are as follows:

"§ 658. (Definition of real property: Severance by agreement.) Real or immovable property consists of:

"1. Land;

"2. That which is affixed to land;

"3. That which is incidental or appurtenant to land;

"4. That which is immovable by law; except that for the purposes of sale, emblements, industrial growing crops and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale, shall be treated as goods and be governed by the provisions of the title of this code regulating the sales of goods."

"§ 660. (Definition of fixtures: Severance by agreement.) A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws; except that for the purposes of sale, emblements, industrial growing crops and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale, shall be treated as goods and be governed by the provisions of the title of this code regulating the sales of goods."

We are warned, however, by the decisions that these tests are not necessarily to be given too literal an application. It was said in Gosliner v. Briones, 187 Cal. 557, 559, 204 P. 19, quoted and reiterated in Fisher v. Pennington, 116 Cal.App. 248, 250, 2 P.2d 518, 519, that: "This section of the code is simply a rule for general guidance, concerning itself more with ultimate than with probative facts. Whether or not in any case a building is 'permanently resting upon' the soil, so as to be deemed 'affixed to the land' within the meaning of the section, remains a question of fact to be determined upon the evidence of that case."

It is claimed, in respondent's behalf, that the equipment involved must be deemed to have been personal property rather than a part of the realty (1) because of the terms of the lease under which respondent was up to the time of the condemnation in possession of the premises, (2) by virtue of the law relative to trade fixtures, independently of the lease and (3) because (as respondent's counsel assert) it was by stipulation conceded at the trial in the Municipal Court that the equipment was personal property.

The last contention can be at once disposed of. The occurrence referred to at the trial was as follows:

Mr. Boldman: "We want to introduce —"

Mr. Johnson: "It will be stipulated that was the personal property of the landlord and tenant."

Mr. Boldman: "I was just going to read the portion—"

Mr. Johnson: "You might read it if you care to."

Mr. Boldman: "The lease gave the tenant the right to remove his fixtures. That was the lease under which Walter Church had installed the fixtures and held them at the time of the condemnation. If that is stipulated to we wont put the lease in."

Mr. Johnson: "It is so stipulated."

[1] While the words of Mr. Johnson, "It will be stipulated that was the personal property of the landlord and tenant," taken alone, might lend some color to respondent's claim, it is clear enough from the passage between counsel above referred to that what happened was merely that Mr. Boldman was about to introduce the lease, and started to do so with the words "We want to introduce * * *," whereupon Mr. Johnson broke in with the stipulation now in question and that all he meant by the stipulation was that, according to the terms of the lease, the fixtures put in by the tenant were to remain the tenant's

property and subject to removal by him. It cannot be believed that by the language used Mr. Johnson as counsel for the People intended to stipulate that as between the respondent and the State, the equipment was personal property—which would be tantamount to stipulating that appellants had no case

[2] The admitted circumstance that as between the landlady, Mrs. Joslyn, and the tenant, respondent Church, the equipment here involved was always the property of the tenant and subject to removal by him during the continuance of his lease or at its termination, is not necessarily conclusive of the situation as between Church, the tenant, and the State, which never became his landlord but was, rather, the purchaser of his leasehold interest, at the same time that it became the purchaser of his landlady's reversion. As was said in City of Los Angeles v. Hughes, 202 Cal. 731, 737, 262 P. 737, 740: "It has often been held that property affixed to land which, as between the parties shall be deemed to be personal property, still retains its natural character of realty as to third persons. McNally v. Connolly, 70 Cal. 3, 11 P. 320; San Francisco Breweries v. Schurtz, 104 Cal. 420, 38 P. 92; Oakland Bank of Savings v. California Pressed Brick Co., 183 Cal. 295, 191 P. 524."

In United States v. Seagren, 60 App.D. C. 183, 50 F.2d 333, 334, 75 A.L.R. 1491, decided in 1931 by the Court of Appeals of the District of Columbia, certain lots had been leased to the appellee Seagren "who built and conducted thereon a gasoline filling station on a large scale, with the usual equipment of such an establishment, consisting mainly of two small fireproof houses; a work shop; divers tanks for gasoline and oil three feet underground, with the pipes, pumps, and other paraphernalia for operation, the property being covered with a concrete surface or roadway and inclosed by an iron fence five feet in height." The original lease gave Seagren, the tenant, authority to erect buildings, implant tanks, and other structures, and "to take away and remove the said buildings and other structures" within thirty days from the termination of the lease. Various renewals of the lease always reserved to the tenant the right at the termination of the lease to remove all structures placed upon the land by him. The interests of both landlord and tenant were taken by the United States in an eminent domain proceeding, but the government took an appeal from the judgment in that it included an allowance to the tenant for his structures, claiming that the agreement between landlord and tenant permitting the latter to remove his improvements precluded the tenant from recovery from the government as condemner for their value. The Court, however, held otherwise, saying that "the agreement for removal made by these parties at another time, for another purpose, and affecting no interests but their own, must be rejected here as irrelevant, when set up by the United States to control its condemnation proceedings against the tenant's interest in the land."

The Court went on to quote Nichols on Eminent Domain, 2d Ed., Vol. 1, Sec. 234, as follows: "It frequently happens that, in the case of a lease for a long term of years, the tenant erects buildings upon the leased land or puts fixtures into the building for his own use. It is well settled that, even if the buildings or fixtures are attached to the real estate and would pass with a conveyance of the land, as between landlord and tenant they remain personal property, and, in the absence of special agreement to the contrary, may be removed by the tenant at any time during the continuation of the lease provided such removal may be made without injury to the freehold. This rule is however entirely for the protection of the tenant and cannot be invoked by the condemning party. If the buildings or fixtures are attached to the real estate, they must be treated as real estate in determining the total award, but in apportioning the award they are treated as personal property and credited to the tenant."

To the same general effect are In re North River Water Front, 118 App.Div. 865, 103 N.Y.S. 908; In re Willcox, 165 App.Div. 197, 151 N.Y.S. 141; and In re Allen Street, 256 N.Y. 236, 176 N.E. 377.

In McNally v. Connolly, 70 Cal. 3, 11 P. 320, supra, not indeed a condemnation case but cited in City of Los Angeles v. Hughes, supra, it was held (we quote from the syllabus) that: "An engine, boiler, and machinery for a flouring mill, erected by a lessee on the demised premises, and securely attached thereto by bolts and screws, are fixtures as between him and his attaching creditors, notwithstanding an agreement between the lessor and lessee that the latter should be at liberty to remove the

machinery upon the expiration of the lease."

It was in the body of the opinion (70 Cal. at pages 5, 6, 11 P. at page 321) said: "The fact that, as against the lessor, Connolly & Wheat had the right, upon the expiration of the lease, to remove the machinery, is unimportant. The question here is, how does the law regard it as between debtor and creditor? It is provided by statute in this state that 'a thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws.' Civil Code, § 660. It is clear that under this definition the mill and machinery in question constituted fixtures."

So too in San Francisco Breweries v. Schurtz, 104 Cal. 420, 38 P. 92, where a lessee had used the leased premises as a saloon "and had caused to be attached to them certain personal property used in conducting his business," the Court (104 Cal. at page 427, 38 P. at page 93) said: "But the fixtures attached by a lessee to leased property become a part of the realty, and remain so until they are severed. While so attached, a mortgage of the leasehold estate covers the fixtures, and on foreclosure they are sold as a part of the realty."

See also Boyle Ice-Machine Co. v. Gould, 73 Cal. 153, 14 P. 609.

It is, moreover, undoubtedly the general rule that as between vendor and vendee, the rules for determining what is a part of the realty regularly construed against the seller. Fratt v. Whittier, 58 Cal. 126, 41 Am.Rep. 251.

[3] Unfortunately a great deal of confusion in considering when it is that what was personal property has become a part of the land has been introduced by the different senses in which the decisions use the word "fixture." According to the more common and probably the better usage, a "fixture" is by definition a part of the realty. The word has, however, also a secondary meaning. In Webster's New International Dictionary we find "fixture" as used in the law, defined as follows: "Law. Less commonly, a personal chattel annexed to lands or tenements but removable by the person annexing them, or his personal representative, without the consent of the owner of the real estate;—often called a movable fixture. Anything of an accessory character annexed to houses and lands, so as to legally constitute a part thereof;—often called an immovable fixture. The law on the subject of fixtures varies with different subjects and in different jurisdictions. In general, however, a chattel will become a fixture if it is annexed in a manner relatively permanent and is of such a nature as to be suitable for use as part of the land to which it is annexed. Things fixed to the freehold for purposes of trade or manufacture (called trade fixtures) may in general be taken away when their removal is not contrary to a prevailing practice. In general the rule as between landlord and tenant favors the tenant, as between grantor and grantee and mortgagor and mortgagee it favors the grantee and mortgagee in doubtful cases, and as between heir and executor removal will not be permitted where it will injure the freehold."

It is probably fair to say that of these two definitions the former is not only the one preferred by lexicographers, but it is the one sanctioned by the great weight of authority, both without this State and within it.

"A 'fixture' is an article which was a chattel, but which by being physically annexed or affixed to realty by some one having an interest in the soil becomes part and parcel of it." Commercial Finance Co. v. Brooksville Hotel Co., 98 Fla. 410, 123 So. 814, 64 A.L.R. 1219.

"A 'fixture' is a thing that originally was a chattel, but which has become a part of the real estate by reason of attachment thereto by one having an interest therein." Ochs v. Tilton, 181 Ind. 81, 103 N.E. 837, 838.

"A fixture is that which was once a chattel, but which, by being affixed to realty or appurtenances, at least by juxtaposition, for use in connection therewith, has become part and parcel of it." Inhabitants of Whiting v. Inhabitants of Lubec, 121 Me. 121, 115 A. 896, 899.

"A fixture is an article which was a chattel, but, by being physically annexed to the realty, by one having an interest in the soil, becomes a part and parcel of it." Padgett v. Cleveland, 33 S.C. 339, 11 S.E. 1069, 1071.

So too in California it was laid down in the case of Hegard v. California Insurance Co., 2 Cal.Unrep. 663, 670, 11 P. 594, 598, that "the term 'fixture' has a well-ascertained and certain meaning, as something affixed to realty." So also it was said in Earle v. Kelly, 21 Cal.App. 480, 483, 132 P. 262, 263, that "fixtures are those things which are so attached to realty as to be considered in law a part thereof." Again in R. Barcroft & Sons Co. v. Cullen, 217 Cal. 708, 711, 20 P.2d 665, 666, it was said that: "Generally, fixtures are those things which are so attached to the realty as to be considered in law a part thereof," after which the Court proceeded to add that: "They are defined by section 660 of the Civil Code," appending a quotation from that section.

In Western Union Telegraph Company v. Modesto Irrigation Company, 149 Cal. 662, at page 665, 87 P. 190, at page 192, 9 Ann. Cas.1190, in an opinion written by a very distinguished Judge it was said: "There is no doubt that articles of personal property owned by one person may be attached to land owned by another without becoming a part of the realty and without losing their character as personal property. For instance, trade fixtures annexed to land by tenants do not become part of the freehold even without any special agreement. And the general rule is that the intention of the parties determines the character of the annexed chattels and that they remain personal property if that be the intention of the parties when they are attached. This rule applies to third parties acquiring an interest in the land—as mortgagees, grantees, etc.—except where the mode of annexation is such that the attached property loses its character as personal property, as where it could not be removed without destroying it, or where it is necessary to the support or safety of that to which it is attached. In Hendy v. Dinkerhoff, 57 Cal. 3, 40 Am.Rep. 107, the court say: 'It is well settled, as said by the Court of Appeals of New York in Tifft v. Horton, 53 N.Y. [377], 380, 13 Am.Rep. 537, "that chattels may be annexed to the real estate and still retain their character as personal property." See Voorhees v. McGinnis, 48 N.Y. 278, and cases there cited. Of the various circumstances which may determine whether in any case this character is or is not retained, the intention with which they are annexed is one; and if the intention is that they shall not, by annexation, become a part of the freehold, as a general rule they will not. The limitation to this is where the subject or mode of annexation is such that the attributes of personal property cannot be predicated of the thing in controversy (Ford v. Cobb, 20 N.Y. 344), as when the property could not be removed without practically destroying it, or where it or part of it is essential to the support of that to which it is attached.'"

If the articles of equipment under discussion constituted fixtures within the meaning of the former of the above two definitions, then it is important as above suggested to note that the relations between respondent Church and the People of the State of California were, in effect, those of seller and purchaser and that there is some analogy to the situation as it would have been, had Church, without first removing his equipment, sold his leasehold to the State under a contract making no provision for its removal. The relations between a condemnee and a condemnor have often been likened in decisions to those between a seller and a purchaser. For example, in Jackson v. State of New York, 213 N.Y. 34, pages 35, 36, 106 N.E. 758, L.R.A.1915D, 492, Ann.Cas.1916C, 779, a decision by Mr. Justice Cardozo, it was said: "'Condemnation' is an enforced sale, and the state stands toward the owner as buyer towards seller. On that basis the rights and duties of each must be determined. It is intolerable that the state, after condemning a factory or warehouse, should surrender to the owner a stock of secondhand machinery and in so doing discharge the full measure of its duty. * * * An appropriation of land, unless qualified when made, is an appropriation of all that is annexed to the land, whether classified as buildings or as fixtures, and so it has frequently been held."

[4] When all possible weight is given, however, to this point of view, the analogy in a condemnation case to the relation between seller and purchaser under a contract is not a perfect one, in that the parties do not stand on an equal footing. If the transaction is a sale, it is yet, as described in the last mentioned citation, a "forced sale," and therefore contrary to the general rule prevailing between vendor and vendee, as against the condemnor, its terms should be strictly construed. Even if it be assumed, despite the existing confusion in the use of terms, that a "fixture" is, by that token, a part of the land, to say that is not to determine whether, in any given case,

the annexation has been sufficiently complete to make what was once a chattel thenceforth a "fixture."

[5, 6] The question of the intent with which the annexation has been made is often mentioned in the decisions as a circumstance of great importance in determining that question. As we have seen, in litigation between landlord and tenant, the latter's intent in making the annexation is generally treated as the controlling test as to whether or not the chattel annexed has become a fixture. As we have seen, on the other hand, in litigation between a vendor and vendee, where no express agreement on the subject has been made between them, the intent of the vendor in making the annexation is treated as less material as between him and the vendee. In condemnation suits, however, where the question of what has become a part of the realty has been involved, the decisions seem to consider as of great importance the intent with which a tenant has placed what were originally chattels on the property, in spite of the fact that the condemnor can, in the nature of things, have been no party to such intent, whatever it was. Thus in County of Los Angeles v. Signal Realty Company, 86 Cal.App. 704, 261 P. 536, where the County condemned for street widening five feet along the northerly boundary of certain property occupied by store buildings, the contention of one Culver, a tenant of one of the buildings used as a drug store, that he was entitled to compensation for certain trade fixtures located on the part of the premises taken was rejected, the Court saying (86 Cal.App. at pages 710, 711, 261 P. at page 539): "Appellant's authorities relate wholly to permanent fixtures which constitute improvements in the ordinary use of that term, and we think they are not in point. Appellant's store fixtures consisted of screen doors, shelving, window display cases, signs, awnings, etc., much of which, it is said, were fastened to the building by nails, screws, and bolts. Testifying in his own behalf, however, this appellant said: 'The property I have testified to is property I have paid for. It belongs to me, and I knew when I paid for it that I had a right to remove it at the termination of the lease.' It cannot be doubted that such was the intention of the parties, and there is nothing in the record tending to indicate that the realty company claimed the right to ownership of its tenant's trade fixtures at any time. There is some evidence to the effect that even after severance there would remain more room than was actually utilized by Culver, and while he might prefer to remodel or replace certain fixtures following their removal, at considerable expense to himself, it remains that the plaintiff took no part of his property, and the cost of removal was not a compensable item. In Jahnke v. Jahnke [81 Cal.App. 387], 253 P. 752, it was held that as a general rule the question as to whether articles are so affixed as to become a part of the realty is one of fact to be determined by the trial court upon the evidence presented, and that the intent of the parties is the controlling criterion, citing Gosliner v. Briones, 187 Cal. 557, 204 P. 19; Pennybecker v. McDougal, 48 Cal. 160; Miller v. Waddingham, 91 Cal. 377, 27 P. 750, 13 L.R.A. 680; Hendy v. Dinkerhoff, 57 Cal. 3, 40 Am. Rep. 107; Lavenson v. Standard Soap Co., 80 Cal. 245, 22 P. 184, 13 Am.St.Rep. 147; Jordan v. Myres, 126 Cal. 565, 58 P. 1061; Western Union Tel. Co. v. Modesto Irr. Co., 149 Cal. 662, 87 P. 190, 9 Ann.Cas. 1190. Here, as in Jahnke v. Jahnke, 'the trial court found by implication at least that the articles of property here involved were not affixed to the building so as to become a part thereof, and thereby constitute a part of the realty, and the findings of the court in this regard seem amply supported by the evidence.' A case strikingly analogous to the instant one is New York C. & H. R. R. Co. v. Albany S. T. Co., 161 App. Div. 329, 146 N.Y.S. 674, wherein it was held that evidence as to the value and cost of removal of personal property was properly excluded."

So also in City of Los Angeles v. Klinker, 219 Cal. 198, 25 P.2d 826, 90 A.L.R. 148, in which, and in the cases consolidated with which, the question arose whether the City of Los Angeles, in condemning the property occupied by the newspaper plant of the Los Angeles Times, was bound to pay for the processing machinery of that enterprise, the Supreme Court of this State, though in the circumstances of that case it held that compensation for the machinery must be allowed, reached that conclusion by considering, among other things, the intent of the publishing company to annex it permanently to the realty in installing it. This is apparent from the citations contained in the following extracts from the opinion (219 Cal. at pages 206, 207, 25 P.2d at page 830, 90 A.L.R. 148):

"All parties agree, however, in determining what are fixtures, that the rule announced in Lavenson v. Standard Soap Co., 80 Cal. 245, 250, 22 P. 184, 185, 13 Am.St. Rep. 147, is the correct rule: 'In order to determine whether a thing is a fixture or not, we must look at the manner in which it is annexed, the intention of the person who made the annexation, and the purpose for which the premises are used.'

"In Gosliner v. Briones, 187 Cal. 557, 560, 204 P. 19, 20, the rule is again stated: 'As a general rule the intent of the parties is a controlling criterion in ascertaining whether property is permanently attached to the land or retains its identity as personalty; the character of the annexation to the land or other realty and the use made of the property are important considerations, but in most cases are subsidiarily employed for the purpose of testing the intention of the parties. (Citing many cases).' See, also, Breyfogle v. Tighe, 58 Cal.App. 301, 208 P. 1008.

"The rule is again illustrated in Oakland Bank of Savings v. California Pressed Brick Co., 183 Cal. 295, 298, 191 P. 524, 525, as follows: 'The boilers in controversy were set in the building on the land on a concrete foundation made to receive them, and then bricked in by a wall, so as to retain the heat. The heavy machinery was set on concrete blocks built in the ground for that purpose, with large bolts or rods brought up through the concrete, by means of which the machines were fastened down. The machinery, engine, and boilers were connected together by pipes, rods, shafts, and belts, so that the engine would operate the machinery, and they were all attached for the purpose of using them permanently in the plant in the making of brick. There can be no doubt that they were affixed to the land, so as to become real property, under the definition given in section 660.'

"An engraving plant was held to be a fixture and a part of the realty in the case of In re Post Office Site [2 Cir.], 210 F. 832.

"In White v. Cincinnati, etc., R. R., 34 Ind.App. 287, 71 N.E. 276, 278, the machinery of a paper mill was held a part of the realty. The court in that case set forth the three elements regarded as a true criterion of an immovable fixture in this language: '"The united application of three requisites * * * is regarded as the true criterion of an immovable fixture: (1) Real or constructive annexation of the article in question to the freehold; (2) appropriation or adaptation to the use or purpose of that part of the realty with which it is connected; (3) the intention of the party making the annexation to make the article a permanent accession to the freehold."'"

While then, as noted in the Seagren case, 60 App.D.C. 183, 50 F.2d 333, 75 A.L.R. 1491, supra, and as we have just observed, an agreement between landlord and tenant that the latter may remove his fixtures does not in itself govern the situation as between condemnor and tenant, it is apparently held not to follow that the intention of the tenant himself in installing the fixtures may be disregarded, even as between himself and the condemnor of his leasehold interest. What is condemned, in so far as the tenant is concerned, is his leasehold together with his "improvements pertaining to the realty." The position of the condemnor is a different one from that of either the purchaser at a voluntary sale or one seeking to realize on some mortgage or other encumbrance that he may hold on the land, in that a condemnor cannot claim to be acting under any possible misapprehension of the effect of a contract. He has made no contract with those whose property he seeks to take. He, therefore, cannot complain if some attention is paid to the purposes for which the latter has annexed chattels to the land on any theory that he was not advised of those purposes.

[7] It seems to us, however, that the intent of the tenant in annexing personal property to the land that he leases, which, as between himself and the condemnor of his leasehold, can be recognized as bearing on what the character of such annexed property shall be deemed to be in the condemnation proceeding, is not so much the intent that the tenant may have expressed, whether in his arrangement with his landlord or otherwise, as it is the intent which the sort of property involved and the character of his annexation apparently implies. In other words, the nature of the property itself and the manner of its annexation are important as evidencing the intent with which it is annexed. In this respect the situation, as between condemnor and the holder of a leasehold included in the condemnation, is strongly analogous to that obtaining between the taxing authorities and the holder of a leasehold, as to which it was in San Diego Trust & Savings Bank v. San Diego County, 16 Cal.2d 142,

149, 105 P.2d 94, 97, 133 A.L.R. 416, said that: "As between private parties such as those bearing the relationship to each other of landlord and tenant, * * * their mutual intention as to whether an article is a fixture and part of the realty or is personalty is the controlling factor. As to third persons who are not parties to any such private agreements, however, the intent which controls is not a secret hidden intent but that manifested by the physical facts, giving due consideration to the status of the party by whom the articles have been installed."

See, to the same effect, Citizens Bank of Greenfield v. Mergenthaler Linotype Co., 216 Ind. 573, 25 N.E.2d 444, 447, 448.

The character of the installation, then, is, as to such third parties, and therefore as to a condemnor, important as characterizing the intent with which an annexation has been made. It is also, at least in some degree, important, entirely apart from the question of intent, as an independent element to be considered in deciding whether the annexation has made that which is annexed a part of the realty, for it is obvious that some installations are so clearly of a permanent character, and others, on the other hand, so clearly of a temporary nature as to ipso facto determine whether the annexed articles thereafter "pertain to the realty" or are personal property only.

In City of Los Angeles v. Klinker, supra, it appeared that the main building on the property involved was especially designed and constructed to accommodate the permanent installation of the processing equipment. "Certain floors were designed to carry heavy machinery and equipment not found in ordinary buildings of steel frame. One of the floors above ground surface was designed to carry a load of 275 pounds per square foot. Anticipating expansion, the building was also designed to carry two additional stories, namely a fifth and a sixth story above ground surface. The annex * * * was the same type of construction as the main building, carrying also safety fixtures with reference to load capacity. * * * In the construction of the main building, the foundations for the great presses were constructed independently of, but blending with, the foundations for the building, to prevent vibration which might have affected the stability of the building foundations. * * * The pressroom equipment consists of: The large presses * * * on their massive masonry foundations. Presses Nos. 1 and 2 are two stories high, and are equipped with runways, ladders, and mezzanine landing for the workmen. Other presses are supported by cast-iron columns going through the floor to the concrete foundation and are anchored to the masonry bolts embedded therein. The presses are operated by a drive mechanism under the floor, which connects, by gear system, to a series of vertical shafts which drive their individual cylinders. The drive shaft goes to a motor located on a specially constructed base in the subbasement. The heavy shafting is held on hangers fastened into the ceiling and it comes through the floor and is geared into the press. Removal of the presses embedded in concrete would leave open pits in the floor."

We have quoted in this extent from the description in the opinion, in the case last cited, of the physical situation involved to show how cogent was the proof, there present, of the permanent annexation of the equipment to the realty. To be sure, there were other features of the equipment which, if taken by themselves, would be less obviously, made part of the building itself, but they were so tied in, in their nature and in the purpose of their use, with the machinery described as to be inseparable from it in the treatment given them.

[8] So growing trees, shrubs and other plants are generally considered a part of the realty to which they are attached by their roots and continue to be such until they are severed when for the first time they become personal property. City of Los Angeles v. Hughes, 202 Cal. 731, 262 P. 737, supra.

On the other hand, there are many instances of less permanent attachments which have been held neither to evince any intention to annex the equipment involved to the realty, nor apart from intention to effect such annexation. For example, in Southern California H. & M. Co. v. Borton, 46 Cal.App. 524, 189 P. 1022, the vendor under a conditional sales contract had installed in a house belonging to the vendee certain wall beds. The vendee deeded the house with the land on which it stood to a third party who was really an assignee for the benefit of her creditors, and did not pay the vendor for the beds. The latter was held entitled to repossess them. The Appellate Court, indeed, did not undertake to decide whether or not the beds had be-

come part of the realty or not, holding that in view of the conditional sales contract, whether they did or not no title passed to the vendee until they were paid for, and she could pass none to her assignee. The Supreme Court, however, in denying a petition for a hearing before it, stressed the manner of attachment as a controlling circumstance, saying (46 Cal.App. at page 531, 189 P. at page 1025) inter alia: "The beds were not built in the wall with the house, nor were they a necessary part of the house itself. They could be taken out without unscrewing any screws or removing any fixtures, and the house would remain habitable as before, except that it was not furnished with beds. It is obvious, therefore, that they were not affixed to the building in the ordinary sense of the word so as to become a part of the realty as between the person who sold the same, retaining title in himself, and a subsequent purchaser of the house without notice of such reserved title. These beds were not fixtures, but were a part of the furniture of the house, not essentially different from beds of any other description. So far as the opinion of the district court places the affirmance upon the proposition that the plaintiff would have effectually retained title to the property as against the defendants, even if the beds had been built in or permanently affixed to the house, we are of the opinion that the question was not involved in the case and was unnecessary to the decision, and we withhold approval of the expressions therein to that effect."

Specifically, with respect to the equipment of filling stations, the only California case that has been called to our attention is Murr v. Cohn, 87 Cal.App. 478, 262 P. 768. That indeed is one between landlord and tenants and to that extent distinguishable from the case at bar. However, it was a case in which the written lease affected vacant lots, and was silent as to the use which the tenants were to make of the property (although the lessor was verbally informed that it was to be used as a filling station), or to what, if anything, the tenants were to place upon it, or, if anything was placed upon it, what would be the resulting rights or liabilities of the parties. The tenants placed on the property "one field portable gasoline station, one gasoline air pump, and one gas tank." The Court's opinion was to the effect that the tenant was entitled to remove them. It states that: "The station was put in place by laying pieces of 2x4, making a rectangular frame, and resting it on the surface of the ground. Thereafter concrete was poured into that frame, covering the space of ground inclosed with concrete four inches deep. The station was set on top, the outside walls of steel rested on the 2x4 and were nailed thereto. The pump was placed on a concrete pier, which was also constructed on top of the surface of the ground. The tank was sunk into the ground about 7 feet deep."

In Standard Oil Company of New York v. Dolgin, 95 Vt. 414, 115 A. 235, 17 A.L.R. 1218, it was held that one who lends a tank to the owner of a garage to aid in the handling of gasoline may recover it from a purchaser of the real estate with notice, although it is buried in the earth to guard against injury and to decrease the fire hazard. It was, among other things, held that upon the question whether or not a gasoline tank became a fixture by being placed underground, evidence was admissible that no material damage was done to it or the land by its removal.

[9] As between landlord and tenant, indeed, it has been very commonly held that various types of appurtenances of oil filling stations amount to trade fixtures and may, therefore, be removed by the tenant while still in possession of the leased premises. Cameron v. Oakland County Gas & Oil Co., 277 Mich. 442, 269 N.W. 227, 107 A.L.R. 1142; Shields v. Hansen, 201 Wis. 349, 230 N.W. 51.

In Rucker v. Hunt, 44 Ga.App. 836, 163 S.E. 612, where a filling station was leased by a son from a father without rental payment, and the son, for use therein, installed an air compressor which was merely bolted to the floor, the same was held to continue personal property which the son was entitled to remove.

So in Farmer v. Golden Rule Oil Co., 130 Kan. 803, 287 P. 706, where a parcel of land had been leased by a written lease specifically for use as a gasoline, kerosene and lubricating oil station and a filling station, and the equipment erected by the tenant thereon, the trial court was sustained in denying to one who with knowledge of the terms of the lease purchased the land from the lessor, who was operating the station as agent for the tenant, the right to enjoin the latter before its lease expired from removing the equipment. "The lease," said the Court, "was a comparatively short-time lease. The improvement was installed

by a tenant, for the purpose of trade. The nature of the improvement was such that it could be regarded as personal property."

See also Crater's Wharf v. Valvoline Oil Co., Sup., 196 N.Y.S. 815, where as against one who had purchased the property from the lessor a tenant was permitted to remove filling station equipment.

In Standard Oil Company v. La Crosse Super Auto Service, Inc., 217 Wis. 237, 258 N.W. 791, 794, 99 A.L.R. 60, it was held that gasoline pumps and underground tanks installed by the lessee of a filling station under a lease which provided that the lessee should pay all taxes levied or assessed upon the property belonging to it upon the premises, and should have the right at any time within thirty days after the termination of the lease to remove any equipment at any time placed thereon by it, are as between such lessee and a prior mortgagee of the realty, removable by the lessee upon the termination of the lease. The Court said inter alia: "We consider the following rule to be just: Where land is mortgaged and the mortgagor is not prohibited from leasing the premises and the premises are in fact leased to one who installs therein or thereon trade fixtures for temporary purposes connected with his business or in furtherance thereof, which trade fixtures may be removed without material injury to the freehold upon the termination of the lease, removal of such trade fixtures should be allowed as against the mortgagee."

But in Dent v. Bowers, 166 Ark. 418, 265 S.W. 636, 36 A.L.R. 443, it was held that: "A gasoline filling station consisting of a pump and underground tank placed at the outer edge of the sidewalk in front of a garage passes as a fixture by the sale of the building, notwithstanding the owner of the building had sold it to a tenant whose title had passed to his successors in the tenancy."

In the annotation to this case in A.L.R. it is noted that the Court regarded these appurtenances as fixtures "by reason of having been used on the premises for about five years by several tenants, taking into consideration also the lack of any definite arrangement between the purchaser of the lot and the grantor that they were personal property and not part of the realty."

Again, in Olympia Lodge v. Keller, 142 Wash. 93, 252 P. 121, 52 A.L.R. 795, it was held that a provision in a lease of ground for an auto camp and service station that all improvements thereon shall become the property of the lessor, prevents the removal by the tenant of trade fixtures consisting of gasoline pumps, tanks, oil containers, air compressor, a Luba system, toilet fixtures in the rest room and an electric sign. This decision turned on the meaning of the expression "improvements" as used in the lease, the Court holding it as so used to be broader than the term "fixtures" and to contemplate that the appurtenances referred to should remain the landlord's property.

In Roanoke Marble & Granite Co. v. Standard Gas & Oil Supply Co., 155 Va. 249, 154 S.E. 518, 521, under a lease which provided that the property was to be used exclusively as a filling station, the lessee to erect the improvements thereon at places designated by the lessor, and all the improvements to belong to the lessor at the termination of the lease, it was held an underground storage tank partook "of the nature of a permanent fixture" and could not be removed by the lessee, as to permit its removal would defeat the intent of the parties as expressed in the lease.

Various other cases, in which the status of equipment installed at filling stations has been considered, will be found reviewed in the note appended to the report of the case of Standard Oil Co. v. La Crosse Super Auto Service, supra, in 99 A.L.R. at page 69 et seq. The author of that note concludes that "while the courts have generally stated that the most important consideration in determining the status of storage tanks and other equipment of a gasoline filling station is the intent of the parties at the time the equipment is installed or attached to the real estate, they have shown a marked tendency to decide each particular case on its own facts, taking into consideration the provisions or lack of provisions of a lease, the character of the article and the manner of its installation or attachment, the effect of its removal on the real estate, the statutory or Code provisions in respect to 'trade fixtures,' and rights arising under chattel or real estate mortgages, conditional sales contracts, and vendors' or mechanics' liens." Perhaps this is as accurate a generalization as in the present state of the decisions relating specifically to filling stations is practicable.

While, however, there are few condemnation cases to be found in the books in which the status of the equipment of filling stations is specifically considered and United States v. Seagren, supra, may be, in some sort, the pioneer case on that specific point,

there have been many cases in which machinery originally belonging to a tenant but in some degree attached to the realty has been involved in an eminent domain proceeding in which the leasehold has been condemned. Such a case was Jackson v. State of New York, supra. A similar case is In re Mayor, etc., of City of New York, 39 App.Div. 589, 57 N.Y.S. 657. Others will be found reviewed in the note United States v. Seagren in 75 A.L.R. pp. 1495 et seq. There runs through them the proposition to which we have already alluded, that in a condemnation case the parties do not stand on an equality and that the Courts must, therefore, be vigilant to see that no injustice is done the property owner who has no option but to take what is given him. While, therefore, as emphasized in Jackson v. State of New York, a condemnor will not be allowed at its will to take a tenant's leasehold, surrender to him second hand machinery attached thereto, and pay him only for the value of his term separated from that of his installations, it is not necessarily true, that reciprocally in condemning his leasehold the condemnor can require him to leave machinery which can be readily detached without damages to the property in so far as the purposes are concerned for which the condemnation is sought. And as was held in In re Acquiring Certain Property on North River, 118 App. Div. 865, 103 N.Y.S. 908, while in condemning for street purposes land improved with a building erected for a factory it is incumbent on the city to pay for such machinery as has become a part of the building, not even the tenant can require it to pay for such machinery as can be readily removed, and will have a substantial value disconnected from the building. If that be true it is manifest that the condemnor cannot compel the tenant to leave such machinery on the premises.

[10] There is another consideration that cannot be ignored in this species of condemnation cases. "Title to land acquired by condemnation for highway purposes vests in the public only an easement or right of way, together with the necessary incidents for the construction, maintenance, and reasonable enjoyment of the same." People v. Olsen, 109 Cal.App. 523, 532, 293 P. 645, 649, citing Political Code Sec. 2631 and Gurnsey v. Northern California Power Co., 160 Cal. 699, 117 P. 906, 36 L.R.A.,N.S., 185.

[11] The judgment in the condemnation suit here involved awarded to the People of the State of California "the right to take and occupy for right of way purposes for a public highway the whole of that certain real property referred to in the complaint as 'parcel 2,' to wit," followed by a description of the land involved. It is manifest, therefore, that all which the State took was a right of way. The verdict of the jury copied into the judgment merely fixed the market value of said parcel with the "improvements thereon" at $13,000 and that was the amount which, together with their taxable costs, was awarded to the owner and the lessee in a lump sum and divided between them in accordance with their mutual stipulation. Undoubtedly in condemning a right of way which could not be used without removing the improvements from the land, the State was bound to take and pay for such permanent improvements as would lose a substantial part of their value in consequence of their removal, such as the buildings that were on the property when it was condemned. If, however, it be true as held in Re Acquiring Certain Property on North River, supra [118 App. Div. 865, 103 N.Y.S. 909], that "as to such personal property as can be readily removed and would have a substantial value disconnected from the building, this rule would not apply," it would seem that the readiness with which equipment can be removed, and whether or not it can be removed without either damaging the freehold or substantially diminishing its own value are elements to be considered in determining whether or not it is personal property.

[12, 13] In the case at bar the evidence shows that the pumps involved can be readily unscrewed from their connection with the underground tanks, and that in actual practice they had been unscrewed and renewed every few months. The hoist, though resting on a concrete footing below the surface of the ground, was not attached to the footing and could be and was in fact removed with no other damage to the freehold than to leave a hole of the diameter of its outer cylinder, which could be and was immediately filled in with dirt. None of these articles of equipment would be used by the State upon the property across which it was acquiring the right of way. The question whether they had become a part of the realty was essentially a question of fact for the trial court and its conclusion therein may not be disturbed unless

we can say as a matter of law that the evidence does not sustain it. In the circumstances, we think the trial court justified in treating them as personal property, not included in the "improvements pertaining to the realty" and therefore no part of the property for which the jury awarded compensation. It follows that the defendant is not liable to the State for removing them.

The judgment is affirmed.

THOMPSON, J., concurs.

KELLY, Judge (dissenting).

I dissent.

A wealth of decisions in California support the view that when a case is tried upon a certain theory, whether within or without the issues presented by the pleadings, the litigants are concluded. The principle on which these decisions rest is that of equitable estoppel, it being held that a party who acquiesces and participates in the trial of an issue without objection as if it arose from the pleadings, when he might have objected on the ground that the issue was not made by the pleadings in the trial court, and where objection might have been met by amendment of the pleadings or otherwise, so that it would have operated less injuriously on the other party than if first made on appeal has thereby waived the objection and therefore should not be heard to make it on appeal. 2 Cal.Juris. 237 et seq.

In the instant case the rights of the parties are determined by the prior action in condemnation. The judgment in the condemnation proceeding awards $13,000 to the defendants for the real estate, together with the improvements thereon, and their costs and disbursements incurred in the action. Jurisdiction was expressly reserved by the Court to thereafter try and determine the proportions and amounts in which said award of $13,000 is to be allocated as between the defendants Jane P. Joslyn and Walter Church. The judgment does not, as filed, separately assess each and every separate estate or interest therein as required by Section 1248 of the Code of Civil Procedure, Subdivision 1. In this section the words "and all improvements thereon pertaining to the realty" are found. I do not believe that this section limits the condemnation to improvements pertaining to the realty. Code of Civil Procedure, Section 1240, defines what may be taken in condemnation. Subdivisions 6 and 7 of said section read:

"6. Rights of way. All rights of way for any and all the purposes mentioned in section 1238, and any and all structures and improvements on, over, across or along such rights of way, and the lands held or used in connection therewith shall be subject to be connected with, crossed, or intersected by or embraced within any other right of way or improvements, or structures thereon. They shall also be subject to a limited use, in common with the owner thereof, when necessary; but such uses, crossings, intersections, and connections shall be made in manner most compatible with the greatest public benefit and least private injury.

"7. Other property. All classes of private property not enumerated may be taken for public use, when such taking is authorized by law."

It will be seen that the provisions of the Statute just cited extend the right to condemn all structures and improvements on, over, across or along such rights of way, without narrowing them to such as pertain to the realty.

After the trial and after judgment entered, a stipulation was entered into by the defendants Joslyn and Church, allocating the proceeds of the judgment, and which said stipulation appears as an exhibit in the instant case. The significant clause in this stipulation reads, after referring to Church's lease, "wherein the said Jane P. Clapp is the lessor and Walter Church is the lessee, that all damages fixed and allowed by the Court in said proceeding for condemnation, with reference to the said property, including both the land and fixtures and improvements thereon, shall be divided between the said Jane P. Joslyn and Walter Church by the said Jane P. Joslyn receiving Nine-tenths (9/10ths) of said amount and the said Walter Church receiving One-tenth (1/10th) which shall be taken and accepted by said parties as their full respective rights and interest in said property so being condemned." This stipulation is broad enough to include all improvements, whether pertaining to the realty or not, and the property moved away by Walter Church certainly consisted of equipment placed upon the premises to facilitate the conduct of Church's business. It is true that this stipulation is not between the parties litigant in the instant case and cannot be binding on the State, but it is

certainly a definite record of the theory upon which the case was tried. By this stipulation Church received $1,300 for all improvements of whatsoever kind or character on the premises and he cannot now be permitted to assert that he is entitled not alone to that proportion of the judgment but also to some of the improvements.

Such being my view of the case, it is idle to speculate upon the question of "fixtures pertaining to the realty" or to lose ourselves in the fog of decisions. By this stipulation the State became the purchaser and Church the vendor of all the improvements of every kind and character It would have, perhaps, been better had the Court in the condemnation proceeding asserted its reserved power to allocate the judgment either by approving the terms of the stipulation or otherwise, but whether the Court did or not becomes, I believe, immaterial under my view of the case.

Support for the views expressed will be found in Daniels v. Gualala Mill Co., 77 Cal. 300, 19 P. 519; Barbour v. Flick, 126 Cal. 628, 59 P. 122; City of Oakland v. Wheeler, 34 Cal.App. 442, 168 P. 23.

The rule of equitable estoppel must be applied when it appears that the rights of litigants depend upon the theory upon which the condemnation case was tried. It is true that most of the decisions on the theory of the case phase have to do with a change of theory on appeal. The reason for the rule, however, must extend to a separate and distinct case in which the rights and interests of the parties depend upon the theory of an earlier case.

The judgment should be reversed.

On Petition for Rehearing.

PER CURIAM.

Plaintiffs' counsel, in their petition for rehearing, press upon our attention the case of Richmond Wharf & Dock Co. v. Blake Brothers Co. et al., 66 Cal.App. 541, 227 P. 223, cited by them in their reply brief on the original hearing, and which they assume to have been overlooked in our decision because not specifically referred to in the opinion. That case was not overlooked, but deemed inapplicable for the reasons stated by counsel for respondent in his supplemental memorandum in which it was analyzed. If the property there involved was to be treated as pertaining to the realty, the plaintiff in that case who claimed under the condemnee would have no title to it because the defendant there, claiming under the condemnor, would have taken it under the condemnation decree; where, in the alternative, if it were deemed not to pertain to the realty but to be personal property only, the plaintiff would still have no right to it, since it would in that event belong to another, namely, the party or the assignee of the party who placed it on the premises. In neither alternative had the plaintiff any standing in court to object to its conversion by the condemnor. No parallel state of facts arises in the case at bar.

Some comment is made in the petition upon the circumstance that the judgment was entered on the jury's verdict in the condemnation suit which preceded the present action without the filing therein of any findings other than those contained in the judgment itself. This we think entirely immaterial. The pleadings in that case were not in evidence before the Municipal Court, but, even if they had been, it is not claimed that they specify any particular improvements included in the property sought to be condemned and therefore, unless they did so, findings that the particular items involved in the case at bar were or were not improvements pertaining to the realty could not in the condemnation case have been made.

The petition for rehearing is denied.

KELLY, J., voted for a rehearing.

21 Cal.2d 822

WASHER v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

S. F. 16848.

Supreme Court of California.

April 7, 1943.

Hearing Denied May 7, 1943.

1. Libel and slander ⇐15

Statutory definitions of "libel" and "slander" include almost any language which upon its face has a natural tendency to injure a person's reputation, either generally or with respect to his occupation, and words clearly conveying a meaning within one of the statutory categories are "actionable per se". Civ.Code, §§ 45, 46, subds. 1, 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Actionable Per Se", "Libel" and "Slander".

2. Libel and slander ⇐86(1, 2)

The office of an "innuendo" is to declare what words meant to those to whom they were published and when the words themselves, under any circumstances, would convey to those who read or hear them a meaning within the statutory definitions of libel and slander, an innuendo need not be pleaded. Civ.Code, §§ 45, 46.

See Words and Phrases, Permanent Edition, for all other definitions of "Innuendo".

3. Libel and slander ⇐86(2, 4)

Though where words under no circumstances could convey a defamatory meaning, the pleading of an innuendo cannot make them defamatory; an innuendo is necessary where the words used are susceptible of either a defamatory or an innocent interpretation. Civ.Code, §§ 45, 46.

4. Libel and slander ⇐15, 89(1)

Language that is susceptible of an innocent interpretation is not "actionable per se", and in addition to an innuendo, plaintiff must allege special damages by reason of the meaning gained from the publication of such language. Civ.Code, §§ 45, 46.

5. Libel and slander ⇐86(2)

In order to state a cause of action for libel or slander for use of the word "falsify" with reference to employee's expense account as a word charging employee with a crime it was necessary to plead such meaning by innuendo. Civ.Code, §§ 45, 46.

The word "falsify" has been described as a word of double import in that it may be used to convey two distinct meanings—either that of being intentionally or knowingly untrue, made with intent to defraud, or mistakenly and accidentally untrue, and it has been suggested that it may also mean not an accidental but an intentional untruth without, however, intent to defraud.

See Words and Phrases, Permanent Edition, for all other definitions of "Falsify".

6. Libel and slander ⇐10(6), 18

Statement allegedly made in justification of bank's action in discharging employee that he had admitted falsifying his expense account and had been guilty of flagrant insubordination was "libelous" and "slanderous per se" in so far as it related to his qualifications as an employee, though the word "falsify" was not understood as implying a criminal act. Civ.Code, §§ 45, 46.

See Words and Phrases, Permanent Edition, for all other definitions of "Libelous Per Se" and "Slanderous Per Se".

7. Libel and slander ⇐86(2)

Though ordinarily an innuendo may be stricken as "surplusage" when the words themselves are libelous or slanderous per se, where innuendo was necessary to allege that statement that employee had admitted he had falsified his expense account was intended to charge a crime, it was proper also to plead by way of innuendo that statement tended to injure employee in his occupation, since court might otherwise have concluded that employee relied only on embezzlement charge under rule that pleader is bound by the meaning placed upon language by innuendo. Civ.Code, §§ 45, 46.

See Words and Phrases, Permanent Edition, for all other definitions of "Surplusage".

8. Libel and slander ⇐82

That plaintiff was not named in defamatory statement did not preclude words clearly conveying a meaning within one of the statutory classifications of libel and slander from being "actionable per se", where plaintiff pleaded that the words were spoken of and concerning him. Civ.Code, §§ 45, 46; Code Civ.Proc. § 460.

9. Libel and slander ⇐89(1)

Where plaintiff alleged that defamatory statement was spoken of and concerning him, statement, in so far as it tended to injure plaintiff in his occupation, was "libelous" and "slanderous per se", though plaintiff was not named therein, so that it was unnecessary to allege special damages as to such ground of recovery. Civ.Code, §§ 45, 46; Code Civ.Proc. § 460.

10. Libel and slander ⇐89(1, 3)

Statement that bank employee admitted having falsified expense account, if understood as charging employee with a crime, was not "actionable per se" so that it became necessary specially to plead the nature of damage, and specifications concerning loss of employment and prospective disadvantages in banking business were sufficient for that purpose as against general demurrer. Civ.Code, §§ 45, 46.

11. Pleading ⇐35, 310

Where written instrument attached to a pleading as an exhibit and incorporated into it by proper reference is the foundation of cause of action or defense, trial court may, upon demurrer, examine the exhibit and treat pleader's allegations of its legal effect as "surplusage".

12. Pleading ⇐310

The pleading as an exhibit of a document that is not the basis of a cause of action or defense is only an assertion of its existence and character in absence of allegations indicating pleader's intention to adopt as his own the recitals of the exhibit, so that unless action or defense is founded upon the exhibit, the language of complaint or answer determines the extent to which document has been made a part of the pleading.

13. Pleading ⇐310

Where complaint alleged that allegedly libelous statement was made in commenting upon National Labor Relations Board's decision ordering plaintiff's reinstatement in defendant's employ but indicated no intention to include Board's statement of facts as part of pleading, a copy of decision attached to amended complaint and incorporated therein by reference could be considered on demurrer to complaint only in so far as it showed there was a decision that concerned plaintiff and that comment was made by an official of defendant in reference to the requirement as to reinstatement. Civ.Code, §§ 45, 46.

14. Libel and slander ⇐83

Allegations that defamatory statement was made to injure, disgrace and defame plaintiff and interfere with his ability to obtain employment and that statement was false and publisher knew it to be false when made and did not have probable or any cause for believing it to be true was sufficient to charge "malice" in fact. Civ. Code, §§ 45, 46, 48.

See Words and Phrases, Permanent Edition, for all other definitions of "Malice".

15. Libel and slander ⇐51(2)

A publication made in any legislative or judicial proceeding or in any other official proceeding authorized by law is "absolutely privileged", that is, not actionable, although made maliciously and with knowledge of its falsity. Civ.Code, § 47, subd. 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Absolutely Privileged".

16. Libel and slander ⇐36

The extension of absolute privilege accorded a publication made in any judicial proceeding to communications made preliminary thereto is limited to communications such as those made by client to attorney or individual to prosecuting attorney or other public officer preliminary to proposed criminal prosecution and does not extend beyond a communication to one actually involved in the proceeding, either as judge, attorney, party, or witness. Civ. Code, § 47, subd. 2.

17. Libel and slander ⇐38(1)

Statement of bank's vice president made to newspaper reporters and others in commenting on National Labor Relations Board's decision ordering bank to reinstate an employee was not "absolutely privileged" as a publication made in "judicial proceeding" or other official proceeding authorized by law, though a proceeding involving a labor dispute to which bank was a party was pending before the labor board at the time. Civ.Code, § 47, subd. 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Judicial Proceeding".

18. Pleading ⇐225(1)

Where complaint was sufficient as against general demurrer, trial court abused its discretion in sustaining demurrer without leave to amend, though there

was no request for leave and complaint may have been subject to special demurrers. Code Civ.Proc. § 472c.

19. Pleading ⇐207

On special demurrer, trial court may require the clarification of any ambiguities in complaint, though it states a cause of action good as against general demurrer.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Action by Edward C. Washer against Bank of America National Trust and Savings Association (a National Banking Association) and others for libel and slander. General and special demurrers to the second amended complaint were sustained without leave to amend and from the judgment for defendants, plaintiff appeals.

Judgment reversed.

For prior opinion, see 128 P.2d 799.

William H. Mackay, of San Francisco, for appellant.

Louis Ferrari, G. D. Schilling, and Kenneth M. Johnson, all of San Francisco, for respondents.

EDMONDS, Justice.

The appellant, as an employee of Bank of America National Trust and Savings Association, had a stormy career which ended with a discharge. The National Labor Relations Board ordered the bank to reinstate him upon the ground that his services had been terminated because of his activities in connection with the organization of the United Office and Professional Workers of America, a labor union affiliated with the C. I. O. The present action is for damages claimed to have been sustained by Washer when, following the decision of the board, A. Fenton, as an officer of the bank, made a statement concerning him. The superior court, in ruling upon the sufficiency of the complaint, sustained the general and special demurrers interposed by the respondents, and the plaintiff has appealed from the judgment entered following that order.

In the first count of the complaint, Washer asserts that the respondent Fenton, acting in the scope of his duties as vice-president and personnel director of the bank, in commenting upon the decision of the National Labor Relations Board, orally made the following statement: "We cannot see how this institution could possibly reinstate anybody who had admitted he had falsified his expense account, who has been guilty of flagrant insubordination." Fenton made this statement to newspaper reporters and "other persons" with the intention that they should understand that it was spoken of and concerning the appellant, and it was so understood by them.

The statement was given to the reporters, the complaint continues, solely for the purpose of publication in San Francisco and elsewhere, and upon information and belief he alleges that it was published in the San Francisco Chronicle and in newspapers throughout the country. In addition, it is alleged, Fenton intended by this statement to convey to his listeners, and all who should read the statement, the idea that the appellant is a dishonest, unsatisfactory, inefficient and insubordinate worker in his profession and trade as a bank employee, and as a lawyer, and that he is guilty of the crime of embezzlement, was dishonest, and had misappropriated and failed to properly account for funds entrusted to him. Such ideas are reasonable conclusions to be drawn from the words, and, appellant is informed and believes, were conveyed to the listeners and readers as intended by Fenton. The statement was made by Fenton with malice, for the purpose of injuring, disgracing and defaming the appellant, and interfering with his ability to obtain employment. Furthermore, it was false and was known by Fenton to be false at the time it was made, and he did not have probable cause, or any cause, for believing it to be true.

Other allegations in count one are that immediately prior to the making of the statement by Fenton, the appellant had an excellent reputation in the banking business as a man of integrity, honesty and efficiency as a bank employee and as an attorney. But solely as the result of this statement, the appellant was refused employment at various banks in the state, and, he alleges, he will be unable to secure employment at his trade or profession in any bank in the state or in the United States. General, special, and exemplary damages are asked.

The second cause of action is in substantially the same form, differing only in alleging that Fenton handed to the press in writing his comment upon the board's decision.

The respondents demurrred generally to the complaint upon the ground that neither count states facts sufficient to state a cause of action against them. In addition, they asserted that the pleading is uncertain, unintelligible, and ambiguous in many particulars which are specifically enumerated.

In appealing from the judgment, the appellant maintains that his complaint sufficiently states two causes of action, one for slander and the other for libel. The respondents take issue with this contention. The complaint, they say, taken as a whole, shows the truth of the alleged defamatory language to the extent necessary for a complete defense, both as to the charge of insubordination, and the charge of falsification of an expense account. To support this assertion, they rely upon the statement of facts in the copy of the decision of the National Labor Relations Board which the appellant attached as an exhibit to his complaint. But assuming that the statement of Fenton is false, say the respondents, it comes within the conditional privilege of section 47 of the Civil Code, and consequently is not actionable in the absence of malice, which the appellant has not properly pleaded.

The respondents also maintain that, as parties to a judicial or quasi-judicial proceeding, the statement made by Fenton is one which carries an absolute privilege, thus rendering falsity and malice immaterial. And the trial court did not abuse its discretion in denying further leave to amend in view of its leniency to the appellant in giving him three opportunities to state a cause of action.

In reply to these contentions, the appellant challenges the respondents' claim that the statement of facts contained in the copy of the decision of the National Labor Relations Board may be used to establish the truth or falsity of Fenton's statement. The respondents' position, he asserts, is based upon a misconception of the function of the exhibit and a distortion of its contents. For the pleader's own language in the body of the complaint must be consulted to determine for what purpose and to what extent the exhibit is adopted. And in the present pleading, the only purpose of the exhibit is to identify the appellant as the one concerning whom the statement was made.

Answering the other arguments of the respondents, the appellant takes issue with their assertion that the statement concerning him was a privileged one. Conceding, however, that they are entitled to a defense of a conditional privilege within the meaning of section 47 of the Civil Code, he claims he has sufficiently pleaded the existence of malice to remove the protection of privilege from the communication. And since a cause of action good as against a general demurrer is stated, the trial court abused its discretion in sustaining the demurrers without leave to amend, even though some of the grounds of special demurrer may have been well taken.

[1] "Libel is a false and unprivileged publication by writing * * * which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." Civ.Code, § 45. "Slander is a false and unprivileged publication other than libel, which: 1. Charges any person with crime. * * * 3. Tends directly to injure him in respect to his office, profession, trade, or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits. * * *" Civ.Code, § 46. These definitions have been held to include almost any language which, upon its face, has a natural tendency to injure a person's reputation, either generally, or with respect to his occupation (Bates v. Campbell, 213 Cal. 438, 441, 2 P. 2d 383; Stevens v. Snow, 191 Cal. 58, 62, 214 P. 968; Schomberg v. Walker, 132 Cal. 224, 227, 64 P. 290; Tonini v. Cevasco, 114 Cal. 266, 272, 46 P. 103); and words clearly conveying a meaning within one of the statutory categories are actionable per se.

The appellant has pleaded that Fenton's statement concerning him comes within two of these classifications in that (1) as a whole, it tended to injure him in his occupation; and (2) that it charged him with a crime. By way of innuendo, he has alleged the defamatory character of the language as follows: "Fenton, when he made said statement, intended to convey to his listeners and all who should read the statement the idea that plaintiff was a dishonest, unsatisfactory, inefficient and insubordinate worker in his profession and trade as a bank employee, and as a lawyer, and to further convey the impression that he was guilty of the crime of embezzlement, and was dishonest, and had misappropriated and

failed to properly account for funds entrusted to him. Plaintiff is informed and believes that said ideas actually were conveyed to said listeners and readers by said statement as intended by Fenton, and such ideas were reasonable conclusions to be drawn from said words."

[2-4] The office of an innuendo is to declare what the words meant to those to whom they were published. When the words themselves, under any circumstances, would convey to those who read or hear them a meaning within the statutory definitions, there is no occasion for the pleading of an innuendo. Conversely, if the words under no circumstances could convey a defamatory meaning, then no innuendo can make them defamatory. An innuendo, however, is necessary where the words used are susceptible of either a defamatory or an innocent interpretation. Bates v. Campbell, supra, 213 Cal. at page 442, 2 P.2d 383; and see Hall, Pleading in Libel Actions, 12 So.Cal.L.Rev. 224, 229–231. And when the offending language is susceptible of an innocent interpretation, it is not actionable per se, but, in addition to an innuendo, it is necessary for the plaintiff to allege special damages by reason of the meaning gained from the publication. Peabody v. Barham, 52 Cal.App.2d 581, 584, 585, 126 P.2d 668.

The word "falsify" has been described as a word of double import in that it may be used to convey two distinct meanings—either that of being intentionally or knowingly untrue, made with intent to defraud, or mistakenly and accidentally untrue. Fouts v. State, 113 Ohio St. 450, 462, 149 N.E. 551; North American Acc. Ins. Co. v. Tebbs, 10 Cir., 107 F.2d 853, 855, 856. A third meaning has also been suggested, namely, not an accidental but an intentional untruth, without, however, an intent to defraud. People v. Tomalty, 14 Cal.App. 224, 229, 230, 111 P. 513.

[5, 6] Because of these differing definitions, to state a cause of action for the use of the word "falsify" as one charging him with a crime, it was necessary for the appellant to plead that meaning by innuendo. But, unquestionably, Fenton's statement justifying the bank's action in discharging the appellant upon the grounds that he had admitted falsifying an expense account and had been guilty of flagrant insubordination, would, by its natural and probable effect upon the hearer or reader, tend to injure the appellant in his occupation (Bates v. Campbell, supra, 213 Cal. at page 442, 2 P.2d 383; and see cases collected in note, 66 A.L.R. 1499), even if the word "falsified" was not understood as implying a criminal act. Fenton's statement was therefore libelous and slanderous per se insofar as it related to his qualifications as an employee.

[7] Ordinarily an innuendo may be stricken as surplusage when the words themselves convey a meaning within one of the actionable categories. Bates v. Campbell, supra, 213 Cal. at page 443, 2 P.2d 383; Hall, Pleading in Libel Actions, supra, p. 230, n. 17. But it was proper for the appellant to plead one to the charge that they tended to injure him in his occupation as well as to assert that they charged him with the commission of the crime of embezzlement, in order to avoid the consequence of the rule that a pleader is bound by the meaning placed upon the language by innuendo. See cases collected in 16 Cal.Jur., Libel and Slander, sec. 57, p. 89, n. 1. Thus, had the appellant pleaded only the innuendo in regard to embezzlement, the trial court might have concluded that he intended only to rely upon that particular interpretation of the statement as the basis for recovery.

[8-10] Contrary to the respondents' assertion, the fact that the appellant is not named in the defamatory statement does not preclude words clearly conveying a meaning within one of the statutory classifications of libel and slander from being actionable per se. Williams v. Seiglitz, 186 Cal. 767, 771, 200 P. 635; Harris v. Zanone, 93 Cal. 59, 65–67, 28 P. 845; Semple v. Andrews, 27 Cal.App.2d 228, 233, 234, 81 P.2d 203; Dewing v. Blodgett, 124 Cal.App. 100, 103, 104, 11 P.2d 1105. It was merely necessary for the appellant to plead, as he did, that the words were spoken of and concerning him. Code Civ.Proc., § 460; Williams v. Seiglitz, supra; Harris v. Zanone, supra; Semple v. Andrews, supra; Dewing v. Blodgett, supra. Consequently, insofar as Fenton's statement tended to injure the appellant in his occupation, it was unnecessary for him to allege special damage. But the words charging him with falsification, if understood as relating to a crime, present a different situation. As they are not actionable per se, the appellant was required specially to plead the nature of his damage, and his specifications concerning the loss of employment and prospective dis-

advantage in the banking business are sufficient as against a general demurrer.

The respondents' principal criticism of Washer's complaint is that it shows the truth of Fenton's statement. They rely upon the statement of facts contained in the decision of the National Labor Relations Board as showing insubordination justifying discharge and also the falsification of Washer's expense account.

[11, 12] The general rule is that when a written instrument which is the foundation of a cause of action or defense is attached to a pleading as an exhibit and incorporated into it by proper reference, the court may, upon demurrer, examine the exhibit and treat the pleader's allegations of its legal effect as surplusage. Gosewisch v. Doran, 161 Cal. 511, 119 P. 656, Ann.Cas. 1913D, 442; Alphonzo E. Bell Corp. v. Bell View Oil Syndicate, 46 Cal.App.2d 684, 116 P.2d 786; National Pavements Corp. v. Hutchinson Co., 132 Cal.App. 235, 22 P.2d 534; Bashford v. A. Levy & J. Zentner Co., 123 Cal.App. 204, 11 P.2d 51; Simmons v. Peavy-Welsh Lumber Co., 5 Cir., 113 F.2d 812, 813. But an instrument which is not the basis of a cause of action or defense falls in a different category; the pleading of such a document as an exhibit is only an assertion of its existence and character (Holly Sugar Corp. v. Johnson, 18 Cal.2d 218, 226, 115 P.2d 8; People v. Reid, 195 Cal. 249, 260, 261, 232 P. 457, 36 A.L.R. 1435; Lambert v. Haskell, 80 Cal. 611, 22 P. 327; Mayor, etc., of City of Los Angeles v. Signoret, 50 Cal. 298; San Francisco Sulphur Co. v. Ætna Indem. Co., 11 Cal.App. 695, 106 P. 111), in the absence of allegations indicating the pleader's intention to adopt as his own the recitals of the exhibit. Holly Sugar Corp. v. Johnson, supra; People v. Reid, supra; Silvers v. Grossman, 183 Cal. 696, 700, 192 P. 534. Consequently, unless the action or defense is founded upon the exhibit, the language of the complaint or answer determines the extent to which the document has been made a part of the pleading.

[13] In each count of the appellant's complaint, after quoting the allegedly defamatory statement of Fenton, Washer says that it was made by him in commenting "upon a decision of the National Labor Relations Board in the case of 'In the Matter of the Bank of America National Trust and Savings Association California and United Office and Professional Workers of America, Case No. C-903' (14 NLRB, No. 15) by which decision the Board ordered the Bank to reinstate plaintiff to employment with the said Bank; a copy of said decision is attached hereto as Exhibit 'A' and made a part hereof." The parties concede that the order of the National Labor Relations Board is not res judicata in the present action, and there is nothing in the appellant's complaint which indicates that he intended to include as a part of his pleading any statement of facts made by the Board in deciding the matter before it. Under these circumstances, the recitals of the Board's decision may be considered only insofar as they show that there was a determination which concerned the appellant and that Fenton's comment was made in reference to the requirement as to reinstatement.

But even though Fenton's statement was false, the respondents assert, his statement was conditionally privileged and therefore is not actionable because of the failure properly to plead the existence of malice. As the appellant has expressly conceded that the occasion for Fenton's comment was one according a conditional privilege, the scope of the inquiry upon this question is limited to a consideration of the allegations of malice (Civ.Code, § 48), which are as follows: "Said statement was made by Fenton with malice, for the purpose of injuring, disgracing and defaming plaintiff, and interfering with his ability to obtain employment. It was false and known by Fenton to be false at the time it was made and Fenton did not have probable cause or any cause for believing it to be true."

In contending that these allegations are incomplete, the respondents rely upon Locke v. Mitchell, 7 Cal.2d 599, 61 P.2d 922, 924. In that case, the defamatory words were alleged to be "false, malicious and scandalous and did and do expose plaintiff to hatred, contempt and ridicule, and have injured and do injure plaintiff in the practice of his profession." In commenting upon the pleading, the court said, "The pleading does not allege that the defendants knew the charges were false or had any reason to believe they were false. The pleading, of course, does use the words 'malicious' and 'maliciously'; but these words, standing alone, are not sufficient to charge malice in fact."

[14] The pleading in the present action apparently was drafted to avoid the vice of the complaint in the Locke case, for

the appellant has alleged, not only that the statement is false, but also that it was known by Fenton to be false at the time he made it and, furthermore, that he did not have probable or any cause for believing it to be true. In addition he has alleged that the statement was made for the purpose of injuring, disgracing and defaming him and interfering with his ability to obtain employment. Such allegations constitute a clear and definite pleading of malice in fact. Morcom v. San Francisco Shopping News, 4 Cal.App.2d 284, 290, 40 P.2d 940.

[15] The respondents, however, claim that they have a complete defense under section 47, subdivision 2, of the Civil Code, which declares that a publication is privileged when made "In any (1) legislative or (2) judicial proceeding, or (3) in any other official proceeding authorized by law * * *." A publication so made is absolutely privileged, that is, not actionable although given maliciously and with knowledge of its falsity. Donnell v. Linforth, 11 Cal.App.2d 25, 52 P.2d 937; and see Layne v. Kirby, 208 Cal. 694, 696, 697, 284 P. 441; Stevens v. Snow, 191 Cal. 58, 64, 65, 214 P. 968; Hale Co. v. Lea, 191 Cal. 202, 205, 215 P. 900; Moore v. United States F. & G. Co., 122 Cal.App. 205, 9 P.2d 562. And the Restatement of Torts, referring particularly to the parties to such a proceeding, states the same rule, say the respondents, as follows: "A party to a private litigation or a private prosecutor or defendant in a criminal prosecution is absolutely privileged to publish false and defamatory matter of another in communications preliminary to a proposed judicial proceeding or in the institution of or during the course and as a part of a judicial proceeding in which he participates, if the matter has some relation thereto." Vol. 3, § 587.

[16] The extension of this absolute privilege to statements not made in the judicial or legislative proceeding itself is, however, limited both by the rule of the Restatement and the decisions to communications such as those made by a client to his attorney or by an individual to a prosecuting attorney or other public officer preliminary to a proposed criminal proceeding. Rest.Torts, § 587, comment b. None of the authorities cited by the respondents extends the privilege beyond a communication to one actually involved in the proceeding, either as a judge, attorney, party, or witness.

[17] It is the position of the respondents that a party to a labor dispute before the National Labor Relations Board, and while such a proceeding is pending (a fact which nowhere appears in the complaint), is clothed with an absolute privilege to discuss such matters, and that language pertinent thereto will not be actionable even though false and made with malice. They rely upon Thornhill v. State of Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093, and Carlson v. People of State of California, 310 U.S. 106, 60 S.Ct. 746, 84 L.Ed. 1104, as holding that the publicizing of the facts of a labor dispute in a peaceful manner is within the liberty of free discussion guaranteed by the Fourteenth Amendment to the United States Constitution. However, they fail to recognize the distinction between the authority of a court to enjoin discussion relating to employment or working conditions and the responsibility of the speaker civilly for any injury caused by a malicious and false statement made in the course of such a controversy. For although either an employer or an employee may be immune from liability when he, without malice, publishes the facts of a dispute between them, a statement made maliciously and with knowledge of its falsity does not have that protection.

[18, 19] As the complaint states a cause of action, the denial of leave to amend was an abuse of discretion, even if the special demurrers were well taken. Wennerholm v. Stanford Univ. School of Medicine, 20 Cal.2d 713, 719, 128 P.2d 522, 141 A.L.R. 1358. And since the action was commenced subsequent to the effective date of section 472c of the Code of Civil Procedure, a special request by the appellant for leave to amend was unnecessary. Wennerholm v. Stanford Univ. Sch. of Med., supra, 20 Cal. 2d at page 719, 128 P.2d 522. But upon a reconsideration of the special demurrers, the trial court may require the clarification of any uncertainties or ambiguities. Wennerholm v. Stanford Univ. Sch. of Med., supra, 20 Cal.2d at page 720; Guilliams v. Hollywood Hospital, 18 Cal.2d 97, 104, 114 P.2d 1.

The judgment is reversed.

GIBSON, C. J., CURTIS, and TRAYNOR, JJ., and GRIFFIN, J. pro tem., concurred.

Hearing denied; CURTIS, CARTER, and SCHAUER, JJ., dissenting.

21 Cal.2d 790

DARE v. BOARD OF MEDICAL EXAMINERS et al.

S. F. 16609.

Supreme Court of California.

April 7, 1943.

1. Certiorari ⇐24

The State Board of Medical Examiners cannot exercise judicial functions unless authorized to do so by the Constitution, and therefore, certiorari is not an appropriate method of reviewing the action of the board. St. 1939, p. 1682, § 2409.

2. Mandamus ⇐87
Physicians and surgeons ⇐5(3)

A citizen, feeling aggrieved because of action of State Board of Medical Examiners, which if undisturbed would have effect of depriving him of a constitutional right, is entitled to have the validity of the action inquired into in a court of justice, and the proper method of inquiring into the propriety of official acts of such a board is by mandamus proceeding. St. 1939, p. 1682, § 2409.

3. Mandamus ⇐173

In mandamus proceeding to review action of State Board of Medical Examiners, the court is not confined to record before the board but may exercise an independent judgment on all of the competent evidence before it. St. 1939, p. 1682, § 2409.

4. Mandamus ⇐173

In mandamus proceeding to review action of State Board of Medical Examiners although the hearing to which petitioner is entitled is in the nature of a "trial de novo", the record of evidence before the board is admissible in evidence. St. 1939, p. 1682, § 2409; Code Civ.Proc. §§ 976, 1084–1097.

See Words and Phrases, Permanent Edition, for all other definitions of "Trial De Novo".

5. Mandamus ⇐1

"Mandamus" is a proceeding in which equitable principles are applicable.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandamus".

6. Mandamus ⇐173

The scope of a "trial de novo" in mandamus proceeding to review action of State Board of Medical Examiners is not the unqualified trial de novo to which a litigant is entitled in the superior court on appeal from a justice's court on questions of fact or on questions of both law and fact, and such a trial is not governed by rules applicable to statutory review of action of Board of Governors of State Bar. St. 1939, p. 1682, § 2409; Code Civ.Proc. §§ 976, 1084–1097.

7. Mandamus ⇐87

Where no other remedy is available, "mandamus" is the proper remedy for one improperly deprived of a professional license by a state-wide administrative board to secure the restoration of his license. Code Civ.Proc. §§ 1085–1088.

8. Mandamus ⇐87, 154(4)

Where petitioner seeks review of order of state-wide administrative board revoking petitioner's professional license, petitioner is not entitled as a matter of right to issuance of writ of mandamus, but he must make proper showing by allegations of his petition, and court is not without discretion, wisely exercised, to grant or deny either alternative or peremptory writ. Code Civ. Proc. §§ 1085–1088; Rules of the Supreme Court, rule 26, § 3.

9. Mandamus ⇐190

In mandamus proceeding to review order of state-wide administrative board, if petitioner is required to produce record before board at his own expense, the court, in event the petitioner prevails, is authorized to impose the expense of preparing it by way of damages. Code Civ.Proc. § 1095.

10. Mandamus ⇐168(3), 173

In mandamus proceeding to review order of state-wide administrative board, the court is not confined to the record of proceedings before the board, but the record before the board is competent evidence which should be considered and weighed along with other evidence in the cause. Code Civ.Proc. §§ 1084–1097.

11. Mandamus ⇐174

In mandamus proceeding to review order of state-wide administrative board revoking professional license, if record before board discloses that petitioner intentionally presented a skeleton defense in hearing before the board for purpose of transferring controversy from board to court, that fact should weigh heavily

against him in his endeavor to invoke equity powers of court. Code Civ.Proc. §§ 1084–1097.

12. Mandamus ⇐173

In mandamus proceeding to review order of state-wide administrative board revoking professional license, where it appears that controversy has been tried out in good faith before the board, the time of court need not be taken up, nor the parties put to additional expense, in duplicating the record before the board. Code Civ. Proc. §§ 1084–1097.

13. Mandamus ⇐168(3), 172

In mandamus proceeding to review order of state-wide administrative board revoking professional license, court is not bound by findings and determinations of board, and if it should appear that incompetent evidence had been received by the board, the complaining party should not be foreclosed from objecting on the trial to its admissibility Code Civ.Proc. §§ 1084–1097.

14. Mandamus ⇐168(3)

In mandamus proceeding to review order of administrative board revoking professional license, if board improperly excluded admissible evidence, the litigant should not be foreclosed from offering it at trial. Code Civ.Proc. §§ 1084–1097.

15. Mandamus ⇐168(3)

In mandamus proceeding to review order of state-wide administrative board revoking professional license, if credibility of witnesses before board is brought in question, the opportunity should be afforded for further examination or to contradict or impeach their testimony. Code Civ. Proc. §§ 1084–1097.

16. Mandamus ⇐154(4)

In mandamus proceeding to review order of state-wide administrative board revoking professional license, if proceedings before board are to be questioned at trial, it is petitioner's duty to set forth his objections in the petition for the writ. Code Civ.Proc. §§ 1084–1097.

17. Mandamus ⇐174, 176

In mandamus proceeding to review order of state-wide administrative board revoking professional license, if it appears that there was no breach of duty by the board in receiving or refusing to receive evidence, that there is no other pertinent evidence which trial court, in exercise of wise discretion, should receive, or that such other evidence should be and has been received, the court has power to make its findings of fact and conclusions of law and to render judgment either denying relief or directing board to perform its official duty. Code Civ.Proc. §§ 1084–1097.

18. Physicians and surgeons ⇐11(2)

The use of the suffix "N.D." meaning Doctor of Naturopathy by one licensed as drugless practitioner and licensed to practice chiropractic, but not licensed to practice naturopathy constituted "unprofessional conduct" authorizing revocation of license. Chiropractic Act, St. 1923, p. xx; St. 1939, p. 1682, § 2409; St. 1937, p. 1276, § 2395.

See Words and Phrases, Permanent Edition, for all other definitions of "N. D." and "Unprofessional Conduct".

19. Constitutional law ⇐208(6)
Physicians and surgeons ⇐2

Statute providing that unless a person licensed to use title "doctor" or the prefix "Dr." holds a physician's and surgeon's certificate, the use of the title or the prefix without further indicating the type of certificate he holds constitutes unprofessional conduct is not unconstitutional as "class legislation". St. 1939, p. 1682, § 2409.

See Words and Phrases, Permanent Edition, for all other definitions of "Class Legislation".

TRAYNOR, J., GIBSON, C. J. and EDMONDS, J., dissenting in part.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Mandamus proceeding by John Franklin Dare against the Board of Medical Examiners of the State of California and others. From a judgment denying the writ, the petitioner appeals.

Affirmed.

For prior opinion of District Court of Appeals, see, 127 P.2d 977.

M. Jas. McGranaghan, of San Francisco, for appellant.

Earl Warren, Atty. Gen., and Thomas Coakly, Deputy Atty. Gen., for respondents.

SHENK, Justice.

This is a proceeding in mandamus to compel the respondents, Board of Medical Examiners and its members to cancel the order of the board revoking the petitioner's license to practice as a drugless practitioner, and to restore or re-issue his license. The petition was filed in the superior court. An alternative writ was issued. The respondents filed an answer and the cause was set down for trial. Upon the trial judgment was entered denying the peremptory writ. The petitioner has appealed from that judgment.

The petitioner alleged that he was licensed as a drugless practitioner under a certificate issued by the Board of Medical Examiners; that he also was licensed to practice chiropractic under the provisions of the Chiropractic Act, St.1923, p. xx; that he also held a certificate as a clinical laboratory technologist; that in May, 1940, he was charged by the board with displaying a sign using the prefix "Dr." without expressly indicating the type of certificate held, and that, inasmuch as he did not hold a physician's and surgeon's certificate issued by the board, his act was in violation of the Business and Professions Code, § 2409, St.1939, p. 1682; that he filed an answer in the proceedings before the board and that thereafter a hearing was had resulting in the order complained of. The petitioner purported to state a résumé of the oral, documentary and photographic evidence taken at the hearing before the board, including his own testimony. It was alleged that the board failed to produce any evidence that the use of the suffix "N.D.," assuming that it was so used, constituted unprofessional conduct, or that it tended to mislead the public. It was then alleged that the board found the petitioner guilty as charged and ordered that his license as a drugless practitioner be revoked unless he would agree not to use any form of advertising except the words "drugless practitioner" on his professional card, in which case his license would be restored and he would be placed on five years probation; that similar action was taken as to each of the charges; and that "said order has no support whatsoever under the testimony and evidence submitted to and received by defendant Board."

A short time prior to the hearing before the board, the District Court of Appeal had rendered an opinion in the case of Laisne v. State Board of Optometry, Cal.App., 102 P.2d 538. However, at the time of the trial in the superior court, a petition for hearing in that case had been granted and the cause was then pending in this court. At the commencement of the trial the court inquired about the record of the proceedings before the board. Counsel for the petitioner stated that, regardless of what took place before the board, he was demanding a trial de novo in the sense of a re-trial of the issues involved in the controversy; that he had no intention of producing that record before the court; that he felt that he was not bound by that record and that he participated in the hearing before the board on that theory; and that he would "not stipulate to the introduction of the evidence taken before the board, or the rulings made before the board." When admonished by the court that he was "taking an awful chance" in assuming such an attitude counsel nevertheless insisted upon his demand for a trial anew without qualification or limitation. No offer of proof was made.

On this appeal it is likewise contended by the petitioner that he was entitled to proceed as on a new trial of the issues of fact without the production of the record of the evidence before the board and without any limitation or qualification because of this court's declarations in the case of Drummey v. State Board of Funeral Directors, 13 Cal.2d 75, 87 P.2d 848, and in the case of Laisne v. State Board of Optometry, 19 Cal.2d 831, 123 P.2d 457, decided since the hearing in the superior court, to the effect that in the proceeding in court to question the action of such a board the court is not confined to the record before the board and that the petitioner is entitled to a hearing in the nature of a trial de novo on the issues presented.

The petitioner may not now contend that he was not accorded the right to question the sufficiency of the record before the board, if it had been produced, or was not accorded the right to introduce evidence before the court substantially in accordance with the procedure herein outlined. The record shows that the court offered him such an opportunity but he declined to so proceed on the ground that he was entitled to a trial anew without the introduction of the record before the board.

Prior to the present proceeding the propriety of producing in court and there considering the record of the proceedings before the board had not been questioned. That question is now presented to this court for the first time. The extent of the

independent judgment to be exercised by the court in the mandamus proceeding is also pertinent to the discussion and to the determination of the appeal.

[1-3] The discussion has centered first on the nature of the remedy available to one aggrieved by the order of such a board, and secondly on the scope of that remedy. This court has held in numerous cases that such a board does not and cannot exercise judicial functions unless authorized so to do by the Constitution. A few of the more recent cases are Standard Oil Co. v. State Board of Equalization, 6 Cal. 2d 557, 59 P.2d 119; Whitten v. State Board of Optometry, 8 Cal.2d 444, 65 P.2d 1296, 115 A.L.R. 1; Drummey v. State Board of Funeral Directors, supra; Laisne v. State Board of Optometry, supra. It followed necessarily that certiorari was not the appropriate method of reviewing the action of such a board. Since no other legal remedy was made available this court declared and has adhered to the proposition that a citizen, feeling aggrieved because of the action of such a board, which if undisturbed would have the effect of depriving him of a constitutional right either of liberty or property, should be entitled to have the validity of that action inquired into in a court of justice; that the proper method of inquiring into the propriety of the official acts of such a board is by means of a mandamus proceeding, and that in such a proceeding the court is not confined to the record before the board but may exercise an independent judgment on all of the competent evidence before it.

[4-6] Because the hearing to which the petitioner was entitled was said to be in the nature of a trial de novo, it is contended that the record of the evidence before the board had no proper place in the evidence at the trial. There is no merit in the contention. The significance of the trial designated as a trial de novo must be tested in the light of the nature and scope of the remedy in mandamus thus made available. In its nature mandamus is a proceeding in which equitable principles are applicable. Lukens v. Nye, 156 Cal. 498, 507, 105 P. 593, 20 Ann.Cas. 158, 36 L.R.A.,N.S., 244; Hutchison v. Reclamation Dist., 81 Cal.App. 427, 433, 254 P. 606; Dierssen v. Civil Service Commission, 43 Cal.App.2d 53, 57, 110 P.2d 513. The scope of such a trial is not to be deemed to be the unqualified or unlimited trial de novo to which a litigant is entitled in the superior court on appeal from a justice's court on questions of fact or on questions of both law and fact, Code Civ.Proc. § 976, where, justifiably or not, he may present a "skeleton" case in the lower court and reserve the real showing on the merits for the trial in the superior court. And such a trial is not governed by the rules applicable to the statutory review of the action of the Board of Governors of the State Bar in which this court exercises an independent judgment solely on the facts contained in the record before that board.

The conditions attending the trial in the consideration and determination of the mandamus proceedings may be said to include the following:

First, the petitioner comes before the court governed by the provisions of the Code of Civil Procedure applicable to mandamus proceedings, Code Civ.Proc. § 1084 to 1097 inclusive. In the disposition of such proceedings the court is likewise governed by those code sections. The powers and duties of the court in the premises are provided for therein. Historically the writ of mandamus was devised to provide a remedy where no other remedy existed. Its purpose was to afford a means of procuring justice in the proper field of its operation where there was an asserted legal right and no specific legal remedy for the enforcement of that right. The code provides, § 1085, that the writ "may be issued by any court, except a municipal, justice's or police court, to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person."

Section 1086 provides: "The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. It must be issued upon the verified petition of the party beneficially interested."

Provision is then made for the issuance of an alternative and a peremptory writ, § 1087. "When the application to the court is made without notice to the adverse party, and the writ is allowed, the alternative [writ] must be first issued * * *." § 1088.

[7, 8] From an early date in this state, as noted in the Drummey case, it has been held that, where no other remedy is available, mandamus is the proper remedy for one improperly deprived of a professional license by a state-wide administrative board to secure the restoration of his license. Such is the purpose of the present proceeding. The proceeding is initiated by the filing of a verified petition. The practice is to present the petition to the court with a request that the alternative writ be issued ex parte. But a petitioner is not entitled as a matter of right to the issuance of that writ. He must make a proper showing by the allegations of his petition. If his petition fails to state a prima facie case entitling him to the issuance of the alternative writ, it is within the power of the court to deny it out of hand. This is familiar practice in all courts having original jurisdiction in mandamus. Furthermore, the power of the court is not without a discretion, wisely exercised, to grant or deny either the alternative or the peremptory writ. Wiedwald v. Dodson, 95 Cal. 450, 30 P. 580; Betty v. Superior Court, 18 Cal.2d 619, 116 P.2d 947; Bartholomae Oil Corp. v. Superior Court, 18 Cal.2d 726, 117 P.2d 674. For an abuse of this discretion on the part of a lower court appropriate remedies are available in a higher court, unless the proceeding is entertained originally in the Supreme Court, where an order denying the writ is not generally reviewable except on a petition for rehearing.

Second: If the alternative writ is issued it may be said that the matter then proceeds as an ordinary civil action. But this is not so in some important particulars. The requirements of the alternative writ are that the respondent do the act demanded or show cause at a specified time and place why he has not done so. In the event of non-compliance the order then is in the nature of an order to show cause where the burden is cast upon the respondent to proceed and show to the satisfaction of the court why he has not performed the act demanded by the petitioner. On the return day, in original proceedings in the Supreme Court and District Courts of Appeal, the rule is that "the respondent may make return, either by demurrer or by answer, or by both. If the return be by demurrer alone, and the demurrer is not sustained, the [peremptory] writ may be ordered to issue without leave to answer over." Rule XXVI, § 3, of Rules for the Supreme Court. In the superior court, on the return of the alternative writ, the respondent may file an answer under oath, § 1089, in which questions of law also may be raised. § 1094. But the petitioner is not precluded by the answer from any valid objection to its sufficiency. § 1091.

Third: When the matter is at issue on controverted questions of fact, the cause may then be said to proceed as a civil action, that is, it is set down for trial and is tried as a civil action during the course of which any competent evidence may be introduced and received and the ordinary procedural rules apply. At the close of the hearing the court makes findings of fact and conclusions of law, and enters judgment either denying or granting a peremptory writ.

[9] Fourth: In the course of the trial questions may arise as to the admissibility of offered evidence. The present case is illustrative of those where the admissibility and effect of the record of the evidence before the board is brought into question. None of the cases has specifically declared that such a record is admissible, obviously for the reason that it had been the practice to receive it and its admissibility had not been questioned. The cases have therefore assumed that it would be admissible. It was stated in the Drummey and in the Laisne cases that the court is not confined to the record of the evidence before the board. If the record were not in evidence that statement would be without significance. The admissibility of the record before the board has been assumed for the further reason that such a record is ordinarily essential to the proper determination by the court of the question whether the respondent has performed its official duty in the premises. This is especially true where the issues turn upon questions of fact. The court may refuse to proceed in a proper case unless the record before the board is produced in court. The problem may arise as to who should present that record. Normally the respondent has or should have it prepared as a part of its records and include it as a part of its return to the alternative writ. If not produced until during the course of the trial, the respondent should have it available for the benefit of the court at that time. If the petitioner is required to produce it at his own expense the court, in the event the petitioner prevails, is authorized to impose the expense of preparing

it by way of damages pursuant to section 1095 of the Code of Civil Procedure.

[10] Fifth: As stated the court is not confined to the record of the proceedings before the board. That is but another way of saying that the court may decide the cause on all of the competent evidence before it, which is a truism. Since the record before the board is competent evidence it should be considered and weighed along with other evidence in the cause.

[11, 12] It was said in the Drummey case that "the findings of the board come before the court with a strong presumption of their correctness." [13 Cal.2d 75, 87 P. 2d 854.] If there is no requirement for formal findings and none are made, findings in favor of the prevailing party are implied from the determination of the board. In any event the entire record is a public record, that is, it is the record of the proceedings of a legally constituted public body. It may be assumed that in the ordinary case such a record would disclose that the controversy between the parties had been tried out before the board as fairly and completely as the circumstances of the case would permit. There is nothing in any of the cases to justify the conclusion that one charged with violating the conditions of his professional license may remain silent before the board or present a so-called "skeleton" showing and thereafter secure in court a trial de novo in an unlimited sense. Nor was it ever contemplated that the time of the court should be consumed in a reiteration of the competent evidence presented to the board and contained in the record of its proceedings. Sparks v. Board of Dental Examiners, 54 Cal.App.2d 491, 129 P. 2d 405. If the record before the board should disclose that the petitioner had intentionally presented a "skeleton" defense in the hearing before the board for the obvious purpose of transferring the controversy from the board to the court, that fact should weigh heavily against him in his endeavor to invoke the equity powers of the court in his behalf in the mandamus proceeding. If, however, it appears that the controversy has been tried out in good faith before the board there is no reason why the time of the court should be taken up or the parties be put to additional expense in duplicating the record before the board.

[13-16] Sixth: As above noted the trial court is not confined to the record before the board. Nor is the court bound by the findings and determinations of the board. It must also be said that neither party is necessarily bound in all particulars by the record before the board. If it should appear from that record that incompetent evidence had been received by the board, the complaining party should not be foreclosed from objecting on the trial to its admissibility. Also if the board had improperly refused to entertain admissible evidence the litigant should not be foreclosed from offering it at the trial. If additional evidence not included in either category be sought to be introduced by a party, the court has the right to receive it upon a showing that, in the exercise of reasonable diligence, it could not have been introduced before the board. If the credibility of witnesses before the board be brought in question in the mandamus proceeding the opportunity should be afforded for further examination or to contradict or impeach their testimony under well recognized rules of evidence and procedure. If the proceedings before the board are to be questioned at the trial it would be the duty of the petitioner to set forth his objections in the petition for the writ.

Finally, research discloses that there is nothing novel in denominating the hearing in the mandamus proceeding a trial "de novo," or in placing obviously reasonable limitations upon its general scope at the hearing. The term has been accorded various meanings elsewhere, depending on the purpose of the legislation or the rules of procedure. For example, in admiralty "An appeal * * * vacates the decree of the lower court and there is a trial de novo in the appellate court. Thus, on appeal from the district court to the circuit court of appeals, the proceeding or the trial is de novo on the record on appeal, and on such new or amended pleadings, or such new evidence as the circuit court of appeals may allow or admit." 2 C.J.S., Admiralty, § 187, p. 318, citing authorities. In Shupee v. Railroad Commission of Texas, 123 Tex. 521, 73 S.W.2d 505, the statute provided for a court action by one aggrieved by the commission's decision which should "be tried and determined as other civil causes." Vernon's Ann.Civ.St.Tex. art. 911a, § 17. It also provided that the plaintiff had the burden of showing "by the preponderance of evidence" that the decision was unreasonable or unjust as to him. In that case in arriving at its conclusion that the commission's denial of the

plaintiff's application for a certificate of convenience and necessity should not be disturbed the court frequently referred to the evidence adduced before the commission. It may be said that the statute there contemplated a "trial de novo." Nevertheless the court held that the legislative intent was that the commission's decision was not to be disturbed unless it had no basis in fact and was arbitrary and capricious; that the court should not substitute its judgment for that of the commission, unless it was shown that the judgment of the commission was without foundation in fact, or was unreasonable or arbitrary. Likewise in Texas Liquor Control Board v. Floyd, Tex.Civ.App., 117 S.W.2d 530, 534, we find the statement: "The de novo hearing before the district court, as provided in the Act, does not mean that the issue of whether or not a permittee's license shall be cancelled is to be heard and determined anew by the court in the same manner as if no hearing had been had by the Board or its Administrator."

[17] The foregoing cases are referred to for the purpose of illustrating that judicial trial de novo after an administrative hearing is not usually intended as a trial without appropriate consideration of the evidence upon which the administrative body based its action. All of the decisions recognize the important administrative function of such a board in utilizing its facilities in initiating and investigating disciplinary proceedings, conducting hearings, finding the facts and making its orders accordingly. See Whitten v. State Board of Optometry, 8 Cal.2d 444, 446, 65 P.2d 1296, 115 A.L.R. 1. Those findings and orders have not the finality of a court judgment if attacked in an appropriate court proceedings, such as in mandamus. If in such a proceeding it appears that there was no breach of duty in the matter of receiving or refusing to receive evidence; that there is not other pertinent evidence which the trial court, in the exercise of a wise discretion, should receive, or that such other evidence should be and has been received, then the court has the power to make its findings of fact and conclusions of law and render judgment either denying the relief sought or by an appropriate writ directing the board to perform its official duty in the premises.

The record herein shows that the petitioner drafted the allegations of his petition in line with the foregoing views and procedure. To support those allegations the introduction of the record of the proceedings before the board would have been not only proper, but necessary. However, the petitioner refused so to proceed. In effect, he refused to participate in the trial on the issues of fact if the record before the board was required to be produced.

The attitude thus taken by the petitioner left nothing for the trial court to decide except the issues of law involved. Those questions were argued and the cause was submitted thereon. About three weeks later the court determined those issues adversely to the contentions of the petitioner, and we think correctly.

[18, 19] There is no merit in the contention that the complaint before the board did not state a cause for disciplinary action against the petitioner. In this connection the petitioner contended at the trial and now contends that he was entitled to use the letters "N. D.," meaning Doctor of Naturopathy, because, so he asserts, the methods of treatment of the sick by a drugless practitioner and by a naturopath are the same, and that the public was not prejudiced thereby. He concedes that he was not licensed to practice naturopathy in this state. Section 2395 of the Business and Professions Code, St.1937, p. 1276, provides that the use by the holder of any certificate of any letters, suffix, indicating that he is entitled to practice a system or mode of treating the sick for which he is not licensed in this state constitutes unprofessional conduct. In 1909, Stats.1909, p. 418, the Legislature in effect ratified certificates to practice naturopathy theretofore issued by the Association of Naturopaths of California; but the act did not authorize any future issuance of such certificates and none have since been issued. There is no rule by which a person authorized to practice as a drugless practitioner under the appropriate and revised system, Stats. 1913, p. 722, may successfully claim privileges under an earlier and discontinued system. By section 2395 the Legislature forbade it, and the contention may not prevail that the Legislature could not lawfully do so, or that the restriction adopted was not appropriate to protect the public against deception. The same conclusion follows a consideration of the petitioner's contention that section 2409 of the Business and Professions Code adopted in 1939 is unconstitutional because it is class legislation. That section provides: "Unless a

person licensed and authorized under this chapter or any preceding medical practice act to use the title 'doctor' or the letters or prefix 'Dr.,' holds a physician's and surgeon's certificate, the use of this title or these letters or prefix without further indicating the type of certificate he holds, constitutes unprofessional conduct within the meaning of this chapter." The petitioner has failed to show wherein the distinction thus provided is unreasonable and beyond the power of the Legislature to afford protection against misleading the public. An even more severe restriction was upheld in Davis v. State Board of Optometry, 83 Cal.App. 488, 257 P. 197. See, also, State v. Michaels, 226 Wis. 574, 277 N.W. 157; State v. Pollman, 51 Wash. 110, 98 P. 88.

In view of the state of the record here presented it follows that the trial court had no recourse but to deny the peremptory writ.

The judgment is affirmed.

CURTIS and CARTER, JJ., and GRIFFIN, J., pro tem., concurred.

TRAYNOR, Justice (concurring and dissenting).

The present case, together with Russell v. Miller, Cal.Sup., 136 P.2d 318, is the latest step in the development of a new system of judicial review of the decisions of state-wide administrative boards. The earlier cases (Standard Oil Co. of California v. State Board of Equalization, 6 Cal.2d 557, 59 P. 119; Whitten v. State Board of Optometry, 8 Cal.2d 444, 65 P.2d 1296, 115 A.L.R. 1; Drummery v. State Board of Funeral Directors, 13 Cal.2d 75, 87 P.2d 848; McDonough v. Goodcell, 13 Cal. 2d 741, 91 P.2d 1035, 123 A.L.R. 1205; Laisne v. State Board of Optometry, 19 Cal. 2d 831, 123 P.2d 457) have been comprehensively analyzed elsewhere and their weaknesses exposed. McGovney, Administrative Decisions and Court Review Thereof, In California, 29 Cal.L.Rev. 110; McGovney, The California Chaos in Court Review of the Decisions of State Administrative Agencies, 15 So. Cal.L.Rev. 391; Rode, Administrative Adjudication in California and Its Review by the Writ of Certiorari, 25 Cal.L.Rev. 694; Turrentine, Restore Certiorari to Review State-Wide Administrative Bodies in California, 29 Cal.L.Rev. 275; Turrentine, The Laisne Case—A Strange Chapter in Our Jurisprudence, 17 State Bar Journal, 165; Elliott, Certiorari and the Local Board, 29 Cal.L.Rev. 586. When the majority of the court in Laisne v. State Board of Optometry, supra, held that if the order of an administrative board revoking a license "is questioned in a court of law, then under the Constitution of this state the petitioner must be given a trial de novo on the issues involved" (19 Cal.2d 831, 845, 123 P.2d 457, 465) it was generally assumed that they meant what the Latin term expresses, a new trial of the matter all over again. The author of the majority opinion himself so defined it in his opinion in Collier & Wallis v. Astor, 9 Cal.2d 202, 205, 70 P.2d 171, and the dissenting opinion in the Laisne case assumed that this definition continued to hold firm, without provoking either its repudiation or qualification in the majority opinion. It is now clear, however, that such a trial is no longer contemplated. The complaining party finds that he is entitled, not to a trial de novo, but to a "review" of the action of the board "in the nature of a trial de novo." This review by a proceeding in mandamus has many characteristics of certiorari, some characteristics of a motion for new trial, but few if any characteristics of mandamus.

The new procedure resembles certiorari in the following particulars:

(1) The record of the proceedings before the board is not only admitted in evidence but is "ordinarily essential to the proper determination by the court of the question whether the respondent has performed its official duty in the premises." This definition of the court's function aptly describes a proceeding in certiorari (compare Code Civ.Proc. § 1074), but is foreign to the traditional conception of a proceeding to compel the performance of a duty prescribed by law, for example the duty of an administrative board to take jurisdiction and render a decision. Mandamus does not normally extend to the revision or dictation of the administrative decision. Cal.Code Civ.Proc. § 1085; McGovney, op. cit. 29 Cal.L.Rev. 110, 149.

(2) The respondent is required to produce the record. If the proceeding were in certiorari instead of mandamus it would be governed by section 1071 of the Code of Civil Procedure, providing that the writ specify that the one to whom it is directed must produce a transcript of the record and proceedings at a given time and place. The majority of the court have precluded

themselves from invoking section 1071 only to find themselves compelled to formulate its equivalent: "The problem may arise as to who should present that record. Normally the respondent has or should have it prepared as a part of its records and include it as a part of its return to the alternative writ. If not produced until during the course of the trial, the respondent should have it available for the benefit of the court at that time. If the petitioner is required to produce it at his own expense the court, in the event the petitioner prevails, is authorized to impose the expense of preparing it by way of damages pursuant to section 1095 of the Code of Civil Procedure." Something is lost by language that does not specify the person who must produce the record, and that raises any doubt as to when it should be produced.

(3) The trial court may review the record as it would on certiorari. In the view of the majority opinion it is the function of the trial court to exercise its discretion to grant or deny either the alternative or peremptory writ of mandamus, and the function of the appellate court to determine whether the trial court has abused its discretion. The majority opinion in fact looks to the trial court to exercise its discretion so as to obviate unnecessary retrials in the court. It is anticipated that "in the ordinary case such a record would disclose that the controversy between the parties had been tried out before the board as fairly and completely as the circumstances of the case would permit." Criticism of the Laisne case has been taken to heart in the words: "Nor was it ever contemplated that the time of the court should be consumed in a reiteration of the competent evidence presented to the board and contained in the record of its proceedings. * * * If, however, it appears that the controversy has been tried out in good faith before the board there is no reason why the time of the court should be taken up or the parties be put to additional expense in duplicating the record before the board."

In an actual certiorari proceeding, the court would be confined to the record of the proceedings before the administrative board, and the board's determination would be quashed if the record disclosed that the board had acted outside its jurisdiction, or had made serious errors of law in the exercise thereof, or that its decision was not supported by substantial evidence. Under the system devised by the majority, however, the record is considered and weighed along with other evidence, a procedure unknown to the common law. The rule embodied in section 1870(8) of the Code of Civil Procedure is that if a witness is deceased, or out of the jurisdiction, or unable to testify, his testimony given in a former action between the parties, relating to the same matter may be admitted upon another trial. "The report of the official reporter, or official reporter pro tempore, of any court, duly appointed and sworn, when transcribed and certified as being a correct transcript of testimony and proceedings in the case, is prima facie evidence of such testimony and proceedings." Code Civ.Proc. § 273. There is no comparable provision with respect to administrative determinations.

The majority opinion makes new evidence admissible in the following circumstances.

(1) "If it should appear from that record that incompetent evidence had been received by the board, the complaining party should not be foreclosed from objecting on the trial to its admissibility." The majority opinion does not make clear by what rules the competency of the evidence is to be determined, or whether objection to its admission must be made at the board hearing. Under established precedents administrative boards are not required to follow the common law rules of evidence, even when the statutes governing their procedure are silent in this regard. Wigmore, Evidence, (3rd Ed.) vol. 1, §§ 4b-4c, pp. 27–95; Stephens, Administrative Tribunals and The Rules of Evidence. Likewise objections to the admission of evidence must be made to the administrative board and cannot be raised for the first time in a court review. State Compensation Insurance Fund v. Industrial Acc. Comm., 195 Cal. 174, 184, 231 P. 996.

(2) "If the board had improperly refused to entertain admissible evidence the litigant should not be foreclosed from offering it at the trial." The liberal rules governing the admission of evidence before administrative boards make it unlikely that many errors of this sort will occur. In any event an administrative board should have the opportunity of correcting its own errors by a new hearing in which it can pass upon the new evidence. If instead,

the superior court receives the evidence it may rest its decision upon it, even though the Legislature has delegated this responsibility to the administrative board. The superior court acts in its proper capacity only insofar as it reviews the record of the board proceeding, but steps out of character to take the place of the board by examining evidence that has not been presented thereto and arriving in effect at an administrative determination. Cf. Mojave River Irr. District v. Superior Court, 202 Cal. 717, 725–730, 262 P.2d 724. With respect to many issues it does not have the specialized background characteristic of administrative officers. "Thus the Commissioner of Corporations (with, of course, the assistance of his staff) determines whether a licensed securities broker has sufficient financial responsibility to carry out the obligations incident to operations as broker, the Insurance Commissioner, whether the investments of a licensed company have become insufficiently liquid to satisfy the demands which in the ordinary course of events may be made against it; a district board of oil and gas commissioners, whether there has been an unreasonable waste of natural gas from producing wells, and if so, to what extent gas production should be cut down; the Board of Medical Examiners, whether an abortion was medically necessary. If the Legislature had believed that such matters in connection with license revocation or other regulation would have been handled better by our Superior Courts, the latter would presumably have been entrusted with them." Turrentine, The Laisne Case—A Strange Chapter in Our Jurisprudence, 17 State Bar Journal 165, 168. In any event the courts are already so overburdened with their own work that they may well be driven to avoid undertaking administrative investigations either by denying the alternative or peremptory writ of mandamus or remanding the cases to the administrative boards.

(3) "If additional evidence not included in either category [(1) or (2) above] be sought to be introduced by a party, the court has the right to receive it upon a showing that, in the exercise of reasonable diligence, it could not have been introduced before the board." The majority opinion here borrows from the procedure governing a ruling on a motion for new trial. Section 657 of the Code of Civil Procedure provides that a new trial may be granted because of "Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial." Presumably superior courts will supplement the new system by following other traditional rules with respect to motions for new trial, namely, that motions for new trial on the ground of newly discovered evidence are looked upon with distrust (Smith v. Schwartz, 14 Cal.App.2d 160, 57 P.2d 1386, and cases there cited), and that such evidence must not be merely cumulative, but must satisfy the court that had it been introduced at the previous trial the verdict might have been different. Brannock v. Bromley, 30 Cal.App.2d 516, 86 P.2d 1062; see 20 Cal. Jur. 90–99; McBaine, Cases on Trial Practice, 639–647; Hayne on New Trial and Appeal, Rev.Ed., p. 408. Presumably also the appellate courts will follow established precedents in this field allowing the superior court judge a wide discretionary power in granting or denying a new trial on the ground of newly discovered evidence. See Cooper v. Kellogg, 2 Cal.2d 504, 42 P.2d 59, and cases there cited. While the majority opinion speaks of the court's right to receive the evidence, it makes no reference to any correlative right of the parties to introduce it, and this silence is consistent with its emphasis elsewhere on the power of the trial court to grant or deny the writ in its discretion.

It is clear that evidence at least cannot be deliberately withheld. "If the record before the board should disclose that the petitioner had intentionally presented a 'skeleton' defense in the hearing before the board for the obvious purpose of transferring the controversy from the board to the court, that fact should weigh heavily against him in his endeavor to invoke the equity powers of the court in his behalf in the mandamus proceeding." The very effort to circumvent a bona fide administrative hearing would militate against the possibility of favorable judicial action. The majority opinion thus goes far to allay the fears engendered by the Laisne case that an administrative hearing would be reduced to "something in the nature of an inquest, or at most, to something like a preliminary hearing in a criminal proceeding where the administrative agency will expose its entire case and the licensee will save his evidence for the Court." Attorney General's Petition for Rehearing in Laisne Case, p. 53. With so much ground regained it is difficult to understand why

the administrative board should still not be the first to weigh the new evidence. In motions for new trial not only does the trial judge who hears the evidence have wide discretion in passing upon the motion, but his ruling is rarely disturbed, since he is the one best qualified to determine whether there might have been a different result had the newly discovered evidence been disclosed. Similarly, the administrative board, conversant with the evidence it has already received on a matter within its special province, is uniquely qualified to receive the new evidence and integrate it with the old. There is wisdom in the rule that administrative remedies be exhausted before resort to the courts, and it is not consonant with such a rule to allow evidence to be presented to the superior court that has not been presented to the administrative board. The specialized knowledge and experience of the board enables it to make an effective preliminary inquiry into technical problems outside the ken of most judges. Without this canalization of technical problems they would soon flood the courts, diverting them from other pressing tasks. As it is, many of these problems are resolved expeditiously by administrative determinations so that judicial review never becomes necessary. When new evidence emerges, it is as a new piece of a pattern familiar to the board whose consideration thereof may make resort to the courts unnecessary. Abelleira v. District Court of Appeal, 17 Cal.2d 280, 109 P.2d 942, 132 A.L.R. 715.

(4) "If the credibility of witnesses before the board be brought in question in the mandamus proceeding the opportunity should be afforded for further examination or to contradict or impeach their testimony under well recognized rules of evidence and procedure." If the new system here followed the procedure on motion for new trial, newly discovered evidence designed merely to impeach or contradict a witness would not be admitted. (See cases cited in 20 Cal. Jur. 98.) Even if it departs from the procedure for motion for new trial superior court judges in all likelihood will not go far afield from familiar landmarks, given their discretionary power, which the majority opinion emphasizes. It would in any event often be difficult to locate witnesses who testified at a board meeting. If a witness is not available for the court proceeding he cannot be impeached by previous inconsistent statements, for under section 2052 of the Code of Civil Procedure "the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them." People v. Compton, 132 Cal. 484, 64 P. 849; see Hale, Impeachment of Witness by Prior Inconsistent Statements, 10 So.Cal.L.Rev. 135. His testimony therefore apparently remains in the record. Once again, if an error has arisen in an administrative hearing, the administrative board should be given an opportunity to correct that error.

The majority opinion is for the most part a retracing of the way back from the concept of a trial de novo that never materialized. It stops short of a complete retreat to review by certiorari of administrative decisions, by a guarded permission of new evidence in the court proceeding in rare circumstances, together with a provision that the superior court form an independent judgment on all the evidence. The attendant qualification that "the findings of the board come before the court with a strong presumption of their correctness" [13 Cal. 2d 75, 87 P.2d 854] suggests that the distinction between the new system and old may be more artificial than real.

The majority opinion cites two Texas cases in support of its statement that trial de novo is not always to be taken literally. The Texas courts, however, were not engaged in redefining a requirement of trial de novo made by themselves, nor were they inquiring into the scope of review under mandamus or any other common-law writ. They were interpreting statutes that prescribed statutory modes of review, conceding that the Texas Legislature has power to prescribe the mode and extent of court review of the decisions of Texas administrative agencies. In Shupee v. Railroad Commission of Texas, 123 Tex. 521, 73 S.W.2d 505, the statute provided for review of any decision of the Railroad Commission refusing to grant a certificate of convenience and necessity, by "petition" in a district court comparable to the superior court in California. The statute, Vernon's Ann.Civ.St.Tex. art. 911a, § 17, provided, "Said action * * * shall be tried and determined as other civil causes in a said court." The Supreme Court of Texas thought that the Legislature in granting powers to the commission did not intend

that the court should substitute its judgment for that of the commission, and adopted by quotation from Corpus Juris the rule that the court should not disturb the findings of the commission if they are supported by substantial evidence. Under its holding that the court could not reweigh the evidence the review had the same scope as certiorari review in this state.

In Texas Liquor Control Board v. Floyd, Tex.Civ.App., 117 S.W.2d 530, review of the Board's determinations was by statutory "appeal" to a district court. The statute, Vernon's Ann.P.C. art. 666—14, provided that in the proceeding on this appeal, "the trial shall be de novo under the same rules as ordinary civil suits." The inconsistency of the statute in characterizing the court review as both an appeal and a trial de novo has led the Texas courts to interpret this statute as not intending that the court should substitute its judgment for that of the commission. The Court of Civil Appeals, purporting to follow earlier decisions under the same statute, said, "As we view the law in such cases as this, the district court may not hear testimony which was not produced before the Board or its Administrator and determine, even from a preponderance thereof, whether or not a dealer's license shall be cancelled. The court has not the power to substitute its judgment for that of the Board, unless it appears there was no testimony of probative and substantial effect before the Board to support its judgment and decree, or that the Board acted arbitrarily or capriciously in cancelling the license." Id., 117 S.W.2d 534. Again the holding is that the review intended by the Legislature has the scope of certiorari review.

The majority of the court seek in these Texas decisions a justification for redefining the requirement of their own making that review of the decisions of state agencies in California must be by trial de novo. Confronted as they are, however, by the decision in Standard Oil Co. of California v. State Board of Equalization, 6 Cal.2d 557, 59 P.2d 119, that certiorari review cannot be accorded such agencies, they stop short of following the Texas decisions to the end. Instead they redefine their novel conception of mandamus as a substitute for certiorari. They also redefine the trial de novo as something so close to certiorari review that it is difficult to distinguish one from the other. The present confusion can be ended only by an outright abandonment of the decision in the Standard Oil Company case, and a return to the earlier decisions which that case over-ruled. Stare decisis is weak support for a decision that disregarded it.

The difficulties the court has experienced since the Standard Oil Company case arise from the abstraction that "judicial functions" cannot constitutionally be vested in administrative officers and boards exercising state-wide authority. In the early days of the state, the Practice Act of 1851, section 456, defined certiorari as including review of the decisions of a "board, or officer, exercising judicial functions." It obviously recognized that some boards and officers exercise "judicial functions." Section 456, St.1851, p. 123, was merely a restatement of the common-law scope of certiorari (see Goodnow, The Writ of Certiorari, 6 Pol. Sci. Quart. 493), and was reproduced in section 1068 of the Code of Civil Procedure of 1872. Undoubtedly the provisions of the Constitution of 1879, art. 6, § 5 authorizing the superior and appellate courts to issue writs of certiorari meant certiorari as then defined.

Disregarding the historical uses of the writ and the implications of section 456 of the Practice Act, this court in 1856 in People v. Hester, 6 Cal. 679, held that a decision of a board of county supervisors was not reviewable by certiorari, on the ground that the separation of powers principle of article III of the Constitution of 1849 forbade vesting "judicial functions" in a board that also possessed legislative and executive functions, and that none of the functions of the board could therefore be regarded as judicial. Chief Justice Murray said, "Now the supervisors, not being judicial officers, or charged with the exercise of judicial duties, it results that the writ cannot be directed properly to them."

The opinion in the Standard Oil Company case, eighty years later, employs the same reasoning with respect to boards exercising state-wide powers, although People v. Hester was overruled the year after it was decided, in People v. Supervisors of El Dorado County, 8 Cal. 58. Chief Justice Murray, confessing error, said that the functions of boards and supervisors had always been "various and manifold; sometimes judicial," and that the principle of separation of powers was not intended to forbid the practice of vesting varied powers in such boards. Since then this court has recognized in numerous decisions

that a great variety of local officers and boards exercise "judicial functions" in the sense of certiorari review. See Elliott, Certiorari and the Local Board, 29 Cal.L. Rev. 586. The court has distinguished the "judicial functions" of administrative boards from their legislative, executive, ministerial, and purely discretionary functions. The trend of the decisions has been to regard a board as exercising "judicial functions" when discharging a duty to determine property or other legal rights in accord with law and the evidence taken at a hearing. There is no longer any doubt that local boards may constitutionally be vested with authority to make first instance decisions of questions of law and issues of fact. Laisne v. State Board of Optometry, supra, 19 Cal.2d at page 847, 123 P.2d 457; Walker v. City of San Gabriel, 20 Cal.2d 879, 129 P.2d 349, 142 A.L.R. 1383. The function of the courts has been to review their proceedings by certiorari and set aside their decisions on points of law if erroneous and on questions of fact if there was no substantial evidence to support the findings.

In recent decisions a majority of this court have said that state boards cannot constitutionally be given "judicial functions." They did not, however, carry their reasoning to the logical conclusion that all the statutes creating state boards with fact-finding powers were invalid, and that the boards themselves were illegal. They only went so far as to hold that the functions of the boards could not be regarded as judicial, within the rule that certiorari lies to review the determinations of boards and officers "exercising judicial functions." Nevertheless, the premise of this conclusion was that even power to determine in the first instance rights of property and other legal rights could not constitutionally be vested in state boards. In the Drummey case the court predicated this doctrine on the due process of law clause of the Fourteenth Amendment. This was manifest error because the Supreme Court of the United States has long held that the requirement of due process is not infringed by vesting such power in administrative boards. United States v. Ju Toy, 198 U.S. 253, 25 S.Ct. 644, 49 L.Ed. 1040; and many other decisions cited in the dissenting opinion in the Laisne case. This court seems not to have noted that if due process of law was denied when the state vested such power in state boards, it was also denied when the state vested such power in local boards.

Later a majority of this court found the source of the unconstitutionality of vesting "judicial functions" in state boards in the judiciary clause of the California Constitution. Art. VI, § 1; Laisne v. State Board of Optometry, supra. The reasoning was that this clause vests all the judicial power of the state in the courts created by the Constitution, except that which may be vested by the Legislature in local "inferior courts," which it is authorized to establish. The rationalization for vesting "judicial functions" in local boards is that they are "inferior courts" established by the Legislature under the authority given in article VI. That authority, however, is for the establishment of local "courts," not local administrative boards. If indeed they are courts it is remarkable that the Legislature may vest in them a variety of other powers not judicial. Although article III of the Constitution of the United States requires that the judicial power of the national government be vested in the courts therein named, Congress, with the approval of the Supreme Court, has vested "judicial functions" in numerous federal administrative agencies. To explain why Congress has this power, and the state Legislature does not, a majority of this court stated that all the federal agencies are "inferior courts," which Congress is authorized by article III to establish. They overlooked that the tenure of the personnel of these agencies has never been the tenure that article III requires for judges of courts authorized by it.

It is a false premise that requires such rationalization. The Supreme Court of the United States long ago recognized that some powers of courts are exclusively judicial while others are of a nature that they may be exercised either by courts or by administrative agencies, and that administrative agencies have always exercised some powers identical with the powers of the courts. As early as 1855 in Den ex dem. Murray v. Hoboken Land & Imp. Co., 18 How. 272, 280, 15 L.Ed. 372, the court held valid an act of 1820 authorizing administrative officers in the Treasury to determine the existence and amount of delinquency in the accounts of revenue collectors and to issue distress warrants on their property to enforce collection. The court held that there was no denial of due

process of law and no violation of the judiciary article of the Constitution. The court declared "That the auditing of the accounts of a receiver of public moneys may be, in an enlarged sense, a judicial act, must be admitted. So are all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law. * * * We do not doubt the power of congress to provide by law that such a question shall form the subject-matter of a suit in which the judicial power can be exerted. The act of 1820 makes such a provision for reviewing the decision of the accounting officers of the treasury. But, until reviewed, it is final and binding; and the question is, whether its subject-matter is necessarily, and without regard to the consent of congress, a judicial controversy. And we are of opinion it is not." It may be noted that this familiar decision with its interpretation of a judiciary clause of a constitution was made a quarter of a century before the adoption of the present Constitution of California.

This doctrine was clearly explained by Chief Justice Hughes in Crowell v. Benson, 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598. The question there was whether Congress could vest in an administrative officer the adjudication of claims brought by employees against employers for compensation arising under a workmen's compensation law enacted by Congress. The court held that the statute was valid, and that the decisions of the administrative officer on all ordinary issues of fact were final if supported by substantial evidence. Thus the judicial review authorized under the statute, while not expressly called certiorari review, has the scope of the review afforded by that writ. The court recognized that the statute authorized the administrative officer to determine "the liability of one individual to another" (page 51 of 285 U.S., page 292 of 52 S.Ct.), a function often given courts. It said that the statute empowered the officer to determine "questions of fact as to the circumstances, nature, extent, and consequences of the injuries sustained by the employee." Page 54 of 285 U.S., page 293 of 52 S.Ct. Yet the court found no objection to vesting these "judicial functions" in the administrative officer. It said "the reservation of full authority to the [reviewing] court to deal with matters of law provides for the appropriate exercise of the judicial function in this class of cases." Page 54 of 285 U.S., page 293 of 52 S.Ct. Concluding this phase of the case Chief Justice Hughes said: "For the purposes stated, we are unable to find any constitutional obstacle to the action of the Congress in availing itself of a method shown by experience to be essential in order to apply its standards to the thousands of cases involved, thus relieving the courts of a most serious burden while preserving their complete authority to insure the proper application of the law." On this point all the justices were in agreement.

There was a second point on which they were divided. The majority held that there were two issues of fact that might arise in an adjudication of claims under the statute, to which a different rule applied. They held that where it was contended that the place where the accident occurred was not navigable waters, or that the claimant was not an employee of the defendant when the injury was incurred, the essential powers of the courts could be preserved only if the reviewing court were to give a trial de novo on these fact issues. The reasons given for singling them out were (a) that this statute, enacted by Congress in exercise of its power to make admiralty law, could constitutionally apply only to accidents occurring on navigable waters, and (b) that Congress could not apply the principle of compensation for injuries where they occurred without fault of the defendant, unless an employment relation or comparable relation existed between the claimant and the defendant. On this requirement of trial de novo of the two excepted issues, Justices Brandeis, Stone, and Roberts dissented. In the course of his opinion on the second point, Chief Justice Hughes phrased the now doctrine as if it were a general rule that in all cases where a constitutional right depends upon the decision of an issue of fact there must be a trial de novo in a court on that issue. See pages 56, 60 of 285 U.S., 52 S.Ct. 285, 76 L.Ed. 598. This novel doctrine was not expanded by the Supreme Court into a general rule (see McGovney, op. cit. 29 Cal.L.Rev. 110, 125—129, 138–142), but even if it had been it would have no application to a case like Drummey v. State Board of Funeral Directors, supra. Nevertheless this court cited Crowell v. Benson in support of its holding that the fact issues decided by the board must be independently redetermined by a court, even though there was no is-

sue of constitutional right in that case. Drummey did not question the constitutionality of the statute, his license was suspended by the board under a statute admittedly valid, and the only issue of fact was whether he had done any act that was a ground for suspension under the statute. Nor was any issue of constitutional right raised either in the Laisne case or in the present case. If the petitioner advertised in a manner forbidden by a valid statute he cannot claim that any constitutional right is violated by suspension of his license. A comparable problem is presented by a criminal statute that defines the act constituting a crime. If the statute is constitutional, the issue of fact whether the accused committed the prohibited act raises no constitutional issue. Yet the majority opinion in this case still clings to the statement that the new rule is founded on the protection of "a constitutional right either of liberty or property."

In the present case the question is the scope of judicial review of a decision of an administrative board authorized to adjudicate issues of fact arising in the application of a valid statute. Had Dare questioned the validity of the statute and the board had ruled against him, he could have had the decision set aside by certiorari if the reviewing court concluded that the statute was invalid. Whatever were the early limitations in England on the issues open on certiorari, the courts of this country long ago held that on certiorari the reviewing court can set aside an administrative decision based upon an error of law. A leading case to this effect is People v. Smith, 45 N.Y. 772, decided in 1871; see Goodnow, op. cit. 6 Pol.Sci.Quart., 493. That rule was embodied in section 462 of the Practice Act of 1851 and in section 1074 of the Code of Civil Procedure of 1872 by the provision that the reviewing court may "determine whether the inferior tribunal, Board, or officer has regularly pursued the authority of such tribunal, Board or officer." It should also be observed that if a board follows an unconstitutional procedure, or fails to follow a procedure prescribed by statute, its decision may be set aside on certiorari.

The recent decisions requiring trial de novo of the findings of administrative agencies exercising state-wide power have assumed that for various reasons it is unconstitutional in this state to vest "judicial functions" in such agencies, all this to a single result, the prevention of review of their decisions by writ of certiorari. Do the functions of these agencies cease to be "judicial" when their decisions are reviewable by the majority's newly qualified trial de novo? Has not the majority opinion by its very qualifications of trial de novo, described in the first part of this opinion, belied its own contention that it is unconstitutional to authorize such boards to make first instance decisions on questions of law and issues of fact?

I concur in the judgment insofar as it holds that it was proper for the trial court to deny the alternative writ of mandamus. I dissent on the ground that Standard Oil Co. v. State Board of Equalization, supra, should be overruled and that the present decision should be without prejudice to the right of the petitioner to apply for certiorari.

GIBSON, C. J., and EDMONDS, J., concurred.



21 Cal.2d 817

RUSSELL v. MILLER, Registrar of Contractors, et al.

S. F. 16829.

Supreme Court of California.

April 7, 1943.

1. Mandamus ⇐168(3)

In mandamus proceeding to review order of administrative board suspending contractor's license, ruling of trial court in striking record of oral evidence taken before the board was erroneous.

2. Mandamus ⇐173

In mandamus proceeding to review order of administrative board, the petitioner is not entitled to an unlimited "trial de novo", but a consideration of record of proceedings before the board is essential to proper determination of question of board's official duty.

See Words and Phrases, Permanent Edition, for all other definitions of "Trial De Novo".

3. Mandamus ⇐168(3)

In mandamus proceeding to review order of administrative board, record taken before the board is competent evidence of such matters as were properly admissible as evidence before the board.

4. Mandamus ⇐187(9)

In mandamus proceeding to review order of administrative board suspending contractor's license, error of trial court in striking from record transcript of oral evidence taken before the board was not prejudicial, where both petitioner and respondents introduced in evidence in trial court matters contained in the stricken record of oral evidence.

TRAYNOR, J., and GIBSON, C. J., and EDMONDS, J., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Mandamus proceeding by Norman Russell against Allen Miller, as Registrar of Contractors, etc., and others. From a judgment directing restoration of contractor's license of petitioner, the defendants appeal.

Affirmed.

For prior opinion of District Court of Appeals, see 127 P.2d 958.

Earl Warren, Atty. Gen., and Lucas E. Kilkenny and Harold W. Conklin, Deputy Attys. Gen., for appellants.

Geary & Geary and C. J. Tauzer, all of Santa Rosa, and Bradford M. Melvin and Darwin Bryan, both of San Francisco, for respondent.

SHENK, Justice.

The petitioner filed in the superior court a petition for a writ of mandate directing the respondents, Contractors' State License Board, its members and its registrar, to refrain from enforcing the revocation of the petitioner's license as an electrical contractor, and to dismiss the complaint pending before the board. The respondents have appealed from a judgment which directed them to restore the petitioner's license.

The petitioner was charged by the registrar of the board with certain violations of the terms of a contract for the reconstruction and alteration of the Napa High School Building, one of which was that the work was to be in strict compliance with the Electrical Safety Orders of the Industrial Accident Commission, the National Electrical Code, and any and all ordinances, rules and regulations of the city and county in which the work was to be performed. Eleven violations of the National Electric Code and Electrical Safety Orders and nineteen alleged material and wilful deviations from the plans and specifications were specified. The petitioner filed an answer and a hearing was had, whereupon it was found by the board that the evidence showed the violations as charged. By an administrative order dated February 19, 1940, the petitioner's license was suspended until February 19, 1941, "and until defendant makes restitution to the Board of Trustees of the Napa Union High School satisfactory to the Registrar of Contractors," with a provision expressly preserving existing contracts. A stay of execution was denied by the board because of the last mentioned provision.

The petition for the writ showing the foregoing facts was filed on March 9, 1940. The petitioner challenged the jurisdiction of the board, pleaded the statute of limitations, and the insufficiency of the evidence to sustain the administrative findings and conclusion. An alternative writ was issued and as a return thereto an answer to the petition was filed. The trial court found that there had been certain violations of the safety orders, but that with one exception they had occurred more than two years prior to the filing of the complaint before the board and were therefore barred, § 7091 Business & Profession Code, St. 1939, p. 389; that in the excepted instance and in the cases of other expressly found departures from the plans and specifications, the violations constituted neither wilful departures from nor disregard of the plans or specifications in any material respect; that they were not prejudicial and were not without the appropriate consent of authorized persons.

The trial court concluded that the petitioner was entitled to the restoration of his license and rendered judgment directing the issuance of the peremptory writ.

On the appeal the respondents contend that the trial court committed prejudicial error in ruling that a portion of the record of the evidence before the board was not a proper matter for consideration of the court in the mandamus proceeding, and in striking that portion of the record from the evidence before it.

At the commencement of the trial the petitioner stated that he desired to offer the record of the proceedings, including the oral and documentary evidence, taken before the board. The respondents made available a certified copy of the record for that purpose. It was introduced in evidence by the attorney for the respondents at the opening of the second trial day without any objection on the part of the petitioner. The trial court adopted that procedure as being in conformity with the decision of this court in Drummey v. State Board of Funeral Directors, 13 Cal.2d 75, 87 P.2d 848. On the third and last day of the trial, the petitioner attempted to withdraw the record taken before the board from the consideration of the court and moved to strike it from the evidence on the ground that under the decision of the District Court of Appeal shortly theretofore rendered in the case of Laisne v. State Board of Optometry, Cal.App., 101 P.2d 787, he was entitled to a complete and unlimited trial de novo. Over the respondents' objection the trial court granted the motion as to the transcript of oral evidence, but denied it as to the record of the contracts, exhibits, pleadings and the board's findings and decision. The findings and conclusion of the trial court were therefore based on the evidence introduced on the mandamus hearing but independently of the record of the oral evidence before the board.

[1-3] The ruling of the trial court in so striking the record of the oral evidence was erroneous under the decision of this court in the case of Dare v. Board of Medical Examiners, 136 P.2d 304, this day filed. In that case it was decided that the petitioner in the mandamus proceeding was not entitled to an unlimited trial de novo; that a consideration of the record of the proceedings before the board was essential to a proper determination of the question of the board's official duty in the premises, and that said record was competent evidence in the mandamus proceeding of such matters as were properly admissible as evidence before the board.

[4] Notwithstanding the error of the trial court in the present case in granting the motion to strike from the record the transcript of the oral evidence taken before the board, it is clear that the ruling did not result in prejudice to the rights of the appellants. Both the petitioner and the appellants introduced evidence in the trial court independently of the administrative record, but concerning matters contained in the stricken record of oral evidence, and each side rested its case on such evidence. The trial court expressly announced that its conduct of the hearing was a "trial de novo," and that its decision would be rendered on the evidence then before it exclusive of the record of oral evidence before the board, unless there was further evidence to be presented. No further evidence was presented. The appellants base their claim of prejudice on the assertion that the petitioner's testimony before the board was material to the issues and was there given in more detail than in the trial court, and that they were deprived of the opportunity to produce witnesses to testify to the facts contained in the transcript of the oral evidence. Examination of the record discloses that the trial court invited the introduction of any evidence as in an unlimited trial de novo. That evidence was presented and as so received supports the findings and judgment. The fact that the testimony on behalf of the petitioner may have been more in detail on the administrative hearing would not compel or justify the conclusion that the evidence actually received in court was insufficient as such support.

The judgment is affirmed.

CURTIS and CARTER JJ., and GRIFFIN, J. pro tem., concurred.

TRAYNOR, Justice (dissenting).

I dissent.

In this case the majority opinion gives no heed to the statutory provisions for judicial review. Sections 7090–7098 of the Business and Professions Code authorize the Registrar of Contractors to suspend the license of a contractor for specified misconduct, after notice and a hearing of "all relevant and competent evidence material to the issues." Section 7099 provides that any decision of the Registrar "shall be subject to review by the superior court" for which the party may "file his petition," but is silent as to the scope of such review. It is not identified as certiorari, mandamus, or any other standard procedure set forth in the Code of Civil Procedure. Had the petitioner followed the statutory language he would have filed a petition for review in the superior court. It would not be unreasonable to infer that the Legislature intended a complete retrial in the superior court; the reference in section 7101 to "a judgment of suspension or cancellation of

license by the superior court" seems to imply an independent judgment. Had certiorari review been intended one would look for a different terminology, such as "setting aside or affirming" the decision of the Registrar. This court, however, might have followed the Texas cases relied upon in the majority opinion in Dare v. Board of Medical Examiners, Cal.Sup., 136 P.2d 304, and arrived at the conclusion that the Legislature did not mean trial de novo. There should at least have been an inquiry into the scope of the review intended by the Legislature.

If the majority opinion exemplifies the new system of trial de novo in mandamus proceedings it is at the opposite pole from Dare v. Board of Medical Examiners. Not only was the transcript of oral evidence before the board struck from the record, but the evidence before the board was reiterated in the trial court, contrary to the principles in the majority opinion in the Dare case and without regard for the rules set forth in that opinion regarding the admission of new evidence. There is no clue as to what would constitute an abuse of discretion. So much latitude has been given the trial court as to suggest that the problem whether a petitioner should be accorded a trial de novo or a review with the scope of a certiorari review is in effect shifted to the superior courts.

GIBSON, C. J., and EDMONDS, J., concurred.



21 Cal.2d 862

LIBARIAN v. STATE BAR OF CALIFORNIA.

L. A. 18544.

Supreme Court of California.

April 19, 1943.

1. Attorney and client ⇐60

Though an attorney may not be disciplined twice for same acts of misconduct, fact that attorney did not upon a former proceeding disclose all acts for which he might have been disciplined did not preclude subsequent hearing and imposition of disciplinary measures in respect to the undisclosed acts. Rules of Procedure of the State Bar, rule 36.

2. Attorney and client ⇐45

Professional services performed by one who is licensed to practice law are performed by him as an attorney, regardless of whether such services could also be rendered by one licensed in a different profession, and licensed attorney must conform to standards of legal profession in whatever capacity he may be acting in a particular matter.

3. Attorney and client ⇐38

A licensed attorney who advertised his services as a notary public and in preparing tax returns at reduced rates by means of signs that also disclosed his legal profession violated rule of conduct prohibiting solicitation of professional business so as to warrant his suspension for three months.

In Bank.

Proceeding by M. (Manasse) Stephen Libarian against the State Bar of California to review findings and recommendation of the Board of Governors that petitioner be suspended from the practice of law for a period of three months.

Petitioner ordered suspended from the practice of law for three months.

M. Stephen Libarian, of Los Angeles, in pro per., for petitioner.

Josephine M. Elmore and Jerold E. Weil, both of Los Angeles, for respondent.

PER CURIAM.

In May, 1942, the petitioner, admitted to practice law in this state in 1932, was charged with violations of his oath and duties as an attorney within the meaning of rule 2 of the Rules of Professional Conduct. After hearings before the local administrative committee and the Board of Governors it was found that he had intentionally solicited professional business by advertising in violation of the rule. It was recommended that he be suspended from the practice of the law for a period of three months. The petitioner filed the present proceeding for a review of the findings and recommendation.

The petitioner was born in Turkey in 1892 of Armenian parents. He is a graduate of the law schools of the University of Istamboul, Turkey, of the University

of Paris, and of the Detroit College of Law. He practiced law in Constantinople, Turkey, and in Detroit, Michigan, before his admission to the California Bar. He was naturalized in Michigan in 1928.

In addition to the facts charged which form the basis of the findings in the present proceeding, it was also considered by the committee and the board that the petitioner had received a public reprimand in a prior proceeding involving somewhat similar facts. In July, 1941, he had been charged with the violation of rule 2 in having circulated by door to door distribution several thousands of cards designating himself as attorney and notary, announcing the removal of his law office, and listing fees charged for five items of notarial and legal work. He admitted the charge, but urged as excuse or in mitigation the difficulty that he was then experiencing in earning sufficient to pay rent and to support his wife and two year old child, the probability that his wife, who was then in the East, would not return to him if he was suspended, the showing that he had not committed any act of dishonesty, the "solemn promise" made in his answer and to the committee. A public reprimand only was then administered.

Additional facts which were not disclosed at the time of that hearing are the following: In 1941, from January to April both inclusive, the petitioner mailed several hundred letters announcing the removal of his office and listing sixteen items of legal services, the reduced fees charged therefor, and the fact that 25 cents was the charge for affixing his seal as a notary. The petitioner maintained his law office at his residence. On June 30, 1941, because of inability to pay rent, he again removed his office and home to a number on the same street about ten doors from his former residence. A large sign reading on each side "Income Tax Returns $1.00 and Up," which had been maintained on the roof of his former residence was placed on this new home, and in January, 1942, was replaced by a still larger sign measuring four by eight feet, reading "Income Tax Returns 50¢ and up," installed on the top of the building. Another similar sign was maintained on the office, but upon removal to the new address was changed to read "Income Tax Returns 50¢ Birth Certificates." It was removed on April 15, 1942. The petitioner also maintained a large sign "Law Office Notary fee 25¢," which was also removed on April 15, 1942. Across the face of the building a large sign gave the information during the income tax preparation period that the office was open 24 hours a day, 7 days a week, notary fees 25¢, and the telephone number. That sign was replaced on April 15, 1942, with as large or a larger sign advertising "Birth Certificate Service Office Hours 8:00 a.m. to 10:00 p.m. 7 days a week Notary fee 25¢" and the telephone number. On August 16, 1942, it was removed and replaced by another similar sign including petitioner's name as notary. He also maintained a 3 by 5 foot sign on the ground to the left of the largest sign, bearing the legend, "M. Stephen Libarian, Lawyer, Notary fee 25¢." That sign was removed on April 15, 1942. The photographic evidence shows that the front of the petitioner's residence was almost entirely covered by these signs. The petitioner endeavored to excuse their size by the fact that the thoroughfare on which he lived was one of heavy traffic and large lettering was essential to catch the eye of the passing motorist. The petitioner still maintains the large sign across the front of his residence, but with his wife's name substituted in the place of his own as notary, and the sign on the top of the building advertising "Income Tax Returns 50¢ and up." All other signs have been removed. In the petitioner's office various certificates are displayed showing his profession as attorney at law. He invokes rule 36 of the Rules of Procedure of the State Bar which he contends is a bar to the imposition of discipline for acts which were committed at or before the time of the prior disciplinary proceeding. He also contends that he should be permitted to advertise any services which may be said to be distinct from legal services in any way deemed by him to be expedient.

[1] Neither contention is meritorious. Under the rule invoked an attorney may not be disciplined twice for the same acts of misconduct. But the fact that the attorney did not, upon a former proceeding, disclose all of the acts for which he might be disciplined, will not preclude a subsequent hearing and imposition of disciplinary measures in respect to the undisclosed acts. Prime v. State Bar, 18 Cal.2d 56, 112 P.2d 881.

The petitioner repeatedly urges upon this court that he has never told an untruth nor broken a promise. We have no reason to doubt the petitioner's effort to comply with the letter of the promise he made to the committee. We are unable to find in

the record that on the prior proceeding the petitioner made any promise other than "never to distribute such cards for the remainder of his life as an attorney at law." The petitioner states that had he been asked on the former hearing the question whether he had indulged in other forms or methods of advertising than the distribution of the cards, he would have answered the question truthfully and all of the subsequent proceedings would have become unnecessary. It is quite possible also, that had the petitioner at that time disclosed to the committee the other forms of advertising he might have received the same lenient recommendation of the committee, and the subsequent hearing and disciplinary action might have been obviated.

The petitioner contends that his income from legal services is but a fourth of his entire income; that until he advertised the reduced notarial fees he was unable to make sufficient money for subsistence, but that by employing the methods of advertising noted, he had succeeded in making a good living.

[2, 3] If the petitioner should choose to continue as a practitioner at the bar of this state, he must comply with the standards of the legal profession. He should appreciate that when he is licensed to practice as an attorney at law, the professional services that he thus performs are performed by him as an attorney, whether or not some of the services could also be rendered by one licensed in a different profession. One who is licensed to practice as an attorney in this state must conform to the professional standards in whatever capacity he may be acting in a particular matter. Jacobs v. State Bar, 219 Cal. 59, 25 P.2d 401. As a practicing attorney, he may not solicit employment nor may he advertise contrary to the rules. The restrictions, limitations, and permissible conduct in those respects are familiar both to the lawyer and to the layman. They are published in the Code of Ethics and Rules promulgated by The State Bar, and they do not require reiteration here. It is quite apparent, without extended discussion, that the petitioner has not complied with the applicable code provisions and rule. See Barton v. State Bar, 209 Cal. 677, 683, 289 P. 818; Mayer v. State Bar, 2 Cal.2d 71, 74, 39 P.2d 206. In making these observations we are not to be understood as intimating that the methods employed by the petitioner would be acceptable in any other profession which may permit performance of any of the services offered. In any event, during the period of suspension from the practice of the law, the petitioner may not perform any legal services whatsoever, nor may he hold himself out as an attorney either orally or in writing, nor may he maintain or display, at or in his home, his office, or elsewhere, any sign, certificate, or other insignia indicating a connection with the profession of law. The foregoing sufficiently answers all of the petitioner's contentions.

Considering all of the circumstances, we are of the opinion that the recommendation of the committee and the Board of Governors should be sustained.

It is ordered that the petitioner be suspended from the practice of law in this state for a period of three months commencing from and after the filing of this order.



58 Cal.App.2d 307

McDEVITT v. ROGERS et al.

Civ. 13979.

District Court of Appeal, Second District, Division 2, California.

April 21, 1943.

1. Automobiles ⇐245(14)

Evidence that when defendant motorist was about 150 feet from intersection and proceeding about 20 miles an hour, defendant observed automobile in which plaintiff was riding about 400 feet from intersection and approaching about 45 miles an hour, and that defendant gave proper signal for left turn and proceeded to turn at intersection and collided with automobile in which plaintiff was riding did not establish that defendant was negligent as a matter of law on ground that she violated statute providing that no person shall turn a vehicle unless turn can be made with reasonable safety and statute dealing with left turn at intersection. Vehicle Code, §§ 544(a), 551, St.1935, pp. 185, 186.

2. Appeal and error ⇐1010(1)

Negligence on part of defendant motorist is a question of fact for determination of trier of fact, whose findings will not be disturbed by District Court of Appeal if supported by substantial evidence.

3. Appeal and error ⇐1008(1)

District Court of Appeal was bound not only by trial jury's finding that defendant motorist was not negligent, but also by jury's implied finding that defendant motorist did not violate any provisions of statute providing that no person shall turn a vehicle unless turn can be made with reasonable safety, and statute dealing with left turn at intersection. Vehicle Code, §§ 544(a), 551, St.1935, pp. 185, 186.

4. Automobiles ⇐244(11)

Evidence was sufficient to sustain jury's implied finding in action for injuries sustained by plaintiff in collision at intersection, that defendant motorist in making left turn at intersection did not drive to left of traffic button located in middle of street near cross-walk. Vehicle Code, §§ 544(a), 551, St.1935, pp. 185, 186.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by T. W. McDevitt against W. M. Rogers and Julia R. Rogers to recover for injuries received by the plaintiff in an automobile accident. A nonsuit in favor of W. M. Rogers was granted. From a judgment in favor of Julia R. Rogers, the plaintiff appeals.

Judgment affirmed.

Thomas P. Walker, C. H. Hartke, and Freeman R. Brant, all of Los Angeles, for appellant.

Nourse & Jones and Pat A. McCormick, all of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of defendant Julia R. Rogers, after trial before a jury, in an action to recover damages which resulted from injuries received in an automobile accident, plaintiff appeals.

A motion for a nonsuit in favor of defendant William M. Rogers was granted and no appeal has been taken therefrom.

The evidence being viewed in the light most favorable to defendant Julia R. Rogers (respondent), hereinafter referred to as defendant, the essential facts are:

On December 31, 1940, at about 4 P. M. defendant was driving an automobile in an easterly direction on Garvey Road just west of where the highway intersects with Azusa Avenue, a street which runs in a northerly and southerly direction. At this point Garvey Road, which is a state highway, runs in an easterly and westerly direction. While approximately 150 feet west of the intersection, and while proceeding at a speed of about twenty miles per hour, defendant observed an automobile, owned and operated by Mr. Bloeser, in which plaintiff was riding as a guest, being driven in a westerly direction on the highway at about forty-five miles per hour. At this time the car in which plaintiff was riding was approximately 400 feet east of the intersection. Defendant gave the proper signal for a left turn and proceeded to turn north on Azusa Avenue. While defendant's automobile was in the northerly lane of Garvey Road at the intersection, the car in which plaintiff was riding collided with defendant's automobile, as a result of the accident plaintiff suffered serious personal injuries.

Plaintiff relies for reversal of the judgment on two propositions which will be stated and answered hereunder seriatim.

First: Defendant was negligent as a matter of law because she violated sections 544(a) and 551 of the Vehicle Code, St. 1935, pp. 185, 186.

[1] This proposition is untenable. An examination of the record discloses that there was presented to the trial jury direct evidence of eye witnesses in support of each and every fact set forth above. From these facts the trial jury may have believed that defendant acted as a reasonably prudent person under similar circumstances would have acted in giving a signal for a left turn and then proceeding to turn north at the intersection on to Azusa Avenue, even though when 100 feet east of the intersection she observed the car in which plaintiff was riding approaching on the highway, approximately 400 feet west of the intersection. Therefore defendant was not negligent as a matter of law.

[2, 3] An unbroken line of decisions in this state hold that negligence upon the part of a defendant is a question of fact for determination by the trier of fact, whose finding will not be disturbed by this court if,

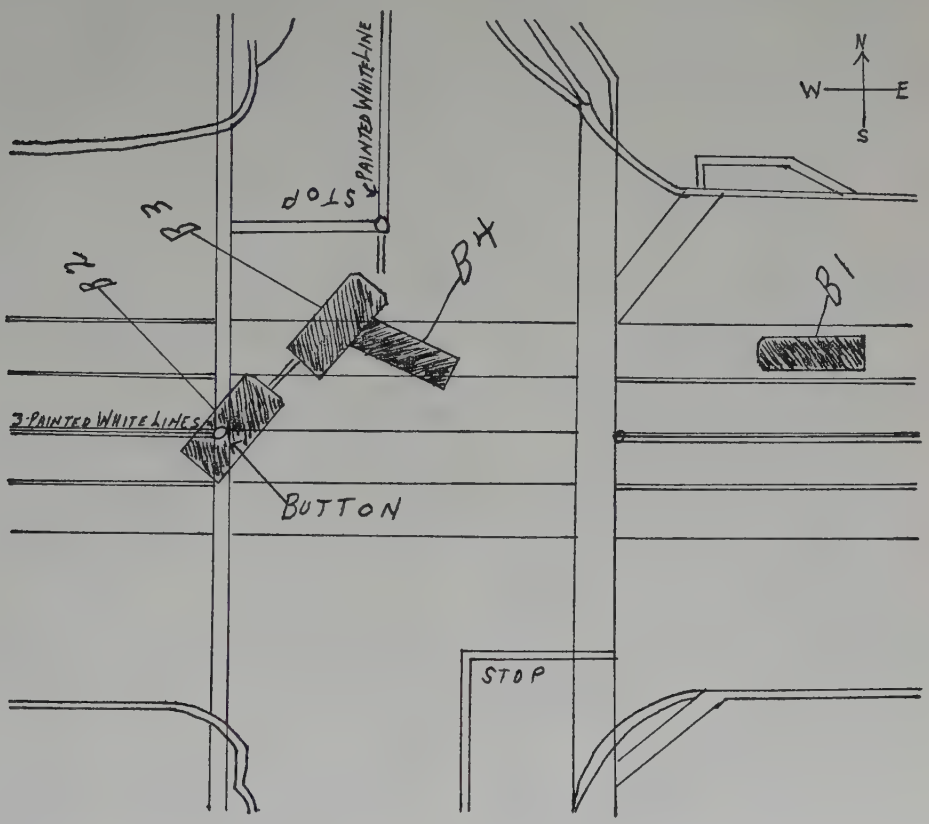
as in the instant case, there is substantial evidence to support it. In view of this rule we are bound not only by the trial jury's finding that defendant was not negligent, but also by the trial jury's implied finding that defendant did not violate any provision of sections 544(a) or 551 of the Vehicle Code. McWane v. Hetherton, 51 Cal.App.2d 508, 511, 125 P.2d 85. See, also, Washam v. Peerless Automatic Staple Machine Co., 45 Cal.App.2d 174, 177, 113 P.2d 724, which is similar in its facts to those in this case, and the principles of law applied in such case are identical with those applicable in the instant case.

The case of Donat v. Dillon, 192 Cal. 426, 221 P. 103, is not here in point for the reason that such case merely held that the general rule is that negligence is a question of fact for the determination of the trial court, whose determination supported by substantial evidence is binding upon an appellate court. In the Donat case the supreme court applied this rule and held that the trial court's finding that the defendant had been negligent was supported by substantial evidence, and affirmed the judgment.

Second: Defendant was negligent as a matter of law when she made the turn on to Azusa Avenue, because she "cut the button" which was located in the center of the state highway.

This proposition is likewise untenable.

This is a diagram of the intersection where the accident occurred:



It is true that one of plaintiff's witnesses, Mr. Bloeser, testified that defendant's car, when making the turn into the intersection, was at one time in the position indicated by "B–2" on the above diagram. However, defendant, when being examined as a witness, was asked if Mr. Bloeser's testimony was correct in placing her car at the locations indicated on the diagram by the figures "B-2" and "B-3". In reply to this question she said:

"I was a little farther east, I was on the right side of the painted white line when I completed that turn."

[4] This testimony was substantial evidence to sustain the jury's implied finding that in making the turn at the intersection defendant was east of the traffic button, and, therefore, did not "cut the button". This view is likewise substantiated by defendant's testimony that when she completed the turn she was on the right side of the painted white line. It is a fair inference from such testimony that she did not "cut the button".

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.



58 Cal.App.2d 318

FERRARI v. MAMBRETTI.

Civ. 12274.

District Court of Appeal, First District, Division 2, California.

April 22, 1943.

Rehearing Denied May 22, 1943.

Hearing Denied June 17, 1943.

1. Appeal and error ⇐995

Where a miscarriage of justice is apparent, the evidence may be scrutinized more carefully by an appellate court, and when the evidence relates to declarations or oral admissions of a party it will be received with caution as required by statute. Code Civ.Proc. § 2061, subd. 4.

2. Appeal and error ⇐994(2, 3), 1003, 1012(1)

The weight of evidence and credibility of witnesses are for the trial court or jury.

3. Executors and administrators ⇐221(2)

In action for the reasonable value of services performed for decedent under an alleged oral contract to leave plaintiff one-half of his estate, where the oral contract was unenforceable under the statute of frauds, it was necessary for plaintiff to show that there was no agreement to pay compensation until completion of the term of employment by decease of the employer to avoid the plea of limitations and presumption that wages became due as the services were rendered. Civ.Code, § 1624, subd. 6.

4. Limitation of actions ⇐195(1)

Where plaintiff, who sought the reasonable value of services allegedly performed for decedent over a 19-year period under an alleged oral contract to leave plaintiff one-half of the estate, did not show that there was no agreement to pay compensation until completion of the term of employment by decease of the employer, presumption that the wages became due as the services were rendered applied and the administratrix' plea of the limitation statute was good. Civ.Code, § 1624, subd. 6.

5. Executors and administrators ⇐221(7)

In action for the reasonable value of services performed for decedent under an alleged oral contract to leave plaintiff one-half of the estate where plaintiff alleged that he agreed to work in decedent's grocery store in the evenings and on Sundays and to contribute his 16 years' business experience to decedent, evidence disclosing that plaintiff agreed to live with decedent and to work in the store on Saturday afternoons and holidays did not establish the alleged contract so as to authorize recovery.

6. Evidence ⇐571(7)

In matters of continuous domestic service, opinion evidence, if given, need not be followed if the trier of the facts is convinced that the opinion expressed is not sound.

7. Evidence ⇐601(4)

If the trier of the facts possesses the common knowledge of the value of domestic services, their reasonable value may be determined without the aid of opinion testimony.

8. Executors and administrators ⇐205(2)

Where plaintiff sought the reasonable value of services consisting of some 10 separate and unrelated activities alleged to have been performed for decedent for a 19-year period beginning in 1921 under an alleged oral contract to leave plaintiff one-half the estate and there was no evidence of the time occupied or the perquisites or the accommodations received by plaintiff in the nature of living expenses from decedent, $12,500 recovery was not authorized on ground that trial court or jury had the common knowledge requisite to determine the value of plaintiff's services.

9. Executors and administrators ⇐221(7)

In action for the reasonable value of services alleged to have been performed

for decedent under an alleged oral contract to leave plaintiff one-half the estate, where contract obligated plaintiff to live with decedent and plaintiff, after he had done so for some six years, married and raised his own family, and contract called for services which were not rendered and did not call for services which were rendered, the contract could not supply the absence of proof of value of plaintiff's services.

10. Appeal and error ⇐1050(1)

In action for the reasonable value of services allegedly performed for decedent under an alleged oral contract to leave plaintiff one-half of the estate, admission of testimony of plaintiff's mother that for 16 years she had cooked and washed decedent's clothes for the sake of plaintiff and had not been paid was prejudicial.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Louis Ferrari against Palmira Mambretti, as administratrix of the estate of David Ferrari, deceased, for the reasonable value of services allegedly performed by plaintiff for decedent. Judgment for plaintiff for $20,000 was reduced to $12,500 on motion for new trial, and defendant appeals.

Reversed.

Norman A. Eisner, G. H. Winter, and Anthony Devoto, all of San Francisco (Sylvester Andriano, of San Francisco, of counsel), for appellant.

Frank J. Perry and George Olshausen, both of San Francisco, for respondent.

NOURSE, Presiding Justice.

The plaintiff sued upon an implied contract to pay for the reasonable value of services alleged to have been performed for the decedent David Ferrari under an alleged oral contract to leave the plaintiff one-half of the estate. The cause was tried with a jury upon an amended and supplemental complaint based upon an amended claim filed and rejected; plaintiff had a verdict for $20,000, which was approximately one-half of the appraised value of the estate; on motion for a new trial the trial court reduced the judgment to $12,500. The jury returned its verdict "in favor of Plaintiff Louis Ferrari and against Defendant Palmira Mambretti, as Administratrix of the Estate of David Ferrari, Deceased. * * *" The judgment on the verdict was in the same form. The defendant appeals from the reduced judgment upon typewritten transcripts.

The action rests upon an alleged oral contract made in 1921 when deceased was thirty-six years of age and plaintiff sixteen. Plaintiff was a second cousin of deceased. He had not attended school regularly, but had taken some work in the night schools. In 1921 he had a full time job with Levi Strauss & Company "packing and piling the goods." At that time Louis was living with his father, mother and a sister. David was living with the family. His father, mother, four brothers and two sisters were then living. David purchased the premises at 2599 San Bruno Avenue, San Francisco, in 1921 where he opened a general grocery store which was conducted by himself with the help of plaintiff's sister. He lived and ate his meals in a portion of the building set aside for that purpose. At this time he approached the parents of the plaintiff and requested that the boy be permitted to come and live with him and help in the grocery store in the evenings after his regular work and on Sundays. It appears in the testimony of plaintiff's witnesses that deceased then promised that he would compensate plaintiff by leaving him one-half of his estate.

Though this contract is unenforceable because not in writing (Section 1624, sub. 6, of the Civil Code), the terms of the original agreement of the parties are of importance in determining the rights of plaintiff to recover compensation under his plea of quantum meruit. The plaintiff endeavored to prove the contract by calling as witnesses his mother and sister who stated that they were present when the agreement was made. The testimony of these witnesses detailing the conversation is the evidence of the contract. The sister testified that David spoke of the good position Louis had with Levi Strauss and said:

"* * * he thought that Louis, with his business possibilities would be a great help to him in all business affairs. 'As you know, I have no education, I don't read or write English, and this grocery business which I am going in is entirely new to me, which Louis and I have been talking about.'

"He then said to Louis, 'Louis, if you will come in and live with me, and help

me in the store on Saturday afternoons and holidays and Sundays and nights when you are through with your work where you are now employed, and help me in my business affairs, with things that may occur from time to time, I will compensate you at the time of my death by leaving you half of my estate.'

"Louis said he wanted to go and live with David and do as David had asked him. David said to my mother and father, 'If you will consent to leave Louis come and live with us and help me in the store, I will assure you that at the time of my death I will leave him half of my estate.'

"My mother and father said they would consent and let Louis go and live with Dave as he would be nearby and could come and visit whenever he wanted, and they could also visit him."

The mother testified that she was present at the same conversation, that:

"My nephew Dave spoke to my son Louis and he said to him, 'I need you to help me in my grocery store to transact the business after your working hours and on Sundays.'

"Then he asked him if he would come and live with him. My son replied yes.

"Then my husband, he asked my husband and myself if we were satisfied or contented that he come there with him, and we told him yes. He said that upon his death that he would leave him one-half of his possessions."

Evidence was then offered in behalf of plaintiff showing that he did live with the deceased from 1921 to 1927, when he married and moved to a nearby flat. In 1924 he had quit his work with Levi Strauss and entered a partnership in a nursery business. From that time he came to decedent's store during the noon hour, relieved the one clerk employed by decedent, and had his lunch with decedent from materials taken from the store. Testimony was offered tending to show that, at some times during the nineteen years of this relation, plaintiff helped decedent in picking chickens and turkeys, opened his mail, took trips for the purchase of supplies, advised in the purchase of real property and in insurance, took some produce of the vegetable garden to the wholesale market, and arranged with decedent to make a loan to one of plaintiff's friends. The relation of the parties continued until October, 1940, when David was murdered in a robbery attack made in his store. He died intestate.

On this appeal the first point raised is that the form of the verdict and the judgment are erroneous. Respondent concedes the point, but urges a modification instead of a reversal. Section 730 of the Probate Code provides that: "* * * the judgment must be that the executor or administrator pay, in due course of administration, the amount ascertained to be due." In Moore v. Russell, 133 Cal. 297, 65 P. 624, 85 Am.St.Rep. 166, and Weygandt v. Larson, 130 Cal.App. 304, 19 P.2d 852, judgments similar to that here were modified to comply with the code section. Whether the judgment and verdict should be modified or reversed for these reasons does not require a decision, since the judgment must be reversed upon more substantial grounds.

Appellant's second point relates to the procedure. A complaint was filed based upon a claim which had been presented to the administratrix and rejected. Thereafter, and within due time, a new or amended claim was presented and rejected. Plaintiff then filed an amended, or supplemental, complaint based upon the amended claim. Appellant argues that proper procedure called for a new action upon the new or amended claim. No authorities are cited to the point, but, for the reason just stated, it would serve no purpose to decide it here.

[1, 2] Appellant next attacks the evidence as insufficient to prove the contract of employment. She points to the "fantastic and incredible" testimony of respondent's sister who gave in detail the conversation heard twenty years prior, and directs attention to the testimony of the same witness given on cross examination where the same conversation was repeated word for word, and without any variation. It is appellant's contention that the repetition of the identical words and phrases used on her direct examination discloses that this testimony was carefully prepared and rehearsed before the examination and that this court should reject it as inherently incredible. Herbert v. Lankershim, 9 Cal.2d 409, 71 P.2d 220, is cited holding that evidence of oral declarations of a deceased party should be received with caution, and that an appellate court would examine such evidence to determine whether it is sufficient to support the judgment. We do not understand that the Lankershim case made a new rule in appeals in-

volving the question of the sufficiency of the evidence. Where a miscarriage of justice is apparent the evidence may be scrutinized more carefully, and when the evidence relates to declarations or oral admissions of a party, it will be received "with caution" as required by section 2061, sub. 4, of the Code of Civil Procedure. It is true that the court quoted with approval from an early English case holding that in the proceedings of this kind the evidence of the oral admissions must be "satisfactory" and "convincing." The use of these words has been frequently criticized in our decisions, and we do not understand that, in the Lankershim case, the supreme court was departing from the rule that the weight of the evidence, and particularly the credibility of the witnesses, was each a matter for the trial court or jury.

Here the testimony of respondent's mother and sister, incredible though it may be, was sufficient when believed by the jury to prove that some kind of a contract was made in 1921. Whether it was the contract upon which the judgment is based we will discuss later.

[3, 4] It is proper here to note that, since the contract testified to was unenforcible under the code section, it was necessary for respondent to show that there was no agreement to pay wages or compensation until the completion of the term of employment by the decease of the employer. This was necessary to avoid the plea of the statute of limitations and the presumption that wages become due as the services are rendered. To meet this contingency respondent states in his brief that the parties agreed that plaintiff should not be paid any wages and that no wages were paid him for any of his services during all the time of his employment. No reference is given to the transcript where such evidence may be found, and we have searched it in vain to find any evidence supporting this statement. The importance of this factor may not be overlooked. If the decedent promised to leave respondent half of his estate in lieu of wages it is one thing. If he intended to and did pay him wages for services rendered it is another case. If for the trivial services shown to have been rendered, plaintiff received compensation in the form of board and lodging, or wages paid, he cannot recover one half of the estate, in addition to such compensation paid, because that would simply render the statute of frauds meaningless, and nullify the statute of limitations.

The facts here are very similar to those in Long v. Rumsey, 12 Cal.2d 334, 84 P.2d 146, 149. There the plaintiff, when a young girl of seventeen, was taken into her cousins' family under an agreement to work in the bakery of her cousins without wages, live in their home, and receive all their estate upon death of the survivor of them. In reversing a judgment for the plaintiff in that case the supreme court commented on the necessity of proving the feature of the contract not to pay until the death of the employer in order to avoid the statute of limitations. The court also commented upon the improbability of the arrangement which the plaintiff there sought to prove—a bond of employment of a girl of seventeen years with two able bodied persons to work for them without wages as long as they lived. As this comment is equally applicable here, where a sixteen year old boy claims to have bound himself to work for an able bodied cousin thirty-six years of age every "Saturday afternoons and holidays and Sundays and nights" as long as the cousin lived, we quote: "One circumstance which naturally tends to indicate such a situation [a bond to work for the life of the employer] is the fact that increasingly onerous services are rendered to a person in his declining years by one under no obligation to do so. It may be observed that it would be equally in accord with common experience to regard the fact that a youth makes his home with and renders service of a general nature to an able-bodied relative as much less persuasive in that regard."

Though Long v. Rumsey was reversed on the ground of the statute of limitations, there is a very strong intimation in the opinion that the contract to pay no wages for services as rendered and to compensate only at the death of the employers was not proved. We are faced with the same difficulty of finding any proof of the contract upon which the judgment rests. The testimony is that the decedent promised to leave respondent half of his estate if the latter "will come and live with me, and help me in the store on Saturday afternoons and holidays and Sundays and nights * * * and help me in my business affairs." Here there is no time of employment, no agreement that respondent should bind himself to give all his nights, Satur-

day afternoons, Sundays and holidays to the deceased for any limited period. The only reasonable inference that may be drawn from the evidence is that deceased was looking for a companion, that "he had grown to like Louis as a son of his own," that he proposed to take the boy to his home, treat him as a son, give him his board and room, and leave him half of his property when he died. The reasonableness of this inference lies in the undisputed facts that the deceased was then a strong, healthy man, 36 years of age, unmarried, and unable to read or write the English language; that the respondent was then a boy of sixteen, inexperienced in any business except "packing and piling the goods" in a factory making men's clothes, had some education in English, and could both read and write that language; and that the two had been living together at the home of respondent's parents for a number of years and had become very close companions.

[5] For these reasons we conclude that respondent failed to prove the contract upon which his cause of action was founded. His complaint alleged that he agreed to "work in said store in the evenings and on Sundays." Also that respondent should contribute his sixteen years of experience "in business and financial affairs." But the undisputed evidence disclosed a different contract, if any—that Louis agreed to come and live with deceased, and also to work in the store "on Saturday afternoons" and "holidays." Now an agreement to work for an unlimited time—here it became a period of twenty years—on "Sundays and evenings" is far different from an agreement to work "Saturday afternoons, Sundays and holidays and nights." When we study the testimony of respondent's witnesses, we find the undisputed evidence of what respondent actually did in the beginning was to move in with deceased where he had a room and some meals and where he occasionally waited on a customer on a Sunday and during the evening when the men of the neighborhood made the store their meeting place for social or political conversation. Though the question of variance between the pleadings and the proof is not raised we refer to this feature for the benefit of the parties when the cause is retried, because, if the services outside the contract were not paid for when rendered, the presumption that they then became due determines the plea of the statute of limitations.

But, aside from all the foregoing, we cannot escape the conclusion that the judgment must be reversed because of the failure to make any proof of the reasonable value of the services. The respondent has listed as services for which compensation is sought—tending the store, plucking chickens and turkeys, marketing vegetables, handling produce in Lake County, consultation and advice on real estate transactions, advice concerning digging of a well, advice concerning insurance, opening the mail, and general handy man. Much of the testimony relating to the work in tending the store was directed to the noon period when Louis had quit his work with Levi Strauss and came to the store regularly for his lunch. This work, if it had any compensable value in addition to the lunch received, was outside the terms of the contract. It is apparent that when the contract was made the parties did not contemplate that Louis would travel some four miles each noon period from his place of employment with Levi Strauss and give the decedent two hours of labor at that time. For the same reason the parties could not have contemplated work in the store on Saturday afternoons, and so the complaint simply sought compensation for "evenings and on Sundays."

When we examine the evidence as to the labor performed in the store evenings and Sundays we find nothing but generalities. Some witnesses saw respondent there some times during the twenty year period on Sundays; some saw him some times in the evenings; some saw him wait on a customer now and then; some saw him smoke a cigar and engage in the general discussion of the group of friends gathered there.

The same must be said as to the evidence relating to picking chickens. Whether this work was done five days in a year or fifty, and whether it was done for one year or twenty, does not appear. The evidence of the trips to Lake County for the purchase of grapes and turkeys, and of the trips to Marin County to purchase Christmas trees is of the same unsatisfactory character. It just appears that the boy went on some of these trips, either with the deceased or alone, and was gone one, two or three days. But whether the total of these excursions was five days or five hundred does not appear. The evidence of respondent's business and financial activities shows at the most that he was a

close friend and confident of the deceased, counseled with him in the purchase and sale of real property, procured one of his close friends to sell insurance to deceased, and opened some of the mail coming to the store. The undisputed evidence is, however, that at all times the deceased conducted his own banking business, attended to the purchase of real property, executed escrow agreements, and built up an estate which was appraised at over forty thousand dollars.

All this brings us to the most serious question raised by appellant, which is that there is no evidence of the value of the services rendered and no basis upon which the jury could determine value. The respondent concedes that there was no evidence of value (except the evidence of the oral agreement to compensate by will), but contends that such evidence was not necessary. The real controversy between the parties is when may the court or jury rely upon the "common knowledge" (not "judicial notice" as stated by respondent) to determine the value of services in the absence of proof of value. The appellant cites and relies upon MacIntosh v. Chicago Electric Co., 44 Cal.App. 320, 186 P. 364; Boyd v. Ibbetson, 90 Cal.App. 298, 265 P. 887; Nylund v. Madsen, 94 Cal.App. 441, 271 P. 374; Miller v. San Francisco Church Exten. Soc., 125 Cal.App. 85, 13 P.2d 824; Moore v. Teel, 6 Cal.App.2d 696, 45 P.2d 412; and Lundberg v. Katz, 44 Cal.App.2d 38, 111 P.2d 917.

[6, 7] In the MacIntosh case the suit was for the reasonable value of work and materials in the repair of an automobile. The court reversed the judgment for plaintiff upon the sole ground that there was no evidence of the value of the work or materials. In the Boyd case the suit was for the reasonable value of services in hauling sand and gravel and the judgment for plaintiff was reversed upon the same ground. The Nylund case was a suit for the reasonable value of nursing services for the deceased during his last illness. A judgment for plaintiff was affirmed upon the ground that the value of such services was a matter of common knowledge and that the court or jury could fix such value without the aid of expert testimony. However, the court qualified this statement by adding: "The rule, of course, is limited to matters which are within common knowledge." [94 Cal.App. 441, 271 P. 377.] The Miller case was a suit for the reasonable value of the services of an architect. The judgment for plaintiff was reversed upon the ground that there was no evidence of such value. The Moore case was a suit for the reasonable value of managing a bungalow court. A judgment for plaintiff was reversed for the same reason. The Lundberg case was a suit to recover the reasonable value of services rendered a deceased as housekeeper and nurse. The cause was tried without a jury and the court relied upon its own knowledge and experience in hiring help of that character. In affirming the judgment for plaintiff the appellate court stated the rule, supported by the citation of numerous authorities, as follows: "In matters of continuous domestic service, opinion evidence if given need not be followed if the trier of the facts is convinced that the opinion expressed is not sound. As a rule the facts do not call for the testimony of an expert. If the trier of the facts possesses the common knowledge of the value of such services, their reasonable value may be determined without the aid of opinion testimony." [44 Cal.App.2d 38, 111 P.2d 920.]

The respondent cites Spencer v. Collins, 156 Cal. 298, 104 P. 320, 20 Ann.Cas. 49; John H. Spohn Co. v. Bender, 18 Cal.App. 2d 447, 64 P.2d 152; Birkhofer v. Krumm, 27 Cal.App.2d 513, 81 P.2d 609, 623, and finds some comfort in language used in some of the cases cited by appellant. The Spencer case was a suit to recover attorney's fees. In a very full opinion the supreme court followed the accepted rule that a judge could draw upon his common knowledge and experience to determine the value of legal services, and that expert testimony of value was not necessary. The Spohn case was a suit to recover fees paid to a receiver under an award previously made by the superior court. The judgment for defendant was affirmed on the ground of estoppel, but in the way of dictum, the appellate court said that the superior court had power to determine the value of the services without expert testimony. The Birkhofer case was a suit to recover a deficiency remaining after a sale under a trust deed. In holding that inadequacy of the price obtained at the foreclosure sale was insufficient to set aside a sale otherwise valid, the appellate court said the courts and juries were not bound to accept "the opinion of a witness on a question of value" but that such opinion is to be weighed with other circumstances. This is far from saying that in matters of which the court, or

the jury, has no knowledge, and which are not matters of common knowledge, a value can be fixed without any evidence to support it.

[8] Of all the authorities cited we find none that disagrees with the rule as stated in Lundberg v. Katz, supra, that the court or jury may fix the value without evidence "If the trier of the facts possesses the common knowledge of the value of such services." [44 Cal.App.2d 38, 111 P.2d 920.] Respondent does not defend the judgment on the ground that either the court or the jury had the knowledge requisite to determine the value of his services. Such defense could not be made under the circumstances of this case. It would be beyond reason to expect twelve jurors to possess the common knowledge of the value of services here sued for without any evidence of the time occupied, or the perquisites, or accommodations received in the nature of living expenses. It would be beyond reason to expect these jurors to know the value of these services in 1921, and for nineteen years thereafter, without some evidence to aid them. (We do not say expert testimony.) This is the more patent when we recall that the services sued for consisted of eight or ten separate and unrelated activities.

[9] Respondent argues that the contract itself, though unenforcible, is evidence of such value. The appellant does not reply to this, but we are not satisfied that the rule is applicable. The contract fixed no value; it called for services which were not rendered, and it did not call for services which were rendered. The undisputed evidence is that the contract obligated respondent to live and make his home with the deceased. This he did for five or six years. Then he married and raised his own family. If the contract was not breached in its entirety at that time (Long v. Rumsey, supra), the services alleged to have been rendered were so far different from those contemplated by the contract that the price fixed in the contract could not supply the absence of proof of the value of the services. And then the contract did not fix a definite "price", but this was dependent upon the value of the estate at the time of the death of the employer, an item which could not have been within the knowledge or contemplation of either party.

[10] If for no other reason, the judgment must be reversed for the error in the admission of the testimony of respondent's mother. Over objection of appellant this witness was permitted to testify that for sixteen years she had cooked and washed the clothes for the deceased and had not been paid. This was testimony which the appellant could not meet and could not deny. The voluntary statement that she did this for the sake of her son (who had married and was not living with deceased) merely emphasized the purpose of the inquiry—to create prejudice against the deceased and sympathy for the respondent and his aged mother. The explanation that this line of testimony was sought to show that the mother was frequently about the store premises and knew what occurred there, is not pursuasive since it was not followed by any inquiry on that line. The testimony was not admissible for any purpose, and its admission was clearly prejudicial to appellant.

The judgment is reversed.

SPENCE, J., concurred.

Hearing denied; GIBSON, C. J., and CARTER and SCHAUER, JJ., dissenting.



58 Cal.App.2d 91

NICHOLS et al. v. SOUTHERN PAC. CO.

Civ. 6752.

District Court of Appeal, Third District, California.

April 10, 1943.

Rehearing Denied May 10, 1943.

1. Removal of causes ⇐89(2)

The filing of a petition and bond for removal of case from state court to federal court presents a pure "question of law" regarding whether, admitting facts stated in petition for removal to be true, it appears on face of record that petitioner is entitled to a removal of the case. Jud.Code § 28, 28 U.S.C.A. § 71.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Law".

2. Removal of causes ⇐89(2)

The "record" presented to state court for its consideration on petition for removal of case to federal court includes the petition for removal, except statements

of federal questions or of separable controversy, made in the petition, and pleadings and proceedings down to that time. Jud.Code § 28, 28 U.S.C.A. § 71.

See Words and Phrases, Permanent Edition, for all other definitions of "Record".

3. Removal of causes ⇐89(2)

The facts necessary for determination of question presented by petition for removal of case from state court to federal court must appear affirmatively in the record. Jud.Code § 28, 28 U.S.C.A. § 71.

4. Removal of causes ⇐89(2)

In action for personal injuries by residents, allegation in nonresident defendant's petition for removal of case to federal court that case was not at issue as to resident defendants and that plaintiffs by announcing themselves ready for trial had voluntarily elected to proceed with the case as against the nonresident alone was merely a "conclusion" and not a "statement of facts" and therefore state court properly permitted plaintiffs to withdraw announcement that they were ready for trial and properly denied petition for removal. Code Civ.Proc. § 437; Jud.Code § 28, 28 U.S.C.A. § 71.

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion" and "Statement of Fact".

5. Removal of causes ⇐89(1)

Where it does not appear on face of record, including petition for removal, that action is a removable one, a state court is not bound to surrender its jurisdiction. Jud.Code § 28, 28 U.S.C.A. § 71.

6. Removal of causes ⇐86(1)

The facts and not deductions of pleader must be alleged in petition for removal of cause from state court to federal court in order to show cause for removal. Jud. Code § 28, 28 U.S.C.A. § 71.

7. Removal of causes ⇐16

The right to remove cause from state court to federal court is purely statutory and exists only in specified cases enumerated in the federal statute. Jud.Code § 28, 28 U.S.C.A. § 71.

8. Removal of causes ⇐86(1)

A petition for removal of cause from state court to federal court to be sufficient must set forth in complete detail the particular facts out of which the right to removal arises.

9. Railroads ⇐348(1)

In action by occupants of automobile for injuries sustained when automobile, at night, ran into tender of railroad engine stopped on highway, evidence of railroad's negligence in not giving warning sustained verdict for plaintiff occupants.

10. Appeal and error ⇐994(2), 1003

The trier of the facts is sole judge of weight and effect of testimony and credibility of witnesses.

11. Appeal and error ⇐930(1)

On appeal from judgment entered on verdict of jury for plaintiffs the appellate court must accept as true the evidence in favor of plaintiffs and resolve all conflicts in evidence in their favor.

12. Railroads ⇐348(8)

In action by automobile occupants for injuries sustained when driver turned to left to avoid box car stopped on highway and struck tender of engine, evidence was sufficient to sustain verdict for occupants as against contention that they were guilty of contributory negligence because they did not see the box car until only 60 feet from it.

13. Master and servant ⇐333

In personal injury action by automobile occupants against railroad and employees operating train, verdict and judgment which neither found for nor against the employees did not exonerate the railroad from liability in view of fact that claim of negligence did not arise solely from acts of the employees but also arose from alleged negligence of railroad in not maintaining proper safeguard for traveling public.

14. Appeal and error ⇐766

Appellate court examined instructions although point was raised that appellant had not complied with court rule. Rules of District Court of Appeal, rule 8.

15. Trial ⇐228(1), 267(1)

A party is not entitled to have jury instructed in any particular phraseology and trial court is not obliged to state all of the law of the case in a single instruction.

16. Trial ⇐295(1)

The charge to the jury must be read as a whole.

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

Personal injury action by T. Y. Nichols and others against the Southern Pacific Company. Judgment for plaintiffs, and defendant appeals.

Affirmed.

T. L. Chamberlain, of Auburn, and Jones & Quinn, of Stockton, for appellant.

F. H. Bowers, of Roseville, for respondents.

PEEK, Justice.

The defendant Southern Pacific Company, a Kentucky corporation, appeals from a judgment in favor of the plaintiffs, and against it alone.

The record discloses that shortly before midnight on the evening of September 7, the plaintiffs, while returning from the State Fair in Sacramento to their home at Loomis, collided with a train operated by appellant. The plaintiffs were traveling in an easterly direction along U. S. Highway No. 40, which is a main traveled two lane continental highway approximately 20 feet in width. The main line tracks of defendant Southern Pacific are immediately to the north of and parallel to the highway. At a point approximately one mile northeast of Roseville the defendants maintain a spur track, which branches, in a southeasterly direction, off of the main line at a sharp angle, crossing the highway and terminating at oil storage tanks located south of the highway. The approach to this crossing from the west is slightly upgrade. Approximately 100 feet east of the crossing the highway turns abruptly to the left or northeast. On the south side of this turn is an embankment of about 30 feet in height, upon the top of which was a bill board fringed by trees. Immediately prior to the accident an engine and one box car in charge of engineer Charles D. Hite and engine foreman or conductor Walter H. White was moving northerly across the highway. This movement of the engine and box car was being made to permit the opening of another switch to the south of the highway so that the train could then move back across the highway to another spur. At the time of the collision the train had stopped. The engine had cleared the crossing and was headed away from it, while the box car was stopped on the highway, its wheels being approximately equally distant from the center white line on the highway, thereby suspending the body of the box car over the center of the highway at an elevation of nearly 3 feet. Apparently plaintiffs were unaware of the box car until they were some 50 or 60 feet away. Mr. Nichols testified that upon seeing the car he turned to his left and at the same time applied his brakes. The right front wheel of the automobile struck the left rear wheel of the tender. As the result of the collision Mrs. Nichols sustained certain injuries.

On January 5, 1940, plaintiffs filed their complaint. The Southern Pacific was first served with summons and complaint and thereafter C. D. Hite and W. H. White were served on August 26, 1940. On August 30, plaintiffs served notice of motion to file an amended complaint, among other things inserting the true names of said defendants in place of the fictitious names as originally set forth in the complaint.

After various conversations and communications between counsel it was stipulated that the defendant corporation's original answer would be deemed the answer to the amended complaint, and the amended complaint was filed. The case came on for hearing on September 12, 1940 before a jury. When the case was called, plaintiffs' attorney, in reply to a question asked by the court, answered, "Plaintiff is ready." Immediately defendant Southern Pacific presented its petition and bond for removal to the federal court under the provisions of section 71, Title 28 U.S.C.A., on the ground that the case was not at issue as to the defendants Hite and White, and that plaintiffs in answering as ready thereby voluntarily elected to proceed against the nonresident corporation alone, that such election amounted to a complete severance of the action, and that the cause should be removed to the federal court. Plaintiffs in answer to the defendants' petition moved the court for an order permitting the withdrawal of the statement "plaintiff is ready," stating that they were basing their motion under the provisions of section 473 of the Code of Civil Procedure, upon the ground that said announcement was made through inadvertence, misleading statements on the part of defendants' counsel which caused "surprise and excusable neglect" and filed a written motion and affidavit in support thereof. The court, after due consideration, made its order granting plaintiffs' motion, and the cause proceeded to trial. A judgment against the defendant corporation alone in the sum of $2,500 was returned by the jury. It is from this judg-

ment that defendant Southern Pacific now appeals.

The questions raised by appellant on appeal are, 1. Did the court err in denying defendants' motion for removal to the federal court? 2. Were the plaintiffs guilty of contributory negligence as a matter of law, and 3, Was the court in error in denying plaintiffs' motions for nonsuit, directed verdict and judgment notwithstanding the verdict, as well as in giving and denying of certain instructions to the jury?

[1] Appellant contends that the sole question on removal relates to the one act of plaintiffs' counsel in announcing his readiness for trial. It is admitted that up to that time no case for removal was presented.

It is said in 23 R.C.L. 774: "The filing of a petition and bond presents to the state court a pure question of law, and that is whether, admitting the facts stated in the petition for removal to be true, it appears on the face of the record that the petitioner is entitled to a removal of the suit. If, upon the face of the record, including the petition for removal, a suit does not appear to be removable, then the state court is not bound to surrender its jurisdiction, and may proceed as if no application for removal had been made. That question the state court has a right to decide for itself. If it errs in keeping the case, and the highest court of the state in which a decision can be had affirms the ruling, the federal supreme court has jurisdiction to correct the error, considering, for that purpose, only the part of the record which ends with the petition for removal. On the other hand, if it correctly determines the question of law its final judgment affirmed by the highest state court will be affirmed by the federal supreme court (if such judgment is not reversible for error on some other federal ground)."

[2] As to what constitutes the record it is said by the same authority, page 736, section 120, that "the record presented to the state court for its consideration on a petition for removal includes the petition for removal—except statements of a federal question or of a separable controversy, made in the petition—and the pleadings and proceedings down to that time."

Also in the same volume, section 119, on pages 735, 736, we find the further statement: "As the jurisdiction of a federal court is limited, in the sense that it has no other jurisdiction than that conferred by the constitution and laws of the United States, the presumption is, except on collateral attack, that a case is without its jurisdiction unless the contrary affirmatively appears. The special facts necessary for jurisdiction must, in some form, affirmatively appear in the record of every suit. This rule applies to suits coming to the federal court by removal as well as to those in which it issues the original process. The federal court can no more take a case until its jurisdiction is shown by the record than the state court can be required to let it go until the record shows that its jurisdiction has been lost."

[3, 4] Following the statement of the rule as above set forth that the facts necessary for a determination of the question must appear affirmatively in the record, we find the record as of September 12, made up of (1) the complaint, (2) the amended complaint substituting the names of Hite and White for the fictitious defendants, (3) notice of motion to file amended complaint (noticed for September 10, mailed August 30), (4) summons, and return showing service on the Southern Pacific Company, and (5) stipulation of the parties that if amended complaint be filed by plaintiffs prior to September 12, the answer to the original complaint may be deemed the answer to the amended complaint, etc. (filed September 12); and lastly, the defendants' petition for removal. In brief the petition alleges that the action came on for trial on September; that when the case was called plaintiffs announced themselves as ready; that on August 26, the defendants Hite and White were served "but that said action was not at issue so far as defendants C. D. Hite and W. H. White are concerned." It is then alleged that by announcing themselves as ready for trial and said action not being at issue as to said defendants, that plaintiffs elected voluntarily to proceed with the case against the nonresident corporation, and that such election amounts to a complete severance of the action as to the defendant corporation, petitioner herein, as effectively as if it originally brought suit against such defendant alone.

Disregarding all matter except such as is shown to have been of record prior to September 12, and considering only the matters constituting the record as hereinabove set forth together with the petition,

the question then becomes this: Does the record show a voluntary discontinuance by plaintiffs of their cause against the resident defendants Hite and White as a matter of law? There is nothing in the record, exclusive of the petition, that would tend to show an intent to discontinue as to said defendants. Reliance must therefore be had solely upon the allegations of the petition. The allegation that summons had been served upon the resident defendants more than ten days prior to the trial date indicates that plaintiff was not intending to discontinue as to these defendants. There is no allegation in the petition that they had or had not answered or that they were or were not in default for failing to answer or that they had secured additional time to answer, either by stipulation or by order of court, or that they were not in court ready for trial. All that is alleged as ground for the assertion that by announcing themselves ready for trial "plaintiff had voluntarily elected to proceed with the case as against Southern Pacific Company alone," is the allegation that "said action is not at issue so far as said defendants C. D. Hite and W. H. White are concerned."

In our opinion this is merely a conclusion and not a statement of fact and therefore not in accord with the principles previously set forth. It is analogous to a statement that the party is in default under a contract, without stating the facts constituting a breach (49 C.J. p. 55) or that property is exempt from taxation (49 C.J. p. 56) or that plaintiff was not before the court (49 C.J. p. 67), all of which are purely conclusions. In Southwest Power Co. v. Price, 180 Ark. 567, 22 S.W.2d 373, an allegation that time to answer had not expired was held a conclusion of law, and certiorari in that case was denied. An allegation that a resident defendant was fraudulently joined for the purpose of preventing removal without alleging the facts tending to show the fraud was held to be insufficient. McNulty v. Atlas, etc., Co., Mo.App., 249 S.W. 730–733.

[5, 6] Where it does not appear on the face of the record, including the petition for removal, that a suit is a removable one a state court is not bound to surrender its jurisdiction. In Southern Pacific Co. v. Waite, 279 F. 171 (a case in the United States District Court for the Southern District of California), it was held that the mere presentation of a petition for removal not showing on the face of the petition and record that a case is removable does not affect a transfer. This case is cited in Metropolitan Casualty Ins. Co. v. Stevens, 312 U.S. 563, 61 S.Ct. 715, 85 L. Ed. 1044, and must, therefore, be considered as sound law. This well-established principle that facts and not deductions of the pleader must be alleged in the petition in order to show cause for removal has been enunciated many times.

[7, 8] The right to remove a cause to the federal courts is purely statutory and exists only in the specified cases enumerated in the federal statutes. Therefore a petition for removal to be sufficient must set forth in complete detail the particular facts out of which the right to remove arises. Chesapeake & Ohio R. Co. v. Cockrell, 232 U.S. 146, 151, 34 S.Ct. 278, 58 L.Ed. 544, 547, and cases therein cited; McAllister v. Chesapeake & Ohio R. Co., 243 U.S. 302, 310, 311, 37 S.Ct. 274, 61 L.Ed. 735, 741; Sanders v. Atlantic, etc., Co., D.C., 33 F.2d 1010, 1013; Wilson v. Republic, etc., Co., 257 U.S. 92, 97, 42 S.Ct. 35, 66 L.Ed. 144, 148; Towill v. Southern R. Co., 121 S.C. 447, 114 S.E. 416, 419.

[9] Appellant further contends that the verdict is not sustained by the evidence. As often happens in cases of this character, the evidence with reference to the accident is in conflict.

[10] As this court said in the recent case of Norgard v. Norgard's Estate, 54 Cal.App.2d 82, 89, 128 P.2d 566, 569:

"The trial court is the sole judge of the weight and effect of testimony and of the credibility of witnesses, and is free to disbelieve them, even though they are uncontradicted, if there is any rational ground for doing so."

[11] It is self-evident that the jury accepted as true the testimony of respondents, and it rejected a portion at least of the evidence proffered by appellant. It necessarily follows that it is incumbent upon this court, upon appeal, to accept as true the evidence in favor of respondents and to resolve all conflicts in the evidence in their favor. Hinkle v. Southern Pacific Co., 12 Cal.2d 691, 695, 87 P.2d 349, 352.

[12] Appellant further contends that the verdict is not sustained by the evidence in that plaintiffs were guilty of contributory negligence as a matter of law because they did not see the box car until only

60 feet from it. Substantial evidence was introduced by the plaintiffs, which, if believed by the jury, was sufficient for a judgment in favor of plaintiffs. A similar situation is found in Hinkle v. Southern Pacific Co., supra, where it is said: "Appellant insists that the train necessarily must have been seen by respondents if they had looked, and that their evidence to the contrary that they did look but did not see the train is not worthy of credence and will not support the verdict in their favor. Upon this phase of the case it will suffice to say that appellant bases its assumption that the train must necessarily have been seen by the respondents in time for them to have avoided the accident if they had in fact looked, upon the testimony of its train crew, which the jury, as triers of fact, were at liberty to reject, and which they evidently did reject. * * * It is highly probable, in our opinion, that the implied finding of the jury exonerating the respondents from contributory negligence was based upon their acceptance of the respondents' testimony that they saw no one at the crossing and the jury's belief that the respondents did not see anyone because in fact there was no one there. Having in mind the fact that the jury was at liberty to reject much of the evidence proffered in behalf of appellant, together with the circumstance that the accident happened on a very dark night at a narrow crossing where large pine trees were growing close to the tracks, and that the train was not approaching headon with its headlight lighting up the track ahead, but was backing toward the crossing, we cannot say as a matter of law that respondents were negligent in not seeing the backing train in time to avoid it. They were not, therefore, guilty of contributory negligence as a matter of law."

Paraphrasing the statement above contained in the Hinkle case it is highly probable that the implied finding of the jury exonerating the respondents from contributory negligence was based on the acceptance of the respondents' testimony that they saw nothing until immediately prior to the accident, and having in mind that evidence was offered in behalf of plaintiffs, that the accident happened on a dark night with the box car in question immediately in line with a high bank surmounted by a signboard and trees, that because of the manner in which the body of the box car was suspended over the highway the center white line continued on past the car thereby giving an impression to plaintiff that the road was clear, and that because of the direction in which the train was headed the headlight on the engine was turned away from the crossing. We cannot say as a matter of law that the respondents were guilty of contributory negligence in not seeing defendants' box car in time to avoid hitting it.

[13] The jury found neither for nor against the defendants Hite and White. This, appellants contend, amounts to an implied exoneration of the defendant company. Such a verdict and judgment do not have the effect of exonerating or relieving the defendant railroad company from liability where the claim of negligence does not arise solely from the acts of the conductor or train foreman in the operation of the train but also arises from the alleged negligence of the defendant company in not maintaining proper safeguards for the traveling public. The allegation in plaintiffs' complaint that the defendants so negligently operated an engine and box car "without signs, flagman, light, flare, the sounding of any whistle, bell, or warning of any kind," presented one of the issues which were submitted to the jury, which issue obviously was resolved in favor of the plaintiffs.

[14-16] Although the point has been raised that appellant has not complied with rule VIII of this court we have nevertheless examined the instructions, both given and refused, and feel that the trial court substantially covered the questions which properly should have been and were presented to the jury. It is well established that a party is not entitled to have the jury instructed in any particular phraseology nor is the trial court obligated to state all of the law of the case in a single instruction. The charge to the jury must be read as a whole. Surely the appellant does not seriously argue to the contrary.

We find no merit in the contention of appellant that it was prejudiced by certain statements and rulings of the trial court. Nor do we find merit in the further contention that the court erred in denying defendants' motion for nonsuit, directed verdict and judgment notwithstanding the verdict. Again we feel that appellant does not seriously urge consideration of these points, for it is obvious from the record that substantial evidence was introduced precluding the court from granting the motion for nonsuit or from directing a verdict

for either party. Likewise the verdict and judgment, based upon such sufficiency of evidence as well, precluded the court from granting defendants' motion for judgment notwithstanding the verdict.

The judgment is affirmed.

THOMPSON, J., and ADAMS, P. J., concurred.



58 Cal.App.2d 376

In re COOK'S ESTATE.

Civ. 13962.

District Court of Appeal, Second District, Division 3, California.

April 27, 1943.

Rehearing Denied May 18, 1943.

1. Wills ⇐601(8)

Although desire of testator for disposition of his estate will be construed as a "command" when addressed to executor, it will not when addressed to legatee be construed as a "limitation" on the estate or interest which testator has given the legatee in absolute terms.

See Words and Phrases, Permanent Edition, for all other definitions of "Command" and "Limitation".

2. Wills ⇐601(8)

When one to whom request is directed by testator has nothing to do but carry it into effect, which is generally true in case of an executor, it will be deemed "mandatory", but if the desire is so stated as to indicate testator's intention merely to influence and not to control some future action to be taken by the person addressed, which is usually the case where the person addressed is a beneficiary, the expression will be construed as "precatory" and not as effecting a testamentary disposition.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory Request" and "Precatory Request".

3. Wills ⇐601(8)

Holographic will under which testator who referred to his wife as the best wife a man could have stated that all of his property should go to his wife and on her death testator would like his sister and brothers to get at least $2,000 and balance to go to testator's daughter, the entire estate vested in the wife and the expression of testator's desire was merely "precatory" and did not effect a testamentary disposition.

4. Wills ⇐601(8)

Where holographic will stated that all of testator's property should go to his wife and that on her death testator would like his sister and brothers to get at least $2,000 and balance to go to testator's daughter, any doubt concerning construction of the will should be resolved in favor of vesting of entire estate in the wife as contended by the daughter who claimed that the property would go to her as testator's sole heir because of the wife's death without surviving spouse or issue, in view of provision of Probate Code that a clear and distinct devise can not be affected by other words not equally clear and distinct. Probate Code, §§ 104, 229.

Appeal from Superior Court, Los Angeles County; J. W. Mullin, Jr., Judge pro tem.

Proceeding in the matter of the estate of Frank J. Cook, deceased, wherein a controversy arose between Loretta Cook Kurtz, and Irma A. Heyes, administratrix cum testamento annexo, and others concerning construction of the will of Frank J. Cook, deceased. From an adverse order, Loretta Cook Kurtz appeals.

Reversed with directions.

Earle M. Daniels and Hallam Mathews, both of Los Angeles, for appellant.

James H. Denison, of Los Angeles, for respondent Irma A. Heyes.

Freston & Files and Robert H. Dietrich, all of Los Angeles, for respondent Joseph L. Cook and others.

SHINN, Acting Presiding Justice.

Frank J. Cook died testate at Los Angeles on June 29, 1941. Surviving him were Ethel G. Cook, his widow, and Loretta Cook Kurtz, his daughter by a former marriage and his only other heir at law, appellant herein. Subsequent to his death and on August 1, 1941, his widow was declared to be an incompetent person in pro-

ceedings had therefor and Irma C. Heyes was appointed guardian of her person and estate. Thereafter and on March 25, 1942, said incompetent deceased intestate at Los Angeles leaving property and estate now in the course of administration. Frank J. Cook left a brief holographic will wherein he mentioned his daughter and two brothers and a sister without naming any of them, all of whom later appeared and identified themselves as Loretta Cook Kurtz, daughter, Joseph L. Cook, Walter R. Cook and Loretta Cook McNeill, brothers and sister respectively. The present controversy arises over the construction of the will of Frank and his intent to be drawn therefrom, that is, whether he intended an outright grant of the fee of his estate to his wife Ethel, or whether he intended to grant her no more than a life estate with the remainder at her death over to his daughter and his two brothers and sister in the proportions set forth.

The will reads as follows: "All I have goes to Ethel the best wife a man could have. My passing out is no reflection on her but the result of a guilty conscience and a selfish mispent life. At her death I would like my sister and brothers ~~and~~ get at least 2000.00 each of my money and the balance to go to my daughter. Frank J. Cook 6/29/41"

The appeal is by Loretta Cook Kurtz from the decree, which ordered the payment of legacies of $2,000 each to the sister and two brothers and distributed the remainder of the estate to appellant; also from an order for the sale of certain stocks of the estate to obtain funds for payment of the legacies.

Appellant in her opening brief states that although it would appear that the construction which was given the will was favorable to her, she claims even greater rights, namely, all of her father's estate, which she contends was his separate property and would go to her as his sole heir because his widow left surviving her neither spouse nor issue. Probate Code, § 229. Appellant's right to prosecute the appeal is not challenged by respondents.

The principal question is whether it was the intention of the testator to leave his estate to his wife during her lifetime, with remainder over to his daughter, appellant, subject to the payment of legacies to his sister and brothers, or to leave it absolutely to his wife, with the expression of his desire that she make provision for his sister, his brothers and his daughter to the extent stated in the will.

[1, 2] We have accepted as a guide and as a basis for an analysis of the will the statement in Re Estate of Marti, 1901, 132 Cal. 666, at page 671, 61 P. 964, at page 965, 64 P. 1071, as follows: "While the desire of a testator for the disposition of his estate will be construed as a command when addressed to his executor, it will not when addressed to his legatee be construed as a limitation upon the estate or interest which he has given to him in absolute terms." From our study of the cases it appears that the rule, broadly stated, is that when the person to whom a request is directed has nothing to do but to carry it into effect, which is usually true in the case of an executor, it will be deemed mandatory, but that if the desire is so stated as to indicate the testator's intention to merely influence and not control some future action to be taken by the person addressed, as is usually the case where such person is a beneficiary, the expression will be construed as precatory or as not effecting a testamentary disposition. We have reached the conclusion that the latter interpretation is the correct one and that the decree should be reversed.

[3] The words "All I have goes to Ethel" are positive, unequivocal, and complete in themselves. What follows is not stated by way of qualification but merely as a request. In the final sentence the words "at least" are the significant ones. They unmistakably indicate an intention that the wife would be called upon to act affirmatively with respect to carrying into effect the wishes of the testator. A man does not make a present disposition of his property by saying, "I give to my sister and to each of my brothers 'at least' $2,000 and the balance to go to my daughter," but that language would be quite appropriate for the expression of a request. The phrase "at least $2,000 each" means "$2,000 or more each" and as used in the will means that the testator was attempting to influence the discretion of someone who would have the power to dispose of what remained of the estate upon the death of his wife. That person was his widow and could have been no one else. If she had chosen to leave all of the estate to the brothers and the sister to the exclusion of the daughter, the request would not have been violated. If the widow had consumed all of the estate in disregard of the ex-

pressed wish that the brothers and the sister receive "at least $2,000 each," she would have done no more than to disregard the wishes of the testator. If she had considered herself bound to provide for the others, she would have realized that her husband had had in mind not their necessities or their deserts at the time the will was written but what they might be at the time of the wife's death, and that she was expected to divide the remainder among the brothers and the sister on the one hand and the daughter on the other, in view of their respective claims upon her bounty as of the time when she would choose to make her decision. The wish as expressed was definite as to the amount of $6,000 but the will went no further than that even by way of suggestion. And even then the words were addressed to her as the owner of the estate by virtue of the will and in no other capacity. She was not named as executrix. Had the testator been intending to make a present disposition of his estate in which his daughter would share, he would scarcely have phrased the will so as to express a mere wish, especially in terms that would allow his widow free to leave all of her estate to the brothers and the sister. Upon the other hand, the will as written is entirely consistent with the view that the testator understood that his entire estate would go to his wife unconditionally so that she might use it and dispose of it by will as she might see fit. In other words, the brothers and sister and the daughter were not provided for by the will; they were to be provided for through some action of the widow of a testamentary character. It was that action which the testator sought to influence and not to direct. The brothers and sister and the daughter were to take according to the wishes of the widow, and the fact that in the discretion of the widow the daughter might receive nothing is convincing proof that the testator did not understand that she was a beneficiary under his own will.

We regard the will in question to be analogous to the ones construed in Re Estate of Marti, supra, 132 Cal. 666, 61 P. 964, 64 P. 1071, and Re Estate of Goldthwaite, 1934, 140 Cal.App. 551, 35 P.2d 1050, cited by appellant, rather than to those construed in Re Estate of Tooley, 1915, 170 Cal. 164, 149 P. 574, Ann.Cas.1917B, 516, and Re Estate of Mayne, 1938, 28 Cal.App.2d 340, 82 P.2d 504, 505, upon which respondents rely.

In Re Estate of Tooley the will read:

"I give all my property at my death to my daughter Logan Mattie Tooley.

"If at her death she has neither husband or children I desire any property that may be left divided equally among my sisters and brother.

"Martha L. Tooley."

In Re Estate of Mayne the will read:

"In case of my accidental departure of this life, I leave all my property to my husband, Frank K. Mayne.

"To be carefully kept and finally divided equally between Frances and Walter—if any remains after Frank's passing on.

"Lucy Cushman Mayne."

In Re Estate of Marti, supra, the will left all of the husband's estate to his wife, named her as executrix, and provided: "Upon the death of my wife, I desire that one-half of the property bequeathed to her shall be devised by her to my relatives."

In Re Estate of Goldthwaite, supra, the will left the son's home and furnishings to his father and was supplemented by a writing reading as follows:

"March 28, 1931.

"Father—

"If anything should happen to me (die or be killed) enroute to or from California, or while there, will you do me the everlasting favor of giving one-half the proceeds from the sale of my house and furniture to Mary Johnson, 55 Pineapple St., Brooklyn, N. Y. As you know if you ever get this, the entire house and furniture is willed to you, but I love Mary very much and would like to have her have one-half.

"Thanks, Father.

"Spen

"(Spencer Goldthwaite)"

"I hereby witness that the above was written by Spencer Goldthwaite on March 28, 1931, and that the above is his own signature.

"Robert T. Furman, Jr."

The foregoing cases have been selected by counsel as typical of many others with which they are in harmony and they are sufficient for our use in pointing out what we consider to be the controlling fact in all of them. Under the Tooley and Mayne wills the persons to whom the respective requests were directed had nothing to do but to execute the desires of the testators

which were complete in themselves. In the Marti case the widow was to devise one-half of the remainder of the property to the relatives of the deceased husband. In the Goldthwaite case the beneficiary was asked as a favor to the testator to give a part of the estate to "Mary." In each of the latter cases whatever, if anything, of the property disposed of by the will would eventually be received by the objects of the testator's solicitude would go, not by force of the will but by reason of the action of the beneficiary which the testator had sought to influence. In that respect the will before us is not to be distinguished in principle from the one in Re Estate of Marti, supra. The testator there expressly stated that he wished his wife to divide the remainder of the estate by will; in our case the same thing is necessarily implied. Under the Marti will the remainder was to go to the relatives of the testator, who were not named in the will. In our case the relatives of the testator were identified in the will, but the division was left to depend upon the volition of the wife, to be exercised according to her own desire.

In determining what purpose the testator endeavored to express in his will, we should not overlook the feelings that he had toward his wife at the time he wrote the will, for it appears from his reference to her that his affection for her was great and his confidence in her complete. Considering these facts, words of suggestion to her would seem to be more consistent with his expressed regard for her than would words of command.

[4] If there were any doubt as to the proper construction of the will, we think it should be resolved in appellant's favor by reason of the provisions of section 104 of the Probate Code, which reads as follows: "A clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will, or by an inaccurate recital of or reference to its contents in another part of the will." The provisions of the will upon which respondents rely as limiting the clear and distinct devise and bequest of the entire estate to the wife are not equally clear and distinct because they fail to show how the testator wished the estate to be divided. In leaving it within the discretion of the wife to give all of the remaining estate to the brothers and sister to the exclusion of the daughter, we think the testator not only did not make a clear devise or bequest in favor of any person except his wife but that he really made no provision at all. It necessarily results from what we have said that the construction given the will in the trial court was inconsistent with the intentions of the testator as expressed therein, that Ethel G. Cook took the entire estate under the will, and that distribution should have been made to her estate.

In order to provide funds for payment of the legacies the court ordered the sale of certain corporate stocks, this being one of the terms of the order for distribution. Loretta Cook Kurtz appeals from that portion of the order, as well, and it must be reversed in view of our holding that the entire estate is distributable to the estate of Ethel G. Cook, widow of Frank J. Cook. It is unnecessary to consider the further contention of appellant that the court had no jurisdiction to make the order appealed from in the estate of Frank J. Cook instead of ordering distribution to the estate of Ethel G. Cook for further proceedings.

The order for sale of property and decree of distribution are reversed with the direction that distribution be made to the estate of Ethel G. Cook, deceased.

PARKER WOOD, J., and SHAW, J. pro tem., concur.



58 Cal.App.2d 330

Ex parte QUALLS.

Cr. 3708.

District Court of Appeal, Second District, Division 3, California.

April 23, 1943.

1. Criminal law ⇐641(1)

The right of one being held in county jail awaiting trial on charge of felony to private consultations with his attorney is a corollary of constitutional right to be represented by counsel in his defense.

2. Criminal law ⇐641(1)

When opportunities are provided for private consultations between inmate in county jail awaiting trial upon charge of felony and his counsel, those who engage therein must abide by such reasonable regulations as custodian of jail property and prisoners confined therein may see fit to make.

3. Habeas corpus ⇐25(1)

A writ of habeas corpus would be granted ordering sheriff, as custodian of county jail and prisoners confined therein, to permit inmate of county jail who was awaiting trial upon felony charges to consult privately with his attorney in such place and under such circumstances as would afford reasonable opportunity for absolute privacy of consultation upon request of either inmate or his attorney, where it appeared that consultation room furnished did not afford a reasonable degree of privacy.

Proceeding in the matter of the application of William Donley Qualls for a writ of habeas corpus to secure opportunity for private consultation between attorney and client.

Writ granted.

Lasher B. Gallagher, of Los Angeles, for petitioner.

Frederick N. Howser, Dist. Atty., of Long Beach, and Jere J. Sullivan, Deputy Dist. Atty., of Los Angeles, for respondent.

SHINN, Acting Presiding Justice.

This matter came before us for hearing upon a writ of habeas corpus, heretofore issued, directed to the sheriff of Los Angeles County upon petition of counsel for, and on behalf of, William Donley Qualls, who is now an inmate of the County Jail awaiting trial upon two counts of felony. It was represented by the petition that petitioner has employed an attorney who is preparing his defense to said charges; that said attorney has demanded that he be afforded an opportunity for private consultation with his client at some place in the County Jail to be selected by respondent or his deputies who are in charge of the jail; that respondent and his said deputies have failed and refused to accede to such request; that they have been willing to allow petitioner to consult with his said attorney at times when consultations were desired, but only in a large room used by many attorneys and their clients for such purpose; but that between the hours of 9 a. m. and 5 p. m., by reason of the presence of many prisoners and attorneys and of deputies of respondent, there is no opportunity in that room for petitioner to consult privately and confidentially with his said attorney. The purpose of his application is to secure opportunity for such private consultation.

[1] From the facts as stipulated by counsel for petitioner and the District Attorney, appearing on behalf of respondent, and from oral and documentary evidence received at the hearing, which it is unnecessary for us to recite, it appears that while the room provided for such consultations is a large one and is so furnished and arranged as to provide facilities which are adequate to allow conversations between attorneys and their clients, yet the facilities are so limited and the room is so extensively used that during ordinary business hours there is little assurance of the privacy of conference to which the petitioner and those similarly situated are entitled and that at times privacy of consultation is impossible. Their right to private consultations with their counsel is a corollary of the constitutional right to be represented by counsel in their defense. In In re Rider, 1920, 50 Cal.App. 797, at page 799, 195 P. 965, the court said: "The privilege of the presence of counsel upon the trial would be a poor concession, if the right of consultation with such counsel prior to the trial were denied. It is equally essential to the enjoyment of this constitutional guaranty that the accused should have the right to a private consultation with his counsel" and at page 800 of 50 Cal.App., at page 966 of 195 P. quoted with approval the following language from State ex rel. Tucker v. Davis, 9 Okl.Cr. 94, 130 P. 962, 44 L.R.A.,N.S., 1083, as follows: "It is the duty of officers having the custody of persons charged with crime to afford them a reasonable opportunity to privately consult with their attorneys, without having other persons present, taking such precautions as may be necessary, according to the circumstances of each case, to prevent the escape of such prisoner." See, also, to the same effect, In re Snyder, 1923, 62 Cal.App. 697, 217 P. 777.

[2] The District Attorney does not question that petitioner has this right but

contends that there is at all times a reasonable degree of privacy in the consultation room, but this contention is not borne out by the evidence. He further insists that so little use is made of said room between the hours of 7 and 9 a. m. and 5 and 9 p. m., during which hours attorneys are allowed use of the room for consultation, that prisoners may then hold private conferences with their counsel without interruption, and that petitioner, being free to make use of the room during such hours, has no just cause for complaint. The evidence is to the effect that between the hours of 7 and 9 a. m. and 5 and 9 p. m. it would ordinarily be possible for private and confidential conversations to be held in the attorneys' room, but there are no regulations or practices in force which would insure such privacy. Even if there were, petitioner's right to consult privately with his attorney "at all reasonable times" (In re Rider, supra; In re Snyder, supra) cannot be limited to hours that are outside of those which attorneys usually devote to their professional labors. There is no other room in the jail provided for the use of attorneys when consulting with their clients, but there undoubtedly is space, including the attorneys' room, when so managed as to insure privacy, which is or may be made suitable for that purpose and which would assure the desired privacy. Additional facilities that might be so used appear to be quite limited, as is also the demand for the use of places where greater privacy would be afforded than is possible in the attorneys' room as it is now managed. It is nevertheless the duty of the authorities to make reasonable provision to meet the demands of those prisoners who seek the opportunity to consult with their counsel outside of the hearing of other persons. The fact that members of the Bar almost without exception bear with the difficulties which we have mentioned does not alter the case. There is, of course, no duty to provide such quarters beyond the necessities therefor, nor to make them available for immediate use upon request. Some inconvenience must at times be occasioned to prisoners and their counsel because of the great number of prisoners in the jail and the limitation of facilities for complete privacy of consultation, but so long as such facilities are provided and the right to private consultation is respected, respondent's duty in the premises will go no further than to see that all prisoners are accorded equal privileges in the use of space which may be used for private consultation. We appreciate the difficulties which confront the custodian of a jail as large as that of this county, which houses approximately 2,000 prisoners, but are nevertheless confident that they can be satisfactorily overcome by reasonable cooperation on the part of members of the Bar and those who are charged with management of the jail. Needless to say, when opportunities are afforded for private consultations, those who engage therein will be obliged to abide by such reasonable regulations as respondent may see fit to make as the custodian of the jail property and the prisoners confined therein.

[3] It is ordered that respondent, Eugene Biscailuz, Sheriff of Los Angeles County, be, and he is hereby ordered and directed, upon request of petitioner or his counsel, and at all reasonable times, to permit petitioner to consult privately with his attorney in such place and under such circumstances as will afford reasonable opportunity for absolute privacy of consultation.

PARKER WOOD, J., and BISHOP, J. pro tem., concur.



58 Cal.App.2d 160

Ex parte GIANOLI.

Cr. 1818.

District Court of Appeal, Third District, California.

April 13, 1943.

Habeas corpus ⇐34

Where petitioner in habeas corpus proceeding for custody of minor daughter had previously filed notice of appeal from judgment in proceeding for guardianship of person of such minor, and facts and legal questions in habeas corpus proceeding and guardianship proceeding were the same, District Court of Appeal would not entertain habeas corpus proceeding in nature of a "collateral attack" upon judgment in guardianship proceedings and thereby

anticipate determination of questions presented in guardianship appeal.

See Words and Phrases, Permanent Edition, for all other definitions of "Collateral Attack".

Habeas corpus proceedings by Fred M. Gianoli to secure custody of petitioner's fifteen-year-old daughter, Roberta Mabel Gianoli, allegedly restrained of her liberty by Floyd Walker and Iola Walker.

Petition denied and writ discharged.

Frank W. Taft and Henry C. Spurr, both of Ukiah, for petitioner.

Preston & Gibson, of Ukiah, for respondent.

ADAMS, Presiding Justice.

On December 3, 1942, Fred M. Gianoli filed herein a petition for a writ of habeas corpus, alleging that his daughter, Roberta Mabel Gianoli, aged fifteen years, was being restrained of her liberty by Floyd Walker and Iola Walker, his wife; that on or about September 1, 1935, petitioner had placed said child with the Walkers and had been paying them for taking care of her; that since said date petitioner had remarried and that he and his wife had repeatedly asked that his daughter be surrendered to him, but that the Walkers had refused. He also alleged that on the 16th day of October, 1942, he had applied to the superior court for a writ of habeas corpus, praying that his daughter be taken from the custody of the Walkers, and that said court had issued a writ, but upon hearing thereof had denied petitioner relief and had remanded said child to the custody of the Walkers.

The writ having issued from this court, respondents produced the minor in court and made a return alleging that the said Roberta had been living with them at their home in Cloverdale for more than six years, that they were entitled to her custody by virtue of certain guardianship proceedings in the Superior Court of Sonoma County wherein that court, on November 19, 1942, had appointed them guardians of the person of said minor, and that they had duly qualified as such guardians and letters of guardianship had been issued to them on November 21, 1942. Attached to the return, as exhibits thereto, were certified copies of the papers in the guardianship proceeding, including the petition for appointment, nomination of the Walkers as guardians made by the said minor, opposition to the petition filed by Fred Gianoli, the findings and order of the court appointing the Walkers guardians, and the letters of guardianship. They also alleged the filing by Gianoli of a petition for writ of habeas corpus in the Sonoma County court, and attached to their return, as exhibits, the petition, return and order therein. It was further alleged in said return, that on November 27, 1942, petitioner had filed notice of appeal to this court from the order appointing the Walkers guardians of said minor.

At the hearing of the petition before this court it was stipulated by the attorneys for the respective parties that the transcript on appeal in the guardianship matter should be considered as the evidence herein.

The findings and order of the court in that proceeding recite that the minor, Roberta Mabel Gianoli, was born on June 13, 1927; that she was and had been for more than six years temporarily domiciled in Sonoma County, during which time she had been living with the Walkers; that said minor had, in writing, nominated the Walkers as her guardians, that no other guardian had been appointed or nominated by her since she had arrived at the age of fourteen years, and that she had no guardian of her person; that the Walkers were fit, proper and suitable persons to have her care, custody and control; that it was necessary and convenient that a guardian or guardians of her person be appointed, and that her nomination of guardians was her free and voluntary act. It was therefore ordered that the Walkers be appointed guardians of the person of said minor and that letters of guardianship issue to them upon their taking the oath of office as such guardians.

The record in the habeas corpus proceeding in the lower court shows that the Walkers set up in their return therein that said minor was over the age of fourteen years, that she had nominated them as the guardians of her person, and that proceedings for letters of guardianship were pending in that court; that respondents were fit and proper persons to have the care, custody and control of said child, that they were entitled to letters of guardianship, and that it was convenient and proper that such guardians be appointed. It also shows that after hearing in that proceeding the trial court made an order on the 6th day of November, 1942, in which it set forth the facts alleged in said return, and that,

in the guardianship proceeding, the court had, on the same day, made an order appointing the Walkers guardians of the person of said minor; that it would be for the best interest and welfare of said minor to remain in the custody of respondents, and that, therefore, the petition of Fred M. Gianoli should be denied and said minor should be remanded to the custody of the Walkers.

The bill of exceptions, made a part of the transcript on appeal in said guardianship matter, shows that upon the hearing thereof it was stipulated in open court by respective counsel for the parties that both petitioners and contestant are fit and proper persons to be appointed guardians of the person of said minor.

From the foregoing it is apparent that no question is presented in this proceeding that was not presented and ruled upon by the lower court in both the guardianship and the habeas corpus proceedings therein. The facts and the legal questions are the same. On the appeal in the guardianship matter we shall be called upon to decide the questions of law when the case is reached on our calendar. As notice of appeal therein had already been filed by petitioner before the proceeding before us was instituted by him, we are not disposed to anticipate the determination of the questions there presented by deciding them in this proceeding which is, in effect, a collateral attack upon the judgment therein.

A similar situation was presented by In re Green, 67 Cal.App. 504, 226 P. 76, except that in that case the guardianship proceedings were still pending in the lower court. This court there held that pending the determination by the lower court of the issue of the fitness of the petitioner, the mother of the minor, to have its custody, this court would not interfere, by writ of habeas corpus, with the custody of the minor by another.

Also in the case of Ex parte Dupes, 31 Cal.App. 698, 161 P. 276, where an appeal was pending from a decree in a divorce action which involved the custody of a minor child, the court said that, pending the appeal, a new proceeding (in habeas corpus) involving the same questions at issue in the case on appeal, could not be based thereon.

The petition is denied and the writ discharged, without prejudice.

PEEK and THOMPSON, JJ., concurred.

58 Cal.App.2d 124

ALLEN v. BANK OF AMERICA NAT. TRUST & SAV. ASS'N.

Civ. 13854.

District Court of Appeal, Second District, Division 1, California.

April 13, 1943.

As Modified on Denial of Rehearing May 12, 1943.

1. Banks and banking ⇦138

The relation of "banker and depositor" is founded on "contract", and essence of bank's obligation under the contract is that in consideration of the deposit, the bank will, whenever by presentation of genuine check in the hands of a person entitled to receive the amount of the check, a demand for payment is made, honor such check if sufficient funds to cover the amount thereof are on deposit.

See Words and Phrases, Permanent Edition, for all other definitions of "Banker and Depositor" and "Contract".

2. Banks and banking ⇦143(1)

Whenever a bank fails to discharge its agreement with its depositor by dishonoring a duly presented check, a right of action then accrues and although in a sense the injury arises from "contract" it is nevertheless viewed in another sense, independent of contract, and sounds in "tort", involving an element of wrong or a violation of duty. Civ.Code, § 3523.

See Words and Phrases, Permanent Edition, for all other definitions of "Tort".

3. Banks and banking ⇦143(1)

Although drawee bank might rightfully require that a check be produced and surrendered before payment was made, and no liability would attach to bank until such presentation, the bank could waive its right to require presentation. Civ.Code, §§ 3151 to 3156, 3229, 3265a, 3265e.

4. Banks and banking ⇦143(1)

If check was regular as to signature and name of drawee bank and was correctly drawn on proper account, bank in advising holder in response to telegram inquiring whether $25 check was good, that maker had no account with bank "waived" right of bank to require presentation of check, and bank could be held liable for dishonoring check, since bank's action was tantamount to absolute refusal to pay check and it would be an idle act not required by the law for the holder to

send check to bank. Civ.Code, §§ 3151 to 3156, 3229, 3265a, 3265e, 3532.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

5. Banks and banking ⇐143(4)

In action for damages allegedly resulting from action of bank in dishonoring check drawn by depositor, wherein the check was not pleaded in haec verba, complaint which failed to show that check was drawn in name of depositor as such name appeared of record at drawee bank and that it was drawn on and that inquiry by holder was directed to specific branch of bank in particular city where depositor's account was maintained, was demurrable. Civ.Code, §§ 3151 to 3156, 3229, 3265a, 3265e.

6. Banks and banking ⇐143(4)

In action for damages allegedly sustained as result of bank's action in dishonoring check drawn by depositor, amended complaint which alleged that depositor received value from holder for amount of check and that holder caused check to be presented to bank sufficiently showed that the check was delivered to holder in exchange for money and other things of value and that the holder as holder caused the check to be presented to the bank. Civ.Code, §§ 3151 to 3156, 3229, 3265a, 3265e.

7. Banks and banking ⇐143(1)

Telegram sent by bank to holder which had inquired whether depositor's check was good, that the depositor had no account with bank constituted "notice" that check if produced would be dishonored, as against bank's contention in depositor's action for damages resulting from dishonoring of check that bank's telegram amounted only to statement of depositor's financial standing with bank on date of telegram and was sent in response to an inquiry therefor. Civ.Code, §§ 3151 to 3156, 3229, 3265a, 3265e.

See Words and Phrases, Permanent Edition, for all other definitions of "Notice".

8. Banks and banking ⇐143(1)

That depositor whose check was dishonored by bank was not a trader or merchant did not preclude recovery of damages resulting from dishonoring of check, in absence of malice, since under statute common-law distinction between "traders" and "nontraders" is abolished. Civ.Code, § 3320.

See Words and Phrases, Permanent Edition, for all other definitions of "Nontrader" and "Trader".

9. Banks and banking ⇐143(5)

Where depositor whose check is wrongfully dishonored by bank is established in business, wrongful dishonor of check raises presumption that depositor has sustained substantial damage. Civ. Code, § 3320.

10. Banks and banking ⇐143(4)

That depositor asked for more items of damage than were recoverable from bank which dishonored check drawn by the depositor, such as mental suffering and humiliation, did not impair sufficiency of complaint where there were other recoverable items of damage pleaded. Civ.Code, §§ 3151 to 3156, 3229, 3265a, 3265e.

11. Appeal and error ⇐1178(8)

In action for injuries sustained as result of action of bank in dishonoring depositor's check wherein demurrer to amended complaint was sustained without leave to amend, and on appeal complaint was determined to contain certain deficiencies which could be corrected, depositor was entitled to opportunity to amend even though he did not ask permission in trial court to amend. Civ.Code, §§ 3151 to 3156, 3229, 3265a, 3265e; Code Civ. Proc. § 472c.

YORK, P. J., dissenting in part.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by William C. Allen against the Bank of America National Trust & Savings Association for damages resulting from defendant's refusal to honor a check drawn by the plaintiff on the defendant, although plaintiff allegedly had sufficient funds to cover the check on deposit in the defendant. From judgment of dismissal, the plaintiff appeals.

Judgment modified and cause remanded with directions.

Hansen & Sweeney and J. E. Simpson, both of Los Angeles, for appellant.

Louis Ferrari, of San Francisco, and Edmund Nelson and G. L. Berrey both of Los Angeles, for respondent.

WHITE, Justice.

By his third amended complaint filed herein plaintiff alleged that he is a retired U. S. Navy Lieutenant, a graduate of the U. S. Naval Academy at Annapolis, Maryland, and was known to defendant bank as Lieutenant W. C. Allen; that he was engaged in the engineering business and that between August 21 and September 21, 1940, he had on deposit in a commercial bank account with defendant bank at Los Angeles, California, a sum of money in excess of $25. Plaintiff then alleged that on August 31, 1940, while he was in Detroit, Michigan, he made and drew upon his said bank account with defendant bank by delivering to the Fort Shelby Hotel Company his check for $25 for which he received value from the payee. It is then alleged in the complaint that the hotel company "caused said check to be presented at and to the defendant bank on which it was drawn at Los Angeles, California, during the business hours of said bank". It is further alleged in the complaint that said presentment was made by telegram sent by the hotel company to the defendant bank reading "Advise if Lt. W. C. Allen check $25 good." It was then charged in the complaint that the records of defendant bank disclosed that there were sufficient funds to plaintiff's credit in his account to pay said check all to the knowledge of said bank and "notwithstanding that defendant bank could have required that said check be personally exhibited to it, said bank waived and excused any irregularity in presentment, and refused to pay said check and dishonored the same" upon the ground and by notification to said payee that plaintiff herein "had no account with the defendant bank". Plaintiff further alleged in his amended complaint that by reason of the aforesaid conduct and acts on the part of the defendant bank he was damaged in his credit; in the good name which he held in his business; and that he was caused humiliation and physical and mental suffering. The complaint further sets forth that at the time of the dishonor by defendant bank of plaintiff's check he was following his profession as an engineer, which included acting as promotional sales engineer, and "pursuant thereto he was then and there negotiating business transactions which would have returned to him gains and profits from the pursuit of said business and profession". Then follows a charge in the complaint that as a proximate result of the actions of defendant bank, "said business transactions were not consummated by the parties interested therein, who withdrew therefrom and refused to have any further dealings with plaintiff".

To the foregoing complaint, defendant filed its demurrer upon the grounds that sufficient facts were not alleged to constitute a cause of action, and by way of special demurrer defendant claimed that from the complaint it did not appear by what act the bank waived presentation of the check, nor by what act the bank refused to pay the check or dishonored the same; or how or in what manner plaintiff was damaged. That it did not appear from the complaint how the act of the bank prevented consummation of plaintiff's business transactions and that the matter of such transactions was not sufficiently set forth. The special demurrer also challenged the sufficiency of plaintiff's allegations as to how the acts of the bank injured him in his credit or good name and charged that the complaint did not show with what persons plaintiff's credit was injured. Finally the demurrer alleged that it did not appear from the complaint on what branch of the defendant bank the check was drawn or at what branch it was presented by telegram.

By its order, the trial court sustained defendant's demurrer to the amended complaint without leave to amend and a judgment of dismissal was entered. From such judgment plaintiff prosecutes this appeal.

[1, 2] We think it may safely be said that the cause of action attempted to be stated herein rests and is dependent upon the duty of a bank toward its depositors. The relation of banker and depositor is founded on contract. The essence of the bank's obligation under such debtor and creditor contract is that in consideration of the deposit by the customer or depositor, the bank will whenever by the presentation of a genuine check in the hands of a person entitled to receive the amount of such check, a demand for payment is made, honor such check if sufficient funds to cover the amount thereof are on deposit. Vol. 5, American and English Encyclopedia of Law, 2d Ed., pages 1059, 1060. And the rule is firmly established in this state that whenever the bank fails to discharge its agreement by dishonoring a duly presented check, a right of action then accrues. It has been held that while in a sense the injury arises from contract it is nevertheless viewed in another sense, independent

of contract, and sounds in tort, involving an element of wrong or a violation of duty. Siminoff v. James H. Goodman Co. Bank, 18 Cal.App. 5, 121 P. 939; Reeves v. First National Bank, 20 Cal.App. 508, 129 P. 800. As was said in the first-mentioned case at page 12 of 18 Cal.App., at page 942 of 121 P., "A single refusal to honor a check might work the ruin of a business man. That the returning of a check by a bank to the payee, endorsed 'No funds,' would necessarily tend to injure the credit and business standing of the drawer of the check, is a proposition so obvious as to need no argument to establish its truth." For this as for every other wrong, there is a remedy. Civil Code, Sec. 3523.

Respondent first contends that a check may be certified only for the drawer or holder; that there is no allegation in the amended complaint that the hotel company was either drawer or holder, or if so, that the bank was aware of such fact. It is argued that from a reading of the complaint the bank may have regarded the hotel company's telegraphic inquiry as being merely an inquiry as to the credit of plaintiff and that nothing contained in the pleaded telegram indicated that a certification was desired. Conceding the rule to be that the only right which the holder of a check has is to receive payment of it when presented to the bank and sufficient funds are available therefor; and that the bank is not obligated to certify a check, or liable for its refusal so to do, we do not perceive the pertinency of such rule to the issues here involved. This is not an action based on a refusal to certify a check but is an action to recover damages for injuries allegedly sustained for dishonoring and refusing a check.

Therefore, one of the questions presented on this appeal is whether there was under the allegations of the amended complaint a valid presentation of the check in question to the drawee bank.

[3, 4] Section 3265a of the Civil Code defines a check as "A bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this title applicable to a bill of exchange payable on demand apply to a check." Section 3265e of the same code provides in part that a bank is not liable to the holder of a check unless or until it accepts or certifies the check. The rules governing presentment are contained in Civil Code, Sections 3151 to 3156, and Section 3155 reads, "The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it." Without doubt, as contended by respondent, the drawee bank was entitled under the law to have the check presented by delivery to the bank with demand for payment thereof, but appellant contends that in the instant case actual presentation of the check was waived by the defendant bank. Section 3229 of the Civil Code provides that presentment for acceptance is excused and a bill may be treated as dishonored where, although presentment has been irregular, acceptance has been refused on some other ground. Section 3268 of the Civil Code appears to be authority for the statement that the benefits of the law requiring and defining presentment may be waived by any party entitled thereto, unless such waiver would be against public policy. It seems clear, therefore, that while the drawee bank under its obligation to pay the depositor's money to holders of checks issued by him may rightfully and under the law require that checks be produced and surrendered before payment is made and that no liability attached to the bank until such presentation and production is made, nevertheless the bank could waive the advantage of laws and rules adopted and intended for its benefit. The question then arises—Did the action of the bank in responding to the telegram sent by the holder of the check advising that the maker thereof had no account with the defendant bank, waive the right of such bank to require physical presentation of the check in order to impose liability upon it for dishonoring the same. We are convinced that the bank did waive such right, Sec. 3513, Civil Code, assuming that in all other respects the check was regular as to signature, name of drawee bank, and was correctly drawn upon the proper account. In addition to section 3229 heretofore referred to, section 3160 of the Civil Code provides that presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument. The telegram from defendant bank to the holder of the check explicitly advised the latter that the drawer of the check had no account with the drawee bank. Manifestly it would be but an idle act for the hotel company to send the check to the bank

and actually and physically present it for payment. The law neither does nor requires idle acts, Sec. 3532, Civil Code. The telegram sent by the defendant bank was tantamount to an absolute refusal to pay the check as described in the telegram for the reason therein stated, and which was a reason other than irregular presentation. When, therefore, the bank did not express any desire to see the check, it must be held that actual presentment for acceptance under the circumstances here present is excused and the hotel company as holder of the check was entitled to treat the instrument as dishonored by non-acceptance. Freudenberg v. Lucas, 38 Cal. App. 95, 175 P. 482; Caine v. Foreman, 106 Cal.App. 636, 640, 289 P. 929; Porter v. East Jordan Realty Co., 210 Mich. 398, 177 N.W. 987, 11 A.L.R. 963.

[5, 6] However, we are persuaded that respondent must be upheld in its contention that the demurrer to the amended complaint was properly sustained because the pleading fails to allege that the check was made payable at Los Angeles; does not designate the branch of defendant bank at which it was made payable; and to the foregoing may be added the fact that the amended complaint does not allege that plaintiff's account was in the name of "Lt. W. C. Allen" which is the drawer name about which the hotel company telegram inquired. The only allegation in this regard is that the plaintiff "was so known to the defendant bank". This is not sufficient. Where the check is not pleaded in haec verba, the complaint must show that the check was drawn in the name of the depositor as such name appears of record at the drawee bank, and should further show that it was drawn upon and that the inquiry by the holder thereof was directed to the specific branch of the bank in the particular city where plaintiff's account was maintained. Contrary to respondent's claim, we are impressed that the allegations of the amended complaint are sufficient to show that the check was delivered to the hotel company in exchange for money and other things of value, and that the hotel company as holder thereof caused the check in question to be presented at and to the defendant bank.

[7] Defendant bank further contends that the telegram sent by it amounted only to a simple statement of plaintiff's financial standing with the bank on the date of the telegram, and was sent in response to an inquiry therefor. We do not think so. It was more than that and constituted a notice from the bank that such check if produced at the bank to which the hotel company's telegram was sent, signed "Lt. W. C. Allen", would be dishonored because the drawer thereof had no account with the depositary under the name appearing in the telegram.

[8, 9] Respondent's final contention that appellant in any event can not recover damages in the absence of malice because under the allegations of the amended complaint it is apparent that appellant is not a trader or merchant, is without merit. Sec. 3320, Civil Code, places both traders and nontraders in this state on an equal basis so far as liability on the part of a bank and its depositors is concerned. The section provides that no liability shall attach to a bank in favor of a depositor because of nonpayment of a check which should have been paid, through mistake or error, and without malice, unless the depositor shall allege and prove actual damage by reason of such nonpayment, and in the event he does plead and prove actual damage, the liability shall not exceed the amount so proved. It is therefore apparent that the quoted section abolishes the common-law distinction between traders and nontraders. Siminoff v. James H. Goodman Co. Bank, supra; Reeves v. First National Bank, supra. In the Reeves case the court said, "No special damages were sought, and that there was no claim that the refusal to pay the checks was the result of ill will or malice, but it does appear that the plaintiffs were established in business, and, where this is so, the great weight of authority is to the effect that the wrongful dishonor of a check raises the presumption that the drawer has sustained substantial damage, * * *."

[10] Even though plaintiff in his amended complaint has asked for more items of damage than are recoverable, such as mental suffering and humiliation, this does not impair the sufficiency of the complaint where, as here, other and recoverable items of damage are pleaded. Conner v. Bank of Bakersfield, 174 Cal. 400, 163 P. 353.

[11] The deficiencies in the amended complaint to which we have alluded are not such that they may not or could not be corrected if true facts to support such

corrections are present. Although appellant did not ask permission in the trial court to again amend his complaint, we feel that such opportunity should be given him. It is the law that when an order is made sustaining a demurrer without leave to amend, the question as to whether or not the court abused its discretion is open on appeal even though no request to amend the questioned pleading was made. Sec. 472c, Code of Civil Procedure.

The judgment appealed from is hereby modified by striking therefrom the words "This action be and it is hereby dismissed" and the cause remanded with directions to the court below to permit appellant to further amend his complaint if he be so advised. Respondent to recover costs on appeal.

DORAN, J., concurs.

YORK, Presiding Justice (concurring and dissenting).

I concur only in that portion of the foregoing opinion which holds that the order sustaining the demurrer was proper, but I dissent from that portion thereof which suggests to the plaintiff just how to prepare his amended pleading, and which orders the trial court to permit the filing of an amended pleading.

The third amended complaint in question does not even intimate a cause of action against defendant bank, and the briefs filed by plaintiff in this appeal do not even suggest that any of the facts stated in the foregoing opinion as being proper to allege are any of them true. To the contrary, the verified complaint upon its face conclusively shows that plaintiff has no cause of action. In the absence of any statement by the plaintiff as to what amendments, if any, he intends to make, I think it is dangerous, as well as improper, for this court to suggest any form of complaint for the plaintiff to swear to. I do not believe it is within the province of this court, at least in the absence of any intimation of facts which would tend to show that a cause of action actually exists, to suggest what the complaint should contain, in a case where the plaintiff fails to show or to suggest facts justifying his request for permission to file an amended complaint after a general demurrer to the complaint has been sustained.

If a draft or check is signed in a different manner from that in which an account is carried (and certainly if not presented to the particular branch bank where any account referred to is carried), any other branch bank would be more than remiss in its duty if it paid the same. If this is so, how could any action be based on the facts alleged in the complaint or even upon those suggested in the main opinion of this court?

Rehearing denied; YORK, J., dissenting.



HAMES et al. v. RUST et al.

Civ. 6727.

District Court of Appeal, Third District, California.

April 13, 1943.

Rehearing Granted May 13, 1943.

1. Mines and minerals ⇐64

A lease with option to purchase mining claims which did not prohibit assignment thereof, but provided that agreement should be binding on personal representatives, heirs and assigns of the parties, was assignable.

2. Mines and minerals ⇐59

Evidence sustained findings that owner of mining claims had granted to assignee of lease with option to purchase an extension of time in which to perform terms and conditions of lease and option before executing another lease and option to plaintiffs and that original lease and option was in full force and effect at time plaintiffs sought to cancel it for default.

3. Mines and minerals ⇐59

Agreement of assignee of lease with option to purchase mining claims not to sue owner of claims for conversion of property belonging to assignee was a sufficient "consideration" for written modification of lease and option and extension of time for making stipulated payments thereunder. Civ.Code, § 1605.

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration".

4. Contracts ⇐237(2)

Any new agreement between the parties to existing executory contract made in substitution or modification of older compact and bilateral in benefit or burden has, like primary contract, a sufficient

"consideration" in the mutual advantages or obligations which it confers or imposes. Civ.Code, § 1605.

5. Contracts ⇐237(2)

Where an agreement amounts to a waiver or discharge of mutual obligations in a contract, either in whole or in part, the discharge of each by the other from the obligations of the contract may furnish a sufficient "consideration". Civ. Code, § 1605.

6. Mines and minerals ⇐59

Where owner's agreement to extend the time for making deferred payments under a lease with option to purchase mining claims was supported by consideration and assignee of lease and option relied thereon and resumed operation of mine, owner could not rescind extension agreement prior to fulfillment of modified covenants by assignee. Civ.Code, § 1605.

7. Mines and minerals ⇐59

Written modification of lease with option to purchase mining claims by which owner specifically cancelled and released past due deferred payments and payments to become due before specified future date required no consideration. Civ.Code, § 1541.

8. Mines and minerals ⇐59

Rights of assignee of lease and option to purchase mining claims under a valid modification thereof and extension of time for making payments thereunder, executed by owner, were not affected by subsequent execution by owner of another lease and option to third persons and purported transfer of owner's interest in the original lease.

Appeal from Superior Court, Nevada County; George L. Jones, Judge.

Suit by J. T. Hames and others against John Rust and others to cancel a lease and option to purchase certain mining claims originally executed to named defendant and another and by them assigned to the Deer Creek Union Mining Company and to quiet title to such claims. Upon the death of J. T. Hames pending appeal, H. Ward Sheldon, as administrator with will annexed, etc., was substituted as a party plaintiff. From a judgment that they take nothing by their suit, plaintiffs appeal.

Judgment affirmed.

H. Ward Sheldon, in pro. per., of Nevada City, for appellants.

Busick & Busick, of Sacramento, for respondent.

THOMPSON, Justice.

The plaintiffs brought suit to cancel a lease and option to purchase from George A. Nihell two mining claims in Nevada County for alleged default of the terms thereof, and to quiet title thereto. The lease and option are included in one instrument originally executed to the defendants John A. Rust and S. W. Tull, and subsequently assigned to the respondent, Deer Creek Union Mining Company. Three years later, while the former lease was in force, the owner of the claims, George A. Nihell, executed to J. T. Hames and Jett A. Hames a similar lease and option to purchase the claims. The plaintiffs thereafter served notice of default upon the mining company and brought this suit. The court adopted findings favorable to the mining company and rendered judgment against plaintiffs to the effect that they take nothing by this suit. From that judgment this appeal was perfected.

George A. Nihell owned two mining claims in Nevada County called the "Union Quartz Mine" and the "Union Extension Quartz Mine." October 27, 1934, the owner executed to John A. Rust and S. W. Tull a written lease and option to purchase the claims for the sum of $30,000, to be paid in specified monthly installments together with ten per cent of all net proceeds derived from sales of ore extracted from the mines. This lease and option contained the following provision:

"This agreement shall inhere to and be binding upon the personal representatives, heirs and assigns of the parties hereto."

The option and lease was assigned to Deer Creek Union Mining Company on December 22, 1934. In the fall of 1936, the time for performance of that agreement was extended as the court determined. In 1937, the mining company was in default of certain payments provided by the contract. January 15, 1937, George A. Nihell, the lessor, waived in writing default on account of those deferred payments, in the following language: "I am willing to wait for payments on the mine till the financing program is completed

as it is my understanding that arrangements will be completed in a short time."

June 19, 1937, Mr. Nihell again waived in writing the previous defaults in payments in the following language: "I hereby agree to extend the moratorium on your lease and option to September 1, 1937, in order to give time to unwater, sample and prospect the Union Mine."

May 6, 1937, regardless of the foregoing extensions of time and waiver, the owner, Nihell, executed to J. T. Hames a lease and option to purchase the claims, on almost the exact terms of the prior lease to Rust and Tull. On June 21, 1937, Nihell executed another option to purchase the claims to J. T. and Jett A. Hames on similar terms, except that the purchase price was reduced to $20,000. June 21, 1937, Nihell also executed to J. T. and Jett A. Hames a purported assignment of his interest in the original agreement of October 27, 1934, authorizing the assignees to collect the payments due thereunder. August 12, 1937, Nihell executed and delivered to the mining company a written modification of the lease and option of October 27, 1934, cancelling and extinguishing all deferred payments and all payments to become due thereunder to November 15, 1937. October 29, 1937, Nihell executed a third option to purchase the mining claims, to J. T. and Jett A. Hames, on substantially the same terms expressed in the original lease. This suit was commenced October 1, 1937, before the last mentioned instrument was executed. The notice of default, upon which this suit is founded, is not dated, and we are unable to determine when it was served on the defendants. It was signed by George A. Nihell, J. T. Hames and Jett A. Hames. It is true that an "insured parcel" was delivered to the secretary of the mining company at Nevada City on July 9, 1937. We are not informed regarding the contents of that parcel. The court found that "it is not true that notice in writing of default was given defendant Deer Creek Union Mining Company, a corporation, in the manner provided by said contract."

The defendant Deer Creek Union Mining Company answered the complaint, denying the material allegations thereof, and affirmatively alleging that it held title to and possession of said mining claims, as assignee of the original lease and option to purchase the claims, executed to Rust and Tull October 27, 1934, and that said instrument is in full force and effect. It denied that the defendants are in default of any of the terms of that agreement, or that plaintiffs ever notified defendants of any default as required by the lease. The answer alleges that the defendants fully performed all of the covenants of their lease and option to purchase; that they did not fail to operate the mines or to make payments as required by said agreement, and, that on the contrary George A. Nihell and the plaintiffs waived any breach of covenants which might have occurred by modifying in writing the contract and by extending the times of payments thereunder. Finally, it is alleged that plaintiffs have no right or title to said claims superior to those which are possessed by the mining company.

The defaults of the defendants Rust and Tull were entered for failure to answer the complaint.

The suit was first tried by the late Judge Raglan Tuttle, and judgment was rendered in favor of the defendant Deer Creek Union Mining Company. A new trial was granted on the ground of insufficiency of the evidence. On appeal that order was affirmed. Hames v. Rust, 14 Cal.2d 119, 92 P.2d 1010. The cause was then retried in Nevada County by Judge George L. Jones, sitting without a jury. The court adopted findings favorable in every respect to the defendant mining company. It was determined that the lease and option to purchase the mining claims, executed by George A. Nihell to John A. Rust and S. W. Tull on October 27, 1934, was duly assigned and transferred to the Deer Creek Union Mining Company; that for a valuable consideration said lease was modified by a written agreement of Mr. Nihell on August 12, 1937; that he subsequently waived in writing all defaults of said mining company with respect to the covenants of said agreement; that the mining company has paid to Nihell all money and installments due under said modified contract; that the plaintiffs failed to give notice of alleged default as required by the agreement; that the lease and option dated October 27, 1934, as modified, is in full force and effect, and that the plaintiffs are not entitled to the relief sought by their complaint. Judgment was accordingly rendered against the plaintiffs. From that judgment this appeal was perfected.

Pending the appeal of this case the plaintiff J. T. Hames died, and the administrator of his estate was duly substituted as a party plaintiff.

The appellants contend that the waiver of breaches of contract and the extensions of time within which to make stipulated payments were given without consideration, and that they were subsequently revoked. It is also asserted that the respondent was unable to make the payments when they became due and that it did not rely on the written extensions of time, and therefore may not complain of a failure to serve the notice of breaches of contract as required by the original lease.

[1] Since the original lease and option, dated October 27, 1934, contained no clause prohibiting the subletting or assignment of the agreement, and upon the contrary specifically provided that it should "be binding upon the personal representatives, heirs and assigns of the parties hereto," it was assignable. Montgomery v. De Picot, 153 Cal. 509, 512, 96 P. 305, 126 Am.St.Rep. 84, 38 A.L.R. 1173, note.

[2] The evidence adequately supports the finding of the court that the lease and option to purchase the two mining claims which was duly executed by George A. Nihell to John A. Rust and S. W. Tull, October 27, 1934, and assigned to the respondent, Deer Creek Union Mining Company, is in full force and effect. There is sufficient evidence to support the further finding that "George A. Nihell, in the Fall of 1936, granted Defendant, Deer Creek Union Mining Company, a Corporation, an extension of time in which to perform the terms and conditions of said contract, * * * and that on January 15, 1937, said owner, George A. Nihell, granted to said Deer Creek Union Mining Company, a Corporation, in writing, an extension of time for a reasonable time, in which to perform the terms and conditions of said contract." The last mentioned written extension of time, previously quoted, was granted before any other lease and option was executed.

[3-5] There was sufficient consideration for the granting of the extensions of time within which to pay the installments of money and to perform the covenants of the agreement. § 1605, Civ.Code; Lincoln Holding Corp. v. Levering, 219 Cal. 427, 27 P.2d 74; Brownfield v. McFadden, 21 Cal.App.2d 208, 68 P.2d 993; 6 Cal.Jur. 168, §§ 117, 118; 12 Am.Jur. 990, § 412. In the authority last cited it is said in that regard:

"Any new agreement between the parties to an existing executory contract, made in substitution or modification of the elder compact and bilateral in benefit or burden, has, like the primary contract, a sufficient consideration in the mutual advantages or obligations which it confers or imposes. Where an agreement amounts to a waiver or discharge of mutual stipulations in a contract, either in whole or in part, the discharge of each by the other from the obligations of the contract may furnish a sufficient consideration."

Section 1605 of the Civil Code provides that: "Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise."

In the present case there is evidence that the modification of the original lease and the extensions of time to make the specified payments were executed in writing in consideration of an agreed forbearance to sue Nihell for a truck and pump belonging to the mining company which he was charged with selling and converting. That forbearance furnishes adequate consideration for the modification and extensions of time.

Mr. Elmer Rastorfer, secretary of the respondent mining company, testified that George A. Nihell wrongfully transferred the property and executed bills of sale to the truck and pump, belonging to that company, to purported purchasers thereof. Rastorfer said that they had discussed that matter several times; that the mining company had demanded a return of that property to which it held title, and that Nihell had wrongfully appropriated and converted it to his own use and benefit by purporting to sell and transfer the truck and pump to a purchaser thereof to whom he executed bills of sale therefor. The witness said, in effect, that the company agreed to and did refrain from suing Nihell on that account in consideration of his giving to the mining company the requested modification and extensions of time to perform the cove-

nants of the agreement, and that he did so. Mr. Rastorfer testified in that regard:

(Mr. Rastorfer): "Several times we discussed about a truck and a pump that he had given a bill of sale for, or for which he owed us money. * * *

"Q. You insisted that he would have to give you an extension of time, otherwise you would proceed against him? A. Sure, we threatened that several times * * *

"Q. This extension of June nineteenth was given to you by Mr. Nihell simply as a concession without any further consideration for it; you didn't pay him anything for it; * * * isn't that right? A. It was given to help him out, too, in this action about the truck and pump. * * * Because we threatened to sue him if he didn't get the pump back. * * *

"Q. Now, on the nineteenth of June, in connection with the extension that we have last talked about, did you agree not to sue him? A. Yes.

"Q. If he would give that extension? A. If he would give us the extension so we could go ahead with this party that we had in mind, that we would not sue him at that time."

No action was brought against Nihell for the truck and pump. We are of the opinion there was adequate consideration for the granting of the modification of the contract and the extensions of time.

[6] The appellants contend that the extensions of time were given without consideration and that Mr. Nihell was therefore authorized to rescind them at any time prior to fulfillment of the modified covenants by the lessee. Atlantic Fish Co. v. Dollar S. S. Line, 205 Cal. 65, 269 P. 926; 6 Cal.Jur. 378, § 227. The foregoing rule has no application to the present case. We have previously held that the extensions of time were given for adequate consideration, consisting of forbearance to sue Nihell on an asserted valid claim, which was a benefit to him and a detriment to the lessee mining company. That brings it within the provisions of section 1605 of the Civil Code.

The decision in the Atlantic Fish Co. case, relied upon by the appellants, was founded on the assumption that the modification of the contract which was there involved, with respect to refrigeration of fish which were to be shipped, was "without any consideration to support it." That case did not involve the principle of forbearance to sue. In the present case not only was there a valid consideration for the extensions of time, but the respondent relied and acted upon that modification by pumping out the flooded mine and by resuming the operation thereof. Mr. Rastorfer testified in that regard: "Q. You accepted his proposition and continued operating the mine? A. Yes, sir."

[7] Moreover the modification of the lease with respect to the deferred payments and to all other payments to become due "before the fifteenth day of November 1937" required no consideration because those obligations were specifically cancelled and released by a written instrument. § 1541, Civ.Code; Weddle v. Heath, 211 Cal. 445, 455, 295 P. 832; W. Ross Campbell Co. v. Sears, Roebuck & Co., 136 Cal.App. 765, 769, 29 P.2d 910; Rogers v. Kimball, 121 Cal. 247, 253, 53 P. 648. Section 1541 of the Civil Code provides that: "An obligation is extinguished by a release therefrom given to the debtor by the creditor, upon a new consideration, or in writing, with or without new consideration."

August 12, 1937, Mr. Nihell modified the respondent's lease of October 27, 1934, by executing and delivering to it a written instrument waiving all unpaid installments together with all payments which would accrue before November 15, 1937. It contains the following language:

"It is hereby understood and agreed that the attached lease and option dated October 15, 1934, and given to John A. Rust and S. W. Tull, who assigned the same to the Deer Creek Union Mining Corporation, be amended as follows: Paragraph two, page two, be amended by adding the following words at the end of the paragraph: 'Or an extension of time granted upon agreement of party of the first part and party of the second part.' * * *

"It is understood and agreed that the balance due party of the first part under the terms of the lease and option before the fifteenth day of November, 1937, is hereby cancelled. Dated August 12, 1937. (Signed) George A. Nihell, party of the first part. Deer Creek Union Mining Co., party of the second part, by O. Kunel, president, E. D. Rastorfer, secretary-treasurer."

The appellants concede that this release and cancellation of those obligations by the written instrument would be a com-

plete defense to this action except for the alleged fact that the owner of the mining claims, Nihell, executed and delivered to J. T. and Jett A. Hames on May 6, 1937, another lease and option to purchase the claims. But the answer to this contention is that Nihell, in consideration of the mining company's forbearance to sue him for his alleged conversion of the pump and truck, as the trial court specifically determined, "in the Fall of 1936, granted Defendant, Dear Creek Union Mining Company, a Corporation, an extension of time in which to perform the terms and conditions of said contract," and again extended in writing, on January 15, 1937, its time for performance, and that the original lease of October 27, 1934, had not been terminated but was therefore in full force and effect.

[8] It follows that the modification of the original lease and the extensions of time were valid and binding and they could not lawfully be rescinded by subsequent notice or by an effort on the part of the owner of the mining claims to thereafter transfer his title or interest therein. The purported transfer of interest in the original lease to J. T. and Jett A. Hames was subject to the paramount title and contractual rights of the mining company.

The court therefore properly determined that the plaintiffs were entitled to take nothing by their action.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concurred.



TURNIPSEED v. HOFFMAN.

Civ. 3024.

District Court of Appeal, Fourth District, California.

April 26, 1943.

Hearing Granted June 24, 1943.

1. Automobiles ⇐242(1)

In action for injuries suffered by electrician when defendant, while backing truck into his private driveway, collided with parked automobiles so as to shove them against crates on which electrician was standing to repair defendant's motor in building at end of driveway, electrician had the burden of proving negligence of defendant.

2. Automobiles ⇐242(1, 2)

In action for injuries suffered by electrician, when defendant, while backing truck into his private driveway, collided with parked automobiles so as to shove them against crates on which electrician was standing to repair defendant's motor in building at end of driveway, "res ipsa loquitur" doctrine was not applicable, so that electrician was required to establish specific negligence of defendant by showing that defendant did some act that a reasonable man would not have done under the circumstances.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

3. Automobiles ⇐244(35)

That truck traveling in reverse struck rear of parked automobile standing in reverse gear with sufficient force to cause it to move another automobile standing in reverse gear three feet away, a distance of two feet and against crates with sufficient force to topple a workman therefrom did not show that truck was traveling backward at an excessive speed so as to warrant finding of negligence on part of truck driver.

4. Automobiles ⇐160(1)

Automobile driver owes the duty of exercising ordinary care for safety of a person walking in a place where driver knows or has good reason to expect that such person will be.

5. Automobiles ⇐244(3)

Evidence showed no such common use of private driveway alongside house to dairy buildings at rear of lot as would warrant inference that dairyman should have expected an unlighted automobile to be parked there at 7 p.m. and should have acted with ordinary care having the presence of such automobile in mind in the use of his driveway.

6. Automobiles ⇐244(3)

Evidence did not support finding that truck driver was negligent in colliding with unlighted automobile parked on driver's private driveway alongside house while

backing closed panel truck into driveway at 7 p.m., where driver customarily backed truck into driveway to loading platform at rear of house and had no reason to expect any automobile to be parked there.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by Harley Turnipseed against Stanley F. Hoffman for injuries suffered by plaintiff when defendant, while backing his truck into his own driveway at night, collided with other vehicles parked therein. Judgment for plaintiff, and defendant appeals.

Judgment reversed.

McFadzean & Crowe, of Visalia, for appellant.

Russell & Heid, of Tulare, for respondent.

BARNARD, Presiding Justice.

This is a personal injury action and the defendant has appealed from a judgment in favor of the plaintiff.

The defendant was and for some years had been engaged in the milk business, buying milk in wholesale quantities, bottling and refrigerating it and then distributing the same on a regular milk route. His processing plant was in some buildings at the rear of his home in the residential section of Tulare. The lot itself was 51 feet wide and 142 feet deep. The house faced south and these other buildings were at the northwest corner of the lot and about 14 feet from the rear of the house. The southwesterly portion of these buildings consisted of an open shed about 16 feet wide, the westerly half of which was used as a garage, and on the easterly half there was a cement floor used as a loading platform in loading and unloading the milk truck. There was a narrow driveway about 7½ feet wide from the street in front, along the west side of the house, and leading directly into the garage portion of the shed. The loading platform in the easterly half of the shed was behind the westerly portion of the house so that to enter or reach the same it was necessary to drive the milk truck along the narrow driveway to the northwest corner of the house and then turn easterly in an "S" turn, and thus enter the easterly half of the shed. The milk truck was a panel truck with a solid closed body. For convenience in loading and unloading it was the defendant's custom, when entering his premises, to back his truck along the narrow driveway and when he reached the northwest corner of the house to turn it easterly in an "S" turn and back to the loading platform.

At the north end of the west or garage half of the shed there was a raised platform about 5 feet from the ground. On this platform were two cooling compressors operated by electric motors. About 2:30 p.m. on December 29, 1939, one of these electric motors was giving trouble and the defendant called a repair man named Wood who came and after examining the motor reported that he did not have the parts required and suggested that he would call another repair man. The defendant acquiesced although he did not learn who it was that Wood intended to call. He informed his wife that Wood was going to call some one else and that she could expect some refrigerator man there during the afternoon. He then left at about 3:30 p.m. in his milk truck to cover his route. He did not return until 7 o'clock that night and did not see the plaintiff until after the accident occurred.

In the meantime, in response to a call to his employers, the plaintiff came to the premises about 4 o'clock. At that time Mrs. Hoffman's automobile stood in the driveway facing the garage portion of the shed but not within the shed. Three milk crates cleated together stood in front of the raised platform at the north end of the garage portion of the shed. The plaintiff stood upon these and examined the motor which was out of order. He informed Mrs. Hoffman that it would be necessary to take the motor to the shop in order to make the repairs. He testified that Mrs. Hoffman told him that it would be necessary to repair the motor and return it that night as otherwise the milk would spoil, and that he told her that he would get it back that evening before he went home. He removed the motor, placed it in his Ford pickup, which he had parked in the driveway behind Mrs. Hoffman's car, and took it to the shop where he made the necessary repairs.

He brought the motor back about 6 o'clock, driving his car into the narrow driveway and parking it near the northwest corner of the house with its rear 4 or 5 feet along the west side of the house and the front portion extending toward the garage half of the shed. He then found that Mrs. Hoffman's car had been driven

forward under the shed and that the three crates on which he formerly stood had been moved over onto the loading platform. He backed Mrs. Hoffman's car about 4 feet so that the rear 4 feet thereof was outside the shed, on the driveway, at which time the rear end of that car was about 3 feet north of the front end of his own car. He put both his own car and Mrs. Hoffman's car in reverse gear. He testified that his reason for so doing was that "in case of someone hitting it, why, it wouldn't shove the car down," and that he understood there was a law that parked cars should be either left in gear or the emergency brake applied. He then moved the three milk crates to a position between the front of Mrs. Hoffman's car and the raised platform on which the compressors were located. He then took the electric motor and some tools from his car and proceeded to reinstall the motor on the raised platform, standing on the three milk crates to enable him to do the work. There was an electric light at the north end of the shed near where the compressors were located, which was burning, and the plaintiff testified that when he arrived about 6 o'clock there was a light burning somewhere in the defendant's house and that it was light enough to enable him to find the tools, which he needed, in his car.

At 7 o'clock the defendant returned from servicing his milk route. He approached his home from the west and looking up the narrow driveway saw nothing therein. In accordance with his usual custom he then headed out into the street and backed his panel truck into the narrow driveway with the intention of making the "S" turn at the rear of his house and backing the truck to the loading platform in the east half of the shed. He did not know that the plaintiff had removed the electric motor and taken it to the shop, and he testified that on a previous occasion when the motor had given similar trouble it had been repaired on the premises without being taken away. He further testified that he thought that any work which had to be done on the motor would have been completed before that time, and that ordinarily his wife's car was parked entirely within the shed when he returned from his trips so as to leave the driveway clear for him to back to the loading platform.

The driveway was narrow and it was necessary for him to change the course of the vehicle at the northwest corner of his house so as to turn the rear end thereof toward the east half of the shed, where the loading platform was located. He testified that in order to do this it was necessary for him to watch the edge of the narrow driveway and to watch closely for the northwest corner of his house, since it was necessary to go as close as possible thereto in order to complete the operation of backing up to the loading platform. He testified that he drove very slowly, estimating his speed at one or two miles per hour, and that as he proceeded he held the door of his truck open with one arm and continuously looked backward with his main attention centered on the northwest corner of his house.

When he arrived at a point about 4 feet from the northwest corner of his house his truck hit the rear end of the plaintiff's car which was unlighted. This shoved the plaintiff's car forward the 3 feet which separated it from Mrs. Hoffman's car and in turn pushed the latter car forward 2 feet and against the crates on which the plaintiff was standing with his back toward both vehicles. The plaintiff fell backward upon the radiator of Mrs. Hoffman's car and received the injuries which are here in question. The defendant testified that when he returned to his home at 7 o'clock he was unable to see the plaintiff's car in his driveway because it was dark and it was completely obscured by the shadow caused by his wife's car.

There is little conflict in the evidence. The plaintiff testified that in a conversation immediately after the accident the defendant told him that he had been in the habit of backing into the driveway without looking "clear back", that he did not know the plaintiff was there, and that "he had forgotten about anyone being there working on the motor". The defendant denied having made any of these statements to the plaintiff except that he did not know that he was there. It does appear, without contradiction, that before turning out to back into his driveway the defendant looked along the driveway toward the garage and saw nothing, and that as he backed in he was watching the edge of the driveway and looking for the northwest corner of his house in order to make the turn required at that point. It would also seem clear from the general situation and the fact that he was driving a solid panel truck that from where he sat as he was backing his truck in along this driveway he could not have seen the

plaintiff's car which was parked therein directly behind him. While the plaintiff testified that it was light enough about 6 o'clock to enable him to get his tools from his car there is neither evidence that this was the situation at 7 o'clock, when the defendant returned, nor any evidence that the scene was so lighted that the defendant ought to have seen the plaintiff's car while he was backing his own truck into the driveway. Assuming that the defendant stated to the plaintiff that he had forgotten about any one working there on the motor it also appears without contradiction, that he had no knowledge of the plaintiff's conversation with Mrs. Hoffman and that he did not even know that the plaintiff had taken the motor away from the premises.

[1, 2] The main question presented is as to whether the court's finding, that the defendant "so carelessly, recklessly and negligently and without regard for the safety of plaintiff, drove, managed and operated" his milk truck as to cause it to shove the other vehicles forward, is sustained by the evidence. The burden was on the plaintiff to prove negligence on the part of the defendant and, since the doctrine of res ipsa loquitur is not applicable here, it was incumbent upon the plaintiff to establish by the evidence some specific act of negligence on the part of the defendant, or in other words to establish that he did some act which a reasonable man would not have done under the existing circumstances.

[3] The plaintiff first argues that such negligence appears in that the defendant drove his milk truck, from which at best it is most difficult to see, in a backward direction and without looking toward the place where the plaintiff was working, with such speed as to move two automobiles, both in reverse gear, with sufficient force to topple the plaintiff from the milk crates upon which he was standing. While it would take some force to move two vehicles which were standing in reverse gear there would naturally be considerable force from the milk truck which was traveling in reverse, and there is nothing in the fact thus relied on to indicate that any excessive speed was used by the defendant in backing into his driveway. This was the defendant's driveway and the controlling question must be, and is, whether he should have anticipated the possible presence of the plaintiff's car on this driveway, and not with respect to any particular speed at which the defendant was moving.

[4] Upon the controlling issue plaintiff relies upon the rules laid down in Colgrove v. Lompoc, etc., Club, 51 Cal.App.2d 18, 124 P.2d 128, and Yamauchi v. O'Neill, 38 Cal. App.2d 703, 102 P.2d 365, and argues that it appears from the evidence here that this driveway was commonly used by the defendant's customers and others, and that the defendant should therefore have known of, or had good reason to expect, the presence of the plaintiff's car upon this driveway in the position in which it was parked. In the first of these cases, it was held that if the plaintiff was rightfully upon a part of the premises where the operator of an automobile knew or had reason to expect him to be the operator of the automobile owed him a duty to exercise ordinary care to avoid injuring him. The second of these cases involved a driveway, leading to a court in the center of a business building in which were a number of stores, which was customarily used in common by all of the tenants in the building and persons having business with them. The plaintiff was injured while walking in this driveway by a panel truck which was backed into her and the court there applied the same principle, that the driver of an automobile owes the duty of exercising ordinary care to a person walking in a place where the operator knew or had good reason to expect that he would be.

[5, 6] In order to bring himself within this rule the plaintiff relies upon the following testimony. The defendant testified on cross-examination that when Mr. Wood came to look at the electric motor early in the afternoon of this day, he drove into this driveway and parked "toward the back end of the driveway." He was then asked "That is the common place for people who have business back there, to go?" and he replied: "Yes." Again, he was asked whether he had any of that kind of trade where people called at his place of business to get their milk. He then testified that he occasionally had such people although they tried to discourage it, that he had four neighbors who did this and that occasionally people would be out of milk and "even get us out of bed at night, knowing we are in the milk business and live right there at our business." This is all of the evidence on this subject and we think it falls short of showing such a common or general use of this driveway as would support an inference that the defendant either knew or should have expected the presence of an

unlighted car parked in this private driveway at this time and under these circumstances. There is no evidence that the few people who occasionally called to get milk ever came in cars or, if they did, ever parked these cars in this driveway. While it may have been common for people who had business there to drive into the driveway, as the defendant testified, he was then talking about people who came on business as the repair man Wood had done, which was in the daytime, and there is no evidence that any one had ever before come on business at night and parked his car in this driveway. The uncontradicted evidence is that the defendant was in the habit of backing into this driveway on his return from his delivery trips and the only reasonable inference is that this driveway was not commonly or customarily used by any one who came on business after nightfall as a place for parking his car. There is no evidence that any one prior to this time, whether customarily or otherwise, had ever parked an unlighted or unguarded car in this position after ordinary business hours. The defendant looked up the driveway before entering the same and in thereafter watching the edge of the driveway and looking closely for the northwest corner of the house, where it was necessary to make a turn, he was doing what it was necessary to do and what any reasonable person would have done. In the absence of anything which would naturally lead him to expect that another's car would then be parked in the driveway it cannot be said that as a reasonable man he should have left his truck and walked back to the loading platform to see that the way was clear. From his past experience and from what he then knew, or could reasonably have been expected to have anticipated, he was justified in believing that the situation was that which usually and customarily prevailed and that he could proceed to the loading platform in the usual manner. It was his own private driveway, it was long past ordinary business hours, he did not know that the motor had been taken away or that any one had returned with it and, in our opinion, the evidence does not support the inference that he had good or any reason to expect the obstruction in his driveway which actually existed. It follows, we think, that there is no substantial evidence to support the essential finding made by the court.

For the reasons given, the judgment is reversed.

MARKS and GRIFFIN, JJ., concur.



58 Cal.App.2d 340

CALIFORNIA COTTON CO-OP. ASS'N, Limited, v. BYRNE.

Civ. 3070.

District Court of Appeal, Fourth District, California.

April 23, 1943.

Rehearing Denied May 20, 1943.

Hearing Denied June 21, 1943.

1. Sales ⇐397

In action by buyer to recover money paid to seller for cotton which buyer rejected on ground that it was not of the required grade, evidence justified judgment for seller on ground that there was nothing due buyer.

2. Sales ⇐397

Amount of rejections by buyer at or near time of fall in market price of cotton compared to previous number of rejections was a circumstance to be considered in determining whether buyer was entitled to recover against seller for money paid to seller.

3. Appeal and error ⇐931(1)

The District Court of Appeal was required to assume that respondent's testimony was true.

4. Sales ⇐168(4)

The acceptance by seller of cotton rejected by buyer on ground that it was not of proper grade, and sale of cotton to third persons, not for seller himself, but for buyer, did not "estop" seller to raise any question respecting rejections when sued by buyer for amounts paid to seller, and was not a "waiver" of seller's right to claim arbitrary rejection on part of buyer. Civ. Code § 3354.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop" and "Waiver".

5. Damages ⇐62(1)

It is the duty of one who knows he is threatened with damage to do all he reasonably can do to minimize his damage. Civ.Code, § 3354.

6. Sales ⇐391(9)

Where cotton was arbitrarily rejected by buyer on ground that it was not of proper grade, buyer was not entitled to recover insurance and storage charges on rejected cotton from seller.

7. Account stated ⇐3

The arbitrary rejection of cotton by buyer on ground that it was not of proper grade did not give rise to relation of "debtor and creditor", and hence buyer could not maintain action for an account stated.

See Words and Phrases, Permanent Edition, for all other definitions of "Debtor and Creditor".

8. Account stated ⇐1

The theory on which an action for an "account stated" is allowed is that transactions have occurred between the parties from which relation of debtor and creditor has arisen and thereafter one or both have rendered or made statements or declarations specifying definitely the amount due on account thereof, and thereafter there has been an agreement, express or implied, by one who is the debtor and the other that a certain sum is due him on such account, together with express or implied promise to pay.

See Words and Phrases, Permanent Edition, for all other definitions of "Account Stated".

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by the California Cotton Cooperative Association, Limited, against J. C. Byrne, to recover on an account stated and to recover for storage charges and insurance on rejected cotton. From an adverse judgment, the plaintiff appeals.

Judgment affirmed.

Harvey, Johnston & Baker, of Bakersfield, for appellant.

Lawrence W. Young, of Fresno, for respondent.

GRIFFIN, Justice.

This is an action to recover $4,573.31. The complaint contains six separate causes of action. The last five of these were based on accounts stated. The first cause of action was based on a course of conduct between appellant and respondent in connection with contracts of sale between them covering sales of several lots of cotton aggregating about 1,600 bales, out of which course of conduct appellant claims in the last five causes of action that there arose accounts stated. The respondent's answer contains denials as to all of appellant's causes of action. The issues went to trial before the court without a jury and resulted in a judgment in favor of defendant and respondent. From this judgment appellant has taken this appeal.

The trial court found generally that in September, 1940, the appellant and respondent entered into an oral agreement under the terms of which they agreed, during the cotton season of 1940–41, that the respondent would sell to appellant strict middling 1⅛ inch cotton for 10¢ per pound and bright middling 1⅛ inch cotton for 9.85¢ per pound, and that the grade and staple of the cotton agreed to be sold could vary between strict middling 1⅛ inch to bright middling 1⅛ inch; that respondent delivered to appellant 2,603 bales of cotton ranging from strict middling 1⅛ inch to bright middling 1⅛ inch, and that appellant accepted 1,007 bales thereof; that after the agreement was entered into the market price of strict middling 1⅛ inch cotton and bright middling 1⅛ inch cotton dropped considerably below the contract price and that by reason of the dropping of the market price the appellant arbitrarily rejected 1,596 bales of the cotton delivered to it. The court then found that the appellant had not suffered any damages as a result of any act of the respondent and that there were no accounts stated between them.

Appellant contends, mainly, that there is no substantial evidence justifying the finding of the trial court. It is argued that there was no substantial evidence to show that there was any drop in the market or that the rejection of the cotton by appellant was arbitrary. The evidence does show that respondent had been engaged in the business of buying and selling cotton for over thirty years and was an experienced judge of the quality and staple of cotton. It was orally agreed that respondent would sell cotton to the appellant at the price set forth in the findings. Appellant company, under the agreement, was to grade, in accordance with the custom, the cotton so

sold for the purpose of fixing the price to be paid by it. The method of measuring the length of the cotton which was pulled from each side of the bale was not by any measuring device but by running the cotton through the classifier's fingers to determine its length. It was testified that this was the customary method used and that classifiers become so expert they can tell its exact length in this manner. Many bales were rejected by appellant because it was claimed by it that the length of the cotton was 1/32 of an inch off of the specifications called for in the contract.

On October 1, 1940, respondent started to fulfill his contract and the cotton was delivered to appellant in various lots. Upon its receipt, appellant classified each bale of cotton as to staple and grade, and as the season progressed there were increasing rejections by the appellant. On October 1, 1940, respondent delivered to appellant 150 bales of cotton and there were no rejections. On October 10, he delivered 200 bales and there were 74 rejections. On October 15, out of 300 bales delivered 109 were rejected. On October 18, out of 400 bales 190 were rejected. On October 22, out of 282 bales 178 were rejected. On October 23, he delivered 422 bales and there were 267 rejections. On November 6th and 7th, out of 399 bales delivered there were 319 rejections. In the latter part of October, 1940, the "spot price" of cotton broke or went down. The evidence discloses that it would take from ten days to three weeks or longer from the date of the sale to deliver the cotton to appellant. Appellant would then send to respondent its notice of rejection of the cotton approximately 60 days after it was delivered. Respondent was paid by appellant as the cotton was shipped to it upon the basis that it was all according to the classification set forth in the agreement. It was apparently understood that if any of the cotton fell short of that classification respondent was to be billed by appellant for the rejected bales. This action was based upon that claim.

Respondent testified that he was an experienced classifier and that before shipment he examined and classified, in the customary manner, each bale of cotton he had shipped to appellant, and it was all cotton ranging from strict middling 1⅛ inch to bright middling 1⅛ inch, and that all of it was well within the specifications required by the agreement.

The trial court apparently accepted respondent's testimony in this respect because it found that nothing was due appellant because of the claimed rejected cotton.

Appellant's classifiers testified that the rejections above listed were proper. They also offered in evidence records of classification of this same cotton, made at the gin by the United States government classifiers. Their record shows that about 1020 bales of the cotton delivered to appellant failed to meet the specifications of grade set forth in the contract and in many cases the grading given by the government was much less than or was different from that given by appellant's classifiers. It is appellant's contention that respondent's evidence of arbitrary grading by appellant is so unsubstantial that it does not even create a conflict in the evidence on the question; that under the agreement the classification given the cotton by appellant was intended to be final and that respondent failed to prove by substantial evidence that appellant acted arbitrarily in rejecting the cotton or perpetrated any fraud upon him.

[1] Bearing upon the question whether there was evidence to show that in October there was a price drop in the cotton market, we find this evidence. Appellant's manager, on cross-examination, testified that at about that time strict middling 1⅛ inch cotton was purchased by his company at 9.90 and at 9.70, 30 points off. In a letter to respondent dated November 14, 1940, signed by appellant's manager, in addition to registering a complaint as to the grade of the cotton shipped to it by respondent, it is remarked: "Ours is a hedging position and we are aware of the fact basis has broken in the last 40 to 50 pounds advance in the market." In response to the question: "When the market started to break, Mr. Byrne, did you receive more rejections on this cotton?" Mr. Byrne answered: "I received more as the market broke further and further." Appellant claims that if the trial court had accepted the government reports and cotton exchange reports in evidence it could not have found that there was any drop in price of the particular grade of cotton here involved over the period in question. The evidence, though conflicting, supports the trial court's finding in this respect and will not be disturbed on this appeal.

[2, 3] The amount of rejections at or about the time of the fall in price and subsequent thereto, compared to the previous number of rejections, is a circumstance to be considered together with the testimony of respondent in connection therewith. If we assume the testimony of respondent to be true, which we must do on this appeal, i. e., that he inspected and classified all of the cotton shipped, and that the grade and staple was according to the contract, it would be reasonable to believe that the increasing amount of rejections immediately after the fall in price was the result of an arbitrary grading. Although the evidence might also reasonably support a contrary view, we cannot say that it is insufficient to support the finding.

[4, 5] It is next contended that since respondent was notified of the number of rejections by appellant and accepted those rejections as "his cotton", he is now estopped from raising any question respecting those rejections. The evidence shows that some of the rejected cotton was sold by respondent after being rejected by appellant. Respondent claims that he sold that cotton, not for himself, but for and on behalf of appellant. The evidence is conflicting in this respect. Assuming the truth of respondent's testimony, under these circumstances, it could not be said that he waived any right to claim palpable arbitrary rejection on the part of appellant. The rule is well settled that it is the duty of one who knows he is threatened with damage to do all he reasonably can do to minimize his damage. Vitagraph, Inc., v. Liberty Theatres Co., 197 Cal. 694, 697, 242 P. 709; Civ.Code sec. 3354.

[6] The first cause of action included certain items such as claimed advance storage charges, insurance and storage charges on rejected cotton, and interest on unpaid balances. One item of $53.80 involved a bale of cotton claimed to have been lost in delivery by a common carrier. A question arose as to whether appellant or respondent should have made a claim for it. The trial court was justified in believing that appellant's failure to make the claim for it was its loss rather than that of respondent. The record contains several hundred pages of exhibits setting forth certain claims and transactions between the parties to this action. The testimony is not clear as to the exact terms of the oral agreement between them. It is difficult to determine therefrom whether the claimed insurance charges and items of storage and interest are predicated on the theory that certain bales of cotton, after rejection, became the property of appellant or of respondent. In view of the finding that the cotton was arbitrarily rejected by appellant, such cotton as was so arbitrarily rejected at no time after coming into the possession of appellant became the property of respondent. It therefore was not subject to any claim of expense against respondent if it was so improperly rejected.

Appellant's claimed account stated is based principally upon the theory that appellant forwarded to respondent notice of rejection, together with statements covering his account with the company, and that he failed to object thereto; that as a result thereof, an account stated arose in the amount claimed.

[7, 8] If we accept respondent's theory and the court's finding that all of the cotton was arbitrarily rejected, by such wrongful act the relation of debtor and creditor did not arise. The theory upon which an action for an account stated is allowed is that transactions have occurred between the parties from which the relation of debtor and creditor has arisen and that thereafter one or both have rendered or made statements or declarations specifying definitely the amount due on account thereof and thereupon there has been an agreement, express or implied, by the one who is the debtor to the other that a certain sum is due him on such account, together with an express or implied promise to pay the same. Bennett v. Potter, 180 Cal. 736, 745, 183 P. 156; Stimson Mill Co. v. Hughes Mfg. Co., 8 Cal. App. 559, 561, 97 P. 322; 1 Cal.Jur. 191, sec. 48.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

58 Cal.App.2d 346

WHARAM v. INVESTMENT UNDERWRITERS, Inc., et al.

Civ. 13945.

District Court of Appeal, Second District, Division 1, California.

April 24, 1943.

Hearing Denied June 21, 1943.

1. Adjoining landowners ⇐4(7)

In action against defendant lot owner and contractor for damage to plaintiff's lot when part of plaintiff's lot and retaining wall slid down into excavation on defendant lot owner's lot, evidence that workmen of defendant contractor made part of excavation on plaintiff's lot was sufficient to sustain finding of negligence and judgment as against both defendants.

2. Adjoining landowners ⇐4(7)

In action against defendant lot owner and contractor for damage to plaintiff's lot when part of plaintiff's lot and retaining wall slid down into excavation on defendant lot owner's lot, judgment for plaintiff was proper where evidence sustained finding that defendants did not give plaintiff reasonable notice required by statute of excavation and that contractor did not use ordinary care and skill or take reasonable precautions to sustain plaintiff's land. Civ. Code, § 832.

3. Adjoining landowners ⇐3

At common law every landowner was entitled to lateral support of his land from every other coterminous owner as an absolute right incident to land itself.

4. Adjoining landowners ⇐3

At common law coterminous landowner who excavated on his land, by exercise of proper care and application of proper means of support, was compelled to protect adjoining property in natural state from sliding into excavation.

5. Negligence ⇐28

One may not use his own property so negligently as to cause damage to or destruction of his neighbor's property. Civ. Code, § 832.

6. Adjoining landowners ⇐4(4)

In action against defendant lot owner and contractor for damage to plaintiff's lot when part of plaintiff's lot and retaining wall slid down into excavation on defendant lot owner's lot, wherein trial court found under sufficient evidence that no notice as required by statute was given to plaintiff of excavation, duty and liability of defendants were required to be measured and determined under common law rule. Civ.Code, § 832.

7. Appeal and error ⇐1010(1)

Where trial court in action against adjoining landowner and excavating contractor for damage to realty viewed premises and presumably considered configuration of ground, depth of excavation, type of soil and other surrounding conditions, together with certainty of rainfall which preceded landslide, District Court of Appeal could not disturb finding of negligence.

8. Adjoining landowners ⇐4(7)

In action against lot owner and contractor for damage to plaintiff's lot when part of plaintiff's lot and retaining wall slid down into excavation on defendant lot owner's lot, defendants were not absolved from liability because retaining wall on plaintiff's land changed plaintiff's land from its natural state, where testimony supported inference that retaining wall did not materially increase lateral weight and pressure and thus contribute to injury complained of.

9. Appeal and error ⇐882(3)

Defendant could not, for first time on appeal, present contention that theory on which case was tried was not the proper measure of damages.

10. Adjoining landowners ⇐4(7)

Measure of damages in action against adjoining landowner for damage to realty because of excavation is cost of replacement of structure damaged or destroyed.

11. Adjoining landowners ⇐4(6)

Where plans of improvements to be placed on lot were considered by contractor in consultation with owner, and all matters with reference to excavation and construction were determined before lot was purchased, owner of lot was liable to adjoining landowner for damage to realty which slid down into excavation, though contractor who did excavating was an independent contractor, since owner of lot on which excavation was made and contractor were liable as "joint tort-feasors".

See Words and Phrases, Permanent Edition, for all other definitions of "Joint Tort-Feasor".

12. Adjoining landowners ⇐3

A coterminous landowner and his contractor are liable jointly for fall of adjacent realty when they do not support it properly on excavation. Civ.Code, § 832.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by William Wharam against the Investment Underwriters, Inc. and the California National Builders, Inc., to recover for damage to plaintiff's realty. From a judgment in favor of the plaintiff, the defendants appeal.

Judgment affirmed.

Russell D. Garner and C. L. Gardner, both of Los Angeles, for appellants.

Martin Forrest, of Los Angeles, for respondent.

DRAPEAU, Justice pro tem.

The plaintiff and defendant Investment Underwriters, Inc. were owners of lots in the City of Los Angeles, with a common boundary line at the rear of each lot. These lots are located in a block bounded on the north by Second Street, on the south by Third Street, on the west by South Rampart Street, and on the east by South Coronado Street. Plaintiff's lot fronts west on South Coronado Street, defendant's lot fronts east on South Rampart Street. The common boundary at the back of each lot is approximately in the middle of the block. The natural slope of the land is downward from South Coronado Street to South Rampart Street.

In 1935 the plaintiff caused to be built at the rear of his lot a concrete retaining wall. In 1940 the defendant lot owner, Investment Underwriters, Inc., contracted with the defendant, California National Builders, Inc., a contracting firm, to build on the South Rampart Street lot a two-story apartment building with a garage at the rear. This necessitated excavating the rear end of defendant's lot; which was done and the improvements built. Thereafter, and during a time of heavy rainfall, a part of the rear end of plaintiff's lot slid down into the excavation on defendant's lot, together with a part of the retaining wall.

In the resulting action in the Superior Court, plaintiff recovered judgment against both defendants for $2,500 for damages to his lot and the retaining wall. From this judgment defendants have appealed.

[1] The trial court found, among other things, that the slide was caused by the negligence of both defendants. One witness for the plaintiff testified that in addition to excavating on the lot of defendant Investment Underwriters, Inc., the workmen of the defendant contractor climbed the bank and excavated with pick and shovel right past the property line and onto plaintiff's property. "They went back here approximately 3 feet east of the line, or the rear of this wall, and began their cutting down the bank." This testimony was not denied. Under familiar rules binding upon this Court on appeal this testimony is sufficient to sustain the finding of negligence, and the judgment, as against both defendants. Hedstrom v. Union Trust Co., 7 Cal.App. 278, 94 P. 386; 2 C.J.S., Adjoining Landowners, § 17, page 18.

[2-4] There are other reasons which require affirmance of the judgment. At common law every owner of land was entitled to lateral support of that land from every other coterminous owner. This was an absolute right incident to the land itself. The coterminous owner who excavated upon his property, by the exercise of proper care and the application of proper means of support, was compelled to protect adjoining property in its natural state from sliding into the excavation. Aston v. Nolan, 63 Cal. 269; Sargent v. Jaegling, 83 Cal.App. 485, 256 P. 1116; Sullivan v. Zeiner, 98 Cal. 346, 33 P. 209, 20 L.R.A. 730; Harper Co. v. DeWitt M. & R. Co., 115 Cal.App. 15, 300 P. 839.

With the growth of urban communities, and changing conditions, it was early perceived in California that there should be some relaxation of the common law rule. This relaxation was codified by the enactment of our Legislature of Civil Code, section 832 in 1872 and several amendments thereto during the passing years. There is nothing in section 832, supra which permits or excuses negligent trespass upon adjoining property. All that said section does is to permit a land owner to excavate, freed from the absolute common law right of lateral support in his neighbor, provided certain conditions in the Code section are complied with, and always provided that negligence of the excavator is not the proximate cause of damage to the property of the adjoining land owner. For no man

may use his own property so negligently as to cause damage to or destruction of his neighbor's property. See section 832, Civil Code; Pacific Gas & Electric Co. v. Scott, 10 Cal.2d 581, at page 585, 75 P.2d 1054 at page 1056, and cases cited.

[5, 6] If he would relieve himself from the absolute duty of lateral support, the first duty of the excavator set forth in section 832, supra, is that reasonable notice shall be given to the owner of adjoining property. In this case, while there was evidence of some perfunctory effort to notify the plaintiff, there was also evidence amply sustaining the trial court's finding that no notice whatever was given to the plaintiff. Therefore, the duty and the liability of the defendants must be measured and determined under the common law rule. Aston v. Nolan, supra.

[7] The next provision in said code section is that the excavator shall use ordinary care and skill and shall take reasonable precautions to sustain the adjoining land. The trial court found that the defendants failed in this duty likewise; and there is evidence in the record which will sustain this finding. This evidence in part is as follows: That the excavation was made with a vertical cut just west of the boundary line, without doing anything to shore up or to protect the plaintiff's adjacent property. The trial court viewed the premises and in support of its finding is presumed to have taken into consideration the configuration of the ground, the depth of the excavation, the type of the soil and other surrounding conditions, together with the certainty of the rainfall which preceded the slide. Under such circumstances this court may not disturb a finding of negligence.

[8] Appellants suggest that due to the fact that there was a retaining wall on the plaintiff's land, they are absolved from liability under the common law rule, that liability only being applicable to land in its natural state. This exception to the common law rule does not apply in this case, because the testimony supports the inference that the retaining wall was not such a structure as to materially increase the lateral weight and pressure upon plaintiff's property, and thus contribute to the injury complained of. Harper Co. v. DeWitt M. & R. Co., supra.

[9, 10] Complaint is made that the only evidence supporting the amount of damages found by the trial court was based upon the cost of replacement of the retaining wall. The case was tried upon the theory that this was the proper measure of damages. No objection was made to questions propounded to plaintiff's witnesses as to cost of replacement, and the defendants themselves presented witnesses who testified to the same thing. Under familiar rules of appellate practice, appellant may not now, for the first time present this contention in this court. Kaufman v. Tomich, 208 Cal. 19, 280 P. 130. While it is unnecessary to this decision, it may be said that in a proper case it may well be held that the measure of damages in such cases as this would be the cost of replacement of the structure damaged or destroyed. See text and cases cited in 2 C.J.S., Adjoining Landowners, § 22, at page 24.

[11] The last point remaining for consideration is the contention of the appellant land owner that there is no liability as to it because the excavating was done by an independent contractor. This contention is clearly determined against the defendant land owner by California authority. In this case the land owner and contractor are both liable as joint tort-feasors for negligent trespass, for negligence in excavating on defendant's lot, and as parties to a joint enterprise which deprived the plaintiff of his common law right of lateral support. Green v. Berge, 105 Cal. 52, 38 P. 539, 45 Am.St.Rep. 25; Hedstrom v. Union Trust Co., supra; 2 C.J.S., Adjoining Landowners, § 17, p. 18.

In view of its rather sweeping character, the foregoing statement should perhaps be amplified. The defendants are liable as joint tort-feasors in negligent trespass because the president of the contracting defendant testified that the plans for the improvements placed upon the South Rampart Street lot were considered in consultation with the owner, and all matters with reference to the excavation, the height of the wall to be constructed by the defendant contractor, and the distances necessary to locate the wall from the rear lot line in order to establish the proper lateral support were determined before the property was bought. This being the case, it was proper for the trial court to draw the inference that before the work was done the defendant lot owner was apprised of the fact that from the top of the defendant's wall it was the purpose of the contractor to trespass upon plaintiff's lot in order to

establish a sloping grade on the surface from the top of that wall into and upon plaintiff's property. In the case of Hedstrom v. Union Trust Company, supra, the lot owner was held jointly liable with the contractor in negligent trespass because the plans and specifications for the construction of the defendant's building contemplated a trespass into the plaintiff's foundation wall.

[12] The defendants are liable as joint tort-feasors for negligence in excavating on defendant's lot, and for the removal of lateral support because in the case of Green v. Berge, supra, our Supreme Court held that a coterminous owner and his contractor are liable jointly for the fall of adjacent property when not supporting it properly on excavation, thereby overruling the prior case of Aston v. Nolan, 63 Cal. 269. This holding is supported by the weight of authority throughout the United States. See comment 20 Cal.Law Review 62, at page 67, and authorities there cited; 2 C. J.S., Adjoining Landowner, § 16, p. 17; 1 Am.J. 526.

The judgment is affirmed.

YORK, P. J., and DORAN, J., concur.



58 Cal.App.2d 352

In re SMITH'S ESTATE.

KAYE et al. v. HAYES.

Civ. 13981.

District Court of Appeal, Second District, Division 1, California.

April 24, 1943.

1. Wills ⇐439, 440

A will must be construed in accordance with testator's intention as expressed in his will, and all other rules must bend to that paramount canon in construction of wills. Probate Code, § 101.

2. Wills ⇐525

Under terms of holographic will, testatrix intended that, after payment of $5 bequests, to each son of deceased sister, surviving two sisters should receive entire estate after termination of husband's life estate, and probate court erred in finding that testatrix died intestate as to one-third of her estate and that sons of deceased sister were entitled each to one-third of that one-third. Probate Code, § 101.

Appeal from Superior Court, Los Angeles County; Jess E. Stephens, Judge.

Proceeding in the matter of the estate of Myrtle M. Smith, deceased. From a judgment finding that as to one-third of the deceased's estate, deceased died intestate, and that children of deceased's deceased sister were entitled each to one-third of that one-third, W. W. Kaye, administrator with will annexed of the estate of Nellie C. Woody, deceased, and Lillian M. Woody, contestants, opposed by Reed Hayes, petitioner, appeal.

Judgment reversed, and cause remanded with directions to order distribution of estate in accordance with opinion.

W. W. Kaye, of Los Angeles, in pro. per. for appellants.

Paul W. Murray and Simon M. Collins, both of Santa Cruz, and Oscar O. Collins, of Los Angeles, for respondent.

DRAPEAU, Justice pro tem.

The decedent made a will and a codicil, entirely written, dated and signed by her. The only question involved in this appeal relates to the construction of this holographic will; whether the estate shall go to two surviving sisters of the decedent or to the sisters and to three children of a deceased sister per stirpes.

The will was written July 2, 1929, and is as follows:

"This my last will I bequeath to my husband Mark B. Smith as long as he lives my 320 acres desert claim near Tucson Ariz. and my half interest in 160 acres purchased from Victor Cordova joining my desert claim at his death this to be equally divided between my sisters Laura Miller, Nellie and Lillian Woody. WMBS Oil Co. property near Maricopa, Cal. I bequeath my share to Mark B. Smith, but there can be no mortgage put on this property. It cannot be sold without first being taken before the Pres. and 2 other men in said Trust Co. and if sold the money must be put out on 1st mortgages and if that is not enough to live on then $100 or

$200 be taken from principal a month for living expenses and $200(s) for burial of Mark B. Smith.

"If I survive Mark B. Smith then all my personal and real property be equally divided between my 3 sisters above named.

"(Signed) Myrtle M. Smith".

Between the writing of the will and the codicil the husband of the decedent died, and Laura H. Miller one of the three sisters died. The codicil was written November 25, 1936, and is as follows:

"337½ Hopkins Street Hermosa Beach, Calif. November 25, 1936. It is my will and desire that my three nephews namely; and their heirs Reed Hayes, Howard H. Hayes and James H. Miller, Jr., sons of my deceased sister, Laura H. Miller that they shall not receive anything from my estate or belongings or share in my estate in any way shape or form, other than five dollars ($5.00) to be paid to namely Reed Hayes, Howard H. Hayes and James H. Miller, Jr.,—to be paid when my estate is settled.

"I am of sound mind, but I am not writing this under duress.

"(Signed) Myrtle M. Smith".

The probate court by its judgment and decree found that as to one-third of the estate, the decedent died intestate, and that the children of the deceased sister were entitled each to one-third of said one-third.

[1] A will must be construed in accordance with the intention of the testator. Probate Code, Sec. 101. All other rules must bend to this paramount canon in the construction of wills. The intention of the testator expressed in his will must prevail. In re Estate of Ritzman, 186 Cal. 567, 568, 199 P. 783; In re Estate of Reith, 144 Cal. 314, 317, 77 P. 942; In re Estate of Kelly, 112 Cal.App. 758, 759, 760, 297 P. 620; In re Estate of Wilson, 65 Cal.App. 680, 697, 225 P. 283; In re Estate of Puett, 1 Cal.2d 131, 133, 33 P.2d 825; In re Estate of Thompson, 18 Cal.App.2d 680, 683, 64 P.2d 984; In re Estate of Kruger, 55 Cal.App.2d 619, 131 P.2d 619, 622; In re Estate of Lawrence, 17 Cal.2d 1, 7, 108 P.2d 893.

[2] In this case, it was the intention of the testatrix that in the event her husband should predecease her, her estate should go to her three sisters; that after the death of her husband and one of her sisters the entire estate should go to the two surviving sisters and nothing to the sons of her deceased sister except only the sum of Five Dollars to each of such sons named in the will.

Having come to this conclusion, there is no need of reference to other points made in the briefs.

The judgment, order and decree of the court, sitting in probate, from which this appeal is taken, is reversed, and the cause remanded with directions to the court below to order distribution of the estate in accordance with the views hereunder expressed.

YORK, P. J., and DORAN, J., concur.



JORDAN v. GUERRA.

Civ. 3059.

District Court of Appeal, Fourth District, California.

April 13, 1943.

Hearing Granted June 10, 1943.

1. Release ⇐55

In death action, burden of proving fraud, duress, undue influence or mistake in execution of release was on plaintiff. Civ. Code, §§ 1572, 1575.

2. Release ⇐57(1)

A release cannot be set aside in absence of clear and convincing proof of its invalidity.

3. Death ⇐75

Where father testified that he understood what was being done, that release was read to him, that he was able to read and write, that he knew he was releasing motorist from all liability in connection with accidental death of son, and that he was satisfied with settlement at the time but thereafter father testified in answer to leading questions that he thought he was settling for funeral expenses of his infant son only, father's claimed failure to read in entirety release which clearly stated that it constituted complete settlement was not sufficient evidence of fraud or undue in-

fluence to invalidate release. Civ.Code, §§ 1572, 1575; Code Civ.Proc. § 2055.

4. Death ⇐75

In action for death of plaintiff's infant son struck by defendant's automobile, where there was close question regarding defendant's negligence, the status of the son as licensee, invitee or trespasser and contributory negligence of the mother and plaintiff had full knowledge of facts surrounding accident, evidence regarding misrepresentation of material facts, fraud and undue influence was insufficient to support judgment setting aside release. Civ.Code, §§ 1572, 1575; Code Civ.Proc. §§ 597, 629.

5. Release ⇐16

Where it appears from terms of release that it was intention of parties to release known and unknown claims arising from an accident, in absence of fraud or duress, the injured person is not entitled to rescind the agreement and recover damages for injuries known or unknown at the time the release was executed.

Appeal from Superior Court, Fresno County; Dan F. Conway, Judge.

Death action by Elmer Jordan against Paul Guerra. Judgment for plaintiff, and defendant appeals.

Reversed and remanded with directions.

W. H. Stammer and Galen McKnight, both of Fresno, for appellant.

L. M. Linneman, of Dos Palos, and Rae B. Carter, of Fresno, for respondent.

GRIFFIN, Justice.

This action is one for damages for the death of respondent's infant son, alleged to have resulted from the negligence of appellant in operating an automobile upon appellant's own private premises. The complaint sought general damages in the sum of $15,000 and in paragraph III thereof prayed for special damages in the sum of $68.10 for funeral and interment expenses. Appellant denied that he was negligent, alleged contributory negligence on the part of the child's mother, and pleaded a signed, written release executed by respondent which, by its terms, released appellant from all liability arising out of the accident. The case was tried in two parts before two different juries, under section 597 of the Code of Civil Procedure. The first trial, upon the special defense alleging the release, resulted in a verdict for respondent. The second trial, upon the merits of the action, resulted in a verdict and judgment in favor of respondent in the sum of $1,000. At each trial appellant moved for a judgment notwithstanding the verdict Both motions were denied. Appellant appealed.

It is appellant's position on this appeal that the trial court erred in denying each of the motions for judgment notwithstanding the verdict. Appellant does not rely for a reversal of the judgments against him upon any other claimed error committed by the trial court in connection with the admission of evidence or the instructions to the jury. Neither party desires nor requests that the case be remanded for new trial. Appellant concedes that if the trial court acted correctly in denying appellant's motions for judgment notwithstanding the verdict the judgments should be affirmed, but suggests that if the trial court erred in denying those motions the judgments should be reversed and judgment should be directed for the defendant, thereby terminating the litigation. Barthelmess v. Cavalier, 2 Cal.App. 2d 477, 38 P.2d 484; sec. 629, Code Civ. Proc.

On November 15, 1940, Paul Guerra was the owner of a small ranch near Dos Palos. On that date, and for four days prior thereto, respondent's wife, Thelma Jordan, was and had been picking cotton on appellant's ranch. She had also picked cotton on that same ranch one day during the previous month. Mrs. Jordan had been employed to pick the cotton by one Mrs. Frediani, appellant's next-door neighbor, who had an arrangement with appellant whereby her husband furnished a trailer and pickers to pick appellant's cotton and was paid by appellant. On the date of the accident the appellant knew the cotton was being picked, but he did not know and had never met nor seen Mrs. Jordan. He testified that he did not personally employ her and did not even know that she or any member of her family was on the premises. On the morning of the accident, appellant left his ranch to go to Dos Palos. Mrs. Jordan arrived in her car at his ranch soon thereafter. She drove her automobile into appellant's private driveway and parked it under some eucalyptus trees directly in front of the garage where appellant ordinarily kept his automobile. With her were her fourteen-months-old baby, Murvian Jordan, and her two other children, who were three years and four and one half years of age. When

she went to the field to work, which field was immediately south of the driveway in question, she placed the baby in the front seat of her parked automobile and permitted the other children to play in and around appellant's driveway. Mrs. Jordan testified that on the one day she worked at appellant's ranch during the previous month, she received permission from Mrs. Guerra to park her automobile in the driveway. Both Mr. and Mrs. Guerra testified that they did not grant her any such permission. Mrs. Jordan left the baby, Murvian, in her parked automobile all that morning, except for short periods of time when she was there to watch him, and during that time the baby seemed happy and satisfied in the automobile. However, after lunch, before returning to the field, Mrs. Jordan took the baby from the automobile and left him sitting upon the ground with his back against one of the trees along the driveway. The yard adjoining the driveway was covered with sharp gravel. The baby was fourteen months old and could creep but could not walk. Mrs. Jordan testified that since the baby could only creep she felt assured that it would not crawl over the hard gravel. She left the baby unattended while she was picking cotton in the near-by field. Her two older children were playing in the yard some distance away but they were too young to watch the baby. At two o'clock that afternoon appellant returned from Dos Palos to his ranch and drove into his driveway at a very slow speed. He drove around one parked automobile owned by a lady who was in the house visiting appellant's wife. He then saw for the first time Mrs. Jordan's automobile parked in the driveway a few feet beyond the other automobile and under the eucalyptus trees. Appellant saw the two older children playing in a sand pile across the yard and beyond the driveway, but did not see the baby. He testified that he had no knowledge whatsoever of the baby's presence in his driveway. Appellant usually parked his automobile under the same trees under which Mrs. Jordan had parked her automobile, and in order to park at that place on the day in question appellant drove around Mrs. Jordan's automobile. In doing so he passed to the left of the Jordan automobile and turned sharply to his right, coming to a stop four or five feet in front of it, at almost a right angle to it, and with the front of his automobile about six feet from the tree under which Mrs. Jordan had left the baby. Appellant then got out of his automobile and while passing in front of it saw the baby, Murvian, for the first time. It was caught between the right front wheel and bumper of appellant's automobile and was apparently dead. There was no other witness to the accident. No one saw the baby from the time his mother left him under the tree beside the driveway until after the accident occurred. Appellant testified that he had neither warning nor knowledge that the baby was on the premises; that he was not in a position to see in front of Mrs. Jordan's automobile until he had passed around it and turned to his right in front of it, and at that time it was impossible for him to see immediately in front of his wheels from his position in the driver's seat; and that he felt no jar nor impact.

At the time of the accident appellant carried public liability insurance with the Farmers Automobile Inter-Insurance Exchange. One Goodwin was employed by that company as a claim adjuster. On the day after the accident, Goodwin received notice thereof and went to appellant's ranch to investigate the accident and to adjust the claim. After he arrived, the facts of the accident were explained to him by appellant. Thereafter, respondent was contacted by telephone at the funeral parlors, and in response to the telephone call respondent and his father, M. W. Jordan, drove to appellant's ranch. Present at the discussion at appellant's ranch were respondent, respondent's father, Goodwin, appellant, and appellant's wife, but most of the conversation was between Goodwin and respondent. There was some variance in the testimony of the witnesses as to the exact conversation there held. At this meeting respondent signed a statement which was written out in longhand by Goodwin. It reads as follows:

"State of E. C. Jordan. I am 29 years of age. * * * On Nov. 15, 1940, my son Murvian Jordan, age 15 months, was killed in an automobile accident. The car was driven by a Mr. Guerra of Dos Palos. My wife was working on Mr. Guerra's place picking cotton. My young son was taken over to Mr. Guerra's place by my wife when she went to work. Sometime around 2 o'clock in the afternoon while the child was in yard of Mr. Guerra's place it was struck by Mr. Guerra's car. I was not around Mr. Guerra's place when this accident happened, but I understand that the child was on the ground crawling around at

the time of the accident in the rear of Mr. Guerra's house. As a result of the death of my child I incurred funeral bills of approximately $80.00 and some loss of time from work.

"I realize that Mr. Guerra did not intentionally run over my child and that it was an accident. Therefore, in view of such circumstances, I accept the sum of $150.00 as a compromise payment for settlement of any claim I might have as a result of this accident. I understand that in accepting this payment that is all I can get, and that I voluntarily take such sum and thereby release Mr. Guerra from all liability resulting from this accident.

"I have read and understand the two pages and they are true.

"E. C. Jordan."

The portion italicized was written by E. C. Jordan. At the same time a release of claim (Exhibit A) was also prepared on the usual insurance company's form for release of claim and signed by respondent. It reads in part: "For . . . $150.00 . . . I . . . forever release . . . Paul Guerra . . . from all liability now accrued or hereafter to accrue on account of any and all claims or causes of action which I now or may hereafter have against said Paul Guerra * * * in any way arising from any and all injuries, losses and damages now known or that may hereafter develop" as a result of the aforementioned accident; "that I * * * accept said sum for the purpose of making a full and final compromise * * * of the injuries and damages above mentioned." Thereafter, a draft in the sum of $150 (Exhibit B) was made out payable to respondent, which contained the following endorsement signed by respondent:

"Endorsement of this draft constitutes a release of all claims the undersigned has or may have against Farmers Automobile Inter-Insurance Exchange or the insured or any other person on account of claims or accident referred to on the face hereof.

"E. C. Jordan."

The testimony produced at the trial of the first issue respecting the validity of the release which was at that time signed may be thus summarized: Respondent Elmer Jordan was called by appellant under section 2055 of the Code of Civil Procedure as his witness. He testified that the signature at the bottom of the release (Exhibit A) was his, and that the portion "I have read and understand this release" was in his own handwriting. Thereafter the release was received in evidence and read to the jury. He then testified that after he had signed the release he was given the draft for $150 (Exhibit B) and that the endorsement as the first payee on the back thereof was his signature. It was thereupon introduced into evidence and read to the jury. On direct examination by respondent's counsel respondent testified that in respect to the portion of Exhibit A that was in his own handwriting Goodwin asked him to write that portion in there; that he told him "word for word what to write"; that he, respondent, was unable to spell the words and that Goodwin spelled them out for him. Thereupon, appellant rested his case. The respondent then called Mrs. Jordan, who testified generally in reference to the facts surrounding the accident and death of her child as above related. She then testified that she had never seen the release signed by Mr. Jordan (Exhibit A) but that she did know that Mr. Jordan had received $150, and that she learned of that on Saturday afternoon, November 16th, the date when the release was signed and the draft was paid, which was the day following the death of the child. The child was buried on Monday, November 18th. Mrs. Jordan said that she was making approximately $2 a day picking the cotton on the appellant's ranch and that she had been working about four or five days out of the week for five weeks in picking cotton in that vicinity; that she then had no money on hand at all, no bank account, no property of any kind from which an income could be received, and that she had saved nothing from her wages; that on the 16th day of November, 1940, she was "in distress as the result of the death of 'her boy'," i.e., she "was very nervous."

Appellant Paul Guerra, called as a witness on behalf of the respondent under section 2055 of the Code of Civil Procedure, testified generally in respect to the accident. He then testified that on the morning following the accident the insurance adjuster, Mr. Goodwin, called at his home; that after a short conversation someone called Mr. Jordan at the undertaking parlor; that a few minutes thereafter Mr. Jordan and his father came to his home as above related; that the adjuster asked them what they intended to do about the accident and that they didn't say anything; that "they said that they was sorry that there was an accident and they didn't have any money, and they said they would be

satisfied with the funeral expenses;" and that he did not take part in any of the conversation. In appellant's deposition, offered in evidence by respondent, Paul Guerra testified that Mr. Goodwin told respondent that he was there to speak for appellant because appellant was not in any condition to have anything to do with the settlement; that he was "all worried all to pieces"; that he was an insurance adjuster and that was his business. He testified then in his deposition that Mr. Goodwin conversed with respondent; that Goodwin paid them the money, and they agreed to sign; that Goodwin wrote something and read it to them, and that they then read it and said it was all right and that they were more than satisfied; that Goodwin asked them "how much would it be, the expense," and that "they said that they just left the undertaking parlor and so much for the burial and so much for the clothes and it amounted around an even $100"; that Goodwin then said "I will do better than that—you are going to lose a few days work—I will give you $150"; that they were more than glad to take it and that was substantially all that was said at that meeting; that they left to see if appellant's brother would not cash the draft due to the fact that the bank was about to close; that Mr. Jordan and his father then shook hands with him, and told him "there was no hard feelings, that it was an accident"; "They was more than happy and glad for what Mr. Goodwin done, too." He then testified that the draft was written up by Goodwin in his house and handed to respondent, who followed them down where the draft was cashed. He testified that Goodwin did not spell the words out to respondent which were written by him in his signed release (Exhibit A).

Elmer Jordan, respondent, was then called as his own witness and he testified generally as follows: that at the Guerra home, when he signed the release, he felt the effects of "mental distress" caused from the death of his child; that Goodwin said that Mr. Guerra was not capable of taking care of his own business and so he was there in behalf of Mr. Guerra; that he wanted to know about how much the funeral expenses would be; that he told him around $75 or $85; that he said that he was there in behalf of Mr. Guerra, and that he wanted to help out and that he asked him "what did I think would be right and I told him I was out some time, of course, and around $90 or $100"; and he told me if I got $85 "I would be getting in dangerous territory"; that finally he asked him what he thought would be right and he told him around $100; that he said "Well, I will do better than that. I wil give you $150"; that Mr. Guerra said that he was rather upset, that he smoked a carton of cigarettes that night; that Guerra did not have anything to say; that Goodwin presented some papers for him to sign and he signed two of them and wrote something on each of them; that he did not read either instrument or any part of them; that Goodwin did not explain to him what his signature on the papers meant except he understood it "to help out in the funeral expenses." He then testified that he had no money saved in the bank or elsewhere at that time and no property or income other than his wages, which amounted to about $50. The deposition of Elmer Jordan, previously taken, was then read into evidence. In the deposition Jordan testified that at the Guerra home Goodwin started talking, asking him "what the damage would be, how much the expense, funeral and burial expenses would be, in order to make a settlement"; that he asked respondent "if around $75 or $85,—he says 'if you get over that you will be in dangerous territory' "; that he also said "now you know that you are on Mr. Guerra's premises here, that Mr. Guerra has a perfect right here"; and he then asked him how much he really thought he would be out; that he finally told him around $100; that Jordan, Sr., spoke up and said "that we didn't come down here prepared to talk to any attorney or anything like that"; that Goodwin said "I am not an attorney. I don't have any license or anything like that to practice law—I am just down here in behalf of Mr. Guerra"; that "Guerra had agreed to pay $50, whatever was right, on the funeral expenses"; that he asked him then "how about $100" and he said " 'I will even do better than that, I will give you $150, although,' he says, 'that is more than anyone I ever knew of getting' "; that he did not remember whether he told Guerra there that day that he knew it was an accident and could not be helped, but he did tell him that he "didn't hold anything against him on account of the accident"; that he did sign the release but did not know Goodwin represented an insurance company.

In regard to his educational qualifications, he testified in his deposition that he reached the Seventh grade in school; that he was able to read and write, and that his

eyesight was good; that he read part of the paper he signed; that he looked some of it over to see what it was and what it said; that he looked at the draft when he took it and that Goodwin explained to him it was a draft rather than a check; that he was "satisfied to take $150 in settlement of the case at that time" and that he "did take $150 in settlement of the case"; that although he did not know Goodwin was an insurance man, he "understood the things he told" him; that although he was sad, he was not in such a state of mind that he was not able to recognize people and know what they said; that he knew when he "signed this release" he was "releasing Mr. Guerra from all liability in connection with the accident"; that since receiving the $150 and signing the release he never had offered to return the $150 to *Mr. Guerra* or anyone else. On cross-examination, however, he testified that he asked Mr. Linneman, his attorney, to make the offer for him. In regard to the statement (Exhibit C) he admitted signing it and then testified that he did understand the portion he wrote on that instrument. The instrument was then read to the jury. On cross-examination by his own counsel respondent testified that he did not know that he had any claim other than for funeral expenses and loss of time; that he did not understand that he was releasing appellant from any claims other than the funeral expenses and loss of time; that he lost seven days' time at $3.50 per day.

Mark W. Jordan was then called as a witness on behalf of the respondent. He testified that at the home of Mr. Guerra no mention was made of any insurance company; that Goodwin said Guerra was not capable of attending to business and that Mr. Guerra wanted to do the "thing that was right and settle with us in the sum that was reasonable to help put away this child, assist us" and that he asked the respondent "how much he had been out," and he told respondent: "Now, if you go over $80 or $85—why you are getting in dangerous territory"; that the respondent told Goodwin he "would be out about $100," and Goodwin said " 'You are right, but we are going to do a little better than that, we are going to give you $150, and that is more than I would give anyone again'; that we were to bear in mind that we were on Mr. Guerra's premises, that the boy was at the time, see, of this accident." On cross-examination this witness testified that after Goodwin made out the release he read it to him in the presence of respondent.

Mr. Linneman, counsel for respondent, then testified that in the latter part of November, 1940, he discussed the facts and circumstances of this case with respondent; that he wrote to the insurance company involved and offered to repay the sum of $150. A copy of the letter was then received in evidence. It reads in part (Exhibit 2):

"November 29, 1940.

"Farmers Automobile Inter-Insurance Exchange,

"Gentlemen:

"On November 15, 1940, the infant child of Elmer Jordan and Thelma Jordan of this city, was killed by an automobile being driven by Paul Guerra, whose automobile is covered by public liability insurance in your company.

"On November 16th, in consideration of the sum of $150.00 an adjuster of your company obtained the signature of Elmer Jordan, as I am advised, to a release upon forms furnished by your company.

"It is the view of Mr. and Mrs. Jordan, the mother and father of this child, that the sum paid was completely inadequate, and you are hereby advised that such release and settlement is hereby rescinded. I now hold the sum of $150.00 and I hereby tender return thereof to you upon cancellation and surrender of the aforementioned document, and you are advised that said sum will be immediately forwarded to you upon notification of your willingness to accept the same and cancellation and return of the aforementioned document.

"If it should be your desire to negotiate for a settlement of the claim of Mr. and Mrs. Jordan upon a basis which contemplates reasonable compensation for their loss, I shall be glad to confer with you at your convenience."

Mr. Carter, counsel for respondent, then moved to strike out of paragraph III of his complaint the allegation pertaining to a recovery for $68.10, cost of interment and funeral expenses. After some argument the motion was granted.

In rebuttal, appellant called Goodwin, the adjuster for the insurance company, as a witness. He testified generally that at the Guerra home he did not believe that he told respondent at first that he represented an insurance company; that during the discussion he did not know anything about the

financial condition of the Jordan family; that the respondent was "possibly depressed, but was fairly calm for a man under the circumstances of having lost his child"; that he asked Jordan if he knew how the accident happened or how it occurred and that he told him that he was not at the Guerra place at the time it occurred, but that his wife had told respondent how it happened; that Jordan then related what his wife had told him in reference to the accident; that he then asked Jordan what "expense he would incur as a result of the accident and he informed me that he would have a funeral bill somewhere in the neighborhood of $78 to $80, and that he would lose a few dollars from work"; that just about that time in the proceedings Jordan, Sr., mentioned the fact that they had not consulted an attorney before coming out there; that he told them he was not an attorney and was at Guerra's place on behalf of and representing Guerra's insurance carrier, and that was his reason for being there; that an accident had been reported in which his car was involved and that they carried the insurance and that it was his business to look after it; that thereafter Jordan continued to discuss the matter of settlement with him; that he asked him what he wanted to do about the situation and to see if it would be possible to make a settlement; that he asked him what he would take "for a settlement, for a complete settlement of the claim" and that he said: "Well, I think $100 would cover it" and that he told him he could do a little better than that; that he had authority to pay him $150 for a complete and final settlement of the claim; that Jordan seemed to be very satisfied with it and that he would take it; that he explained to him what would be the result of accepting $150 and executing a release, i.e., that it would constitute a compromise settlement; that it was a complete and final settlement, and that thereupon he drew the papers now in evidence; that he wrote them out in Jordan's presence; that he read it to Jordan or in the presence of both Jordan and his father and handed it to respondent to read; that respondent did read it in his presence; that he asked him if he understood about the release and that respondent told him that he did; that he then told him if there were any questions he would be glad to answer them; that he asked no questions; that after respondent read the documents he asked him to write the words "I have read and understand this release"; that about the same procedure followed in reference to the written statement, Exhibit C; that the conference lasted from an hour and a half to two hours.

Mrs. Guerra testified that she was present when Goodwin and respondent had their conversation about the release; that Goodwin told Jordan that he was an insurance adjuster and that it was his work to protect people who held the policies of the insurance company he represented; that she knew Jordan read the papers that Goodwin had written and she remembered him saying that everything was all right and that she saw him accept the check.

After this evidence was adduced the parties rested their case on the issues then pending. Both appellant and respondent then moved for a directed verdict. Both requests were denied. After instructions to the jury and argument of counsel, the jury returned a verdict in favor of respondent.

The respondent offered and the court gave an instruction in reference to the aforementioned release, that it was respondent's contention "that he was induced to sign his name thereto as a result *of fraud and undue influence,* as those terms will hereafter be defined." (Italics ours.) At the request of the respondent the court then instructed the jury "that in determining whether or not any fraud or undue influence existed in this case, you may take into consideration the method employed by the representative of the Farmers Automobile Inter-Insurance Exchange in securing the signature of said plaintiff upon said release. Misrepresentations, if any, that were made by said agent at said time, concealment, if any, by said agent of any facts which said agent was under a duty to reveal, if any, at said time, and the inadequacy of consideration, if inadequacy of consideration in fact existed." Sections 1572 and 1575 of the Civil Code were read defining actual fraud and undue influence. A motion for judgment notwithstanding the verdict was made and denied. We will first consider the appeal from this order.

[1, 2] The burden of proving fraud, duress, undue influence or mistake was upon respondent. Swartz v. Filipelle, 34 Cal. App. 695, 168 P. 574. In Wilson v. McCormick S.S. Co., 38 Cal.App.2d 726, 102 P.2d 412, 416, the appellate court reversed a judgment in favor of the plaintiff and ordered a judgment notwithstanding the verdict under facts which bore some similarity to the case at bar. The plaintiff in

that case testified that he signed the release but that he did not read it because at that time he was suffering from head pains and could not think clearly. The court there said:

"Before courts will set aside solemn binding written contracts, proof of their invalidity must be clear and convincing. Were the rule otherwise, a written instrument would afford but slight protection to the parties. * * *

"Plaintiff's behavior and condition prior to and at the time the release was executed point unerringly to the conclusion that his physical and mental state was such that he formed in his own mind a determination to compromise his claim; * * *. There is neither evidence nor contention here that plaintiff could not read, but there is evidence in the record that he looked at the paper. He signed it; and the evidence falls far short of the amount required to overcome the presumption that he knew and understood its contents."

[3] It is true in the present case that after having testified that he was in full possession of his faculties, that he was not in fear, that he knew and understood what was being done and said, that the release was read to him, that it was given to him to read and that he read part of it, that he was able to read and write, that his eyesight was good, that he knew that he was releasing appellant from all liability in connection with the accident, and that he was satisfied with the settlement at the time, respondent was recalled to the stand by his counsel and in answer to a leading question propounded by counsel testified that he thought he was settling for the funeral expenses only. If we consider all of the testimony, as a whole, together with the execution, by respondent, of all the instruments expressly releasing appellant from all liability, it is difficult to say that there is substantial evidence in this case supporting respondent's claimed thought that he was settling for funeral expenses only. The conduct of all of the parties leads us to believe that respondent did not then think that there was still some claim which he had against appellant that was undetermined or unsettled. The original complaint signed by respondent shows that at the time he filed it he included as part of his prayer for damages a sum for funeral expenses. The releases clearly state on their face that they constitute a complete settlement of all claims, known or unknown. Respondent's claimed failure to read them in their entirety would not, in and of itself, under the circumstances of this case, be sufficient evidence of fraud or undue influence to set them aside. Haviland v. Southern California Edison Co., 172 Cal. 601, 158 P. 328; Rogers v. Atchison T. & S. F. R. Co., 38 Cal.App. 343, 176 P. 176; Hawkins v. Hawkins, 50 Cal. 558; Metropolitan Loan Ass'n v. Esche, 75 Cal. 513, 17 P. 675. The letter to the insurance company written by respondent's attorney attempts to rescind the release for the claimed reason that in "the view of Mr. and Mrs. Jordan," the sum paid was "completely inadequate." Nowhere in that letter is it stated that respondent did not understand that he was making a complete release of all claims, or that he thought that he was settling for funeral bills only, or that he was induced to make the settlement by reason of any fraud, duress, undue influence, or mistake.

[4] It must be admitted that from a relation of the facts surrounding the death of the child, a very close question is presented in respect to the following questions: (1) the negligence of appellant; (2) the particular status of the child at the time as to whether he was a licensee, an invitee, or a trespasser, and what degree of care was owing to the child by appellant under the circumstances; (3) as to the contributory negligence of the mother. All of these questions are raised on this appeal. The statement of facts, signed by appellant, and as related by his wife is not at variance with the evidence as to the appellant's claimed negligence. Based upon that statement of facts it clearly appears that respondent had full knowledge of the facts surrounding the accident. There was therefore no misrepresentation as to those facts. Appellant signed the statement and said "I realize that Mr. Guerra did not intentionally run over my child and that it was an accident, * * * Therefore * * * I accept the sum of $150 as *a compromise* payment of any claim I might have as a result of this accident." (Italics ours.) It is indeed difficult to harmonize this signed statement with appellant's testimony that he thought he was settling only for the funeral bills. Analyzing each claimed representation made by appellant or the witness Goodwin, separately or as a whole, we are not convinced that they are sufficiently substantial to constitute a misrepresentation of a material fact or such a misrepresentation as would constitute a fraud or the establish-

ment of acts of undue influence sufficient to support the judgment setting aside the releases admittedly signed and executed by the respondent.

The cases relied on by respondent may be distinguished. In Carr v. Sacramento C. P. Co., 35 Cal.App. 439, 170 P. 446, the release was set aside where it was alleged and shown that the plaintiff was so enfeebled and weakened, mentally and physically, tha he did not have sufficient mental capacity nor sufficient physical energy to transact the business of negotiating the alleged release and did not have sufficient mental capacity to understand the nature, purpose and effect of the alleged contract of release or of the rights arising in his favor, because of the personal injury by him sustained. Plaintiff in that case was suffering from a traumatic hysteria bordering on melancholia. Such is not the evidence here. In Meyer v. Haas, 126 Cal. 560, 58 P. 1042, the agent of appellant was also agent of the respondent. In addition to that fact, the contract was in a language that the respondent could not read. In Raynale v. Yellow Cab Co., 115 Cal.App. 90, 300 P. 991, the plaintiff testified she was in a daze during all the time the release was being discussed and when it was signed. Respondent does not claim such incapacity in this case. Wetzstein v. Thomasson, 34 Cal. App.2d 554, 93 P.2d 1028, involved the execution of a full release which plaintiff believed to be only partial when she signed it. She was assured orally by the adjuster when she signed it that the future bills would be taken care of. During the four days of negotiations by the adjuster she was in great pain, suffering from nervous shock, and a part of the time she was under the influence of opiates. Respondent has not made any such showing here.

[5] It is an established rule of law that where it appears from the terms of a release that it was the intention of the parties to compromise a release of known or unknown claims arising from an accident, in the absence of fraud or duress, the injured person is not entitled to rescind the agreement and recover damages for injuries known or unknown at the time the release was executed. Berry v. Struble, 20 Cal. App.2d 299, 66 P.2d 746. In the present case it cannot be said that any facts were withheld from the plaintiff as to the nature of the injury to the child or the facts surrounding the happening of the accident. Any rights he may have had at that time must have been known to him when he signed the release. He apparently compromised any claimed rights he then knew of for the sum of $150. Respondent, therefore, cannot rely upon the rule laid down in, Backus v. Sessions, 17 Cal.2d 380, 110 P.2d 51.

It has also been held that total physical disability does not necessarily render a person incompetent nor indicate undue influence, in the matter of executing a release. Mathews v. Pacific Mutual Life Ins. Co., 47 Cal.App.2d 424, 118 P.2d 10. It has often been stated that before a court will set aside a release formally signed, sealed, and witnessed, proof of its invalidity must be clear and convincing. Wilson v. McCormick S.S. Co., supra.

We believe the facts in the instant case are similar to the facts in Wilson v. Zorb, 15 Cal.App.2d 526, 59 P.2d 593, 598, where it was held that the evidence was insufficient to constitute actual fraud or to show that there existed a confidential relationship upon which could be predicated a claim of constructive fraud. After reversing the judgment setting aside the releases based upon a verdict of the jury, the trial court there said, as we must say here:

"After a painstaking review of the evidence, we are convinced that a case was not presented to the jury which justified the annulment of a settlement freely made by competent contracting parties."

See, also, Fritsche v. McCue, 42 Cal.App. 2d 696, 109 P.2d 759; Bacon v. Soule, 19 Cal.App. 428, 126 P. 384; and particularly Lerma v. Flores, 16 Cal.App.2d 128, 60 P.2d 546, 547, which involved the status of a plaintiff, whether he was a guest or a passenger under an agreement to perform certain services. In that case the question of *adequacy of consideration* to support the agreement was presented. It was there said: "The consideration may be any benefit conferred or any detriment suffered * * * and the law will not enter into an inquiry as to its adequacy. * * * Moreover, where the consideration agreed has been accepted, the acceptance constitutes a waiver of any claim of inadequacy." (Citing cases.)

In view of this determination a discussion or review of the other points raised becomes unnecessary.

The judgments and orders are reversed and the cause remanded, with directions to

the court below to enter judgment for the defendant notwithstanding the verdict.

BARNARD, P. J., and MARKS, J., concurred.



58 Cal.App.2d 145

CONLEY et al. v. SHARPE et al.

Civ. 13984.

District Court of Appeal, Second District, Division 1, California.

April 13, 1943.

Hearing Denied June 10, 1943.

1. Deeds ⇐19

A deed without fraud in its inception conveys title and is not void for any failure of consideration, either in whole or in part, since acts done subsequent to execution and delivery of deed cannot affect its integrity.

2.. Deeds ⇐19

Where grantor accepts grantee's verbal promise of support without any agreement or understanding that failure to furnish support should be a condition or affect validity of deed, or entitle grantor to a reconveyance, in absence of fraud, grantor has no right to rescind or to have deed set aside, but his only remedy for breach of grantee's personal covenant is an action for damages.

3. .Deeds ⇐211(1)

Evidence sustained finding that grantors failed to establish such lack of mental capacity as would warrant cancellation of deeds by which an undivided one-half interest in realty was conveyed to grantors' sister.

4. Appeal and error ⇐173(6)

Grantors could not contend for the first time on appeal that they were entitled to cancellation of deeds on ground that grantee failed to perform her promise to support grantors, where pleadings did not raise and trial court was not called upon to decide any such question of failure of consideration.

5. Deeds ⇐19

Where evidence sustained findings that grantee's promise to support grantors and manage property was not made a condition affecting validity of real estate conveyance and that conveyance was not induced by fraud, conveyance could not be cancelled for failure of grantee to perform promise to support.

6. Deeds ⇐19

Where grantee's promise to support grantors was not made a condition affecting validity of conveyance of undivided one-half interest in realty, death of grantee preventing continuing performance of obligation did not warrant cancellation of conveyance, particularly where grantee at time of death was not maintaining grantors.

7. Tenancy in common ⇐30

Where one tenant in common has paid a debt or obligation for benefit of the joint property or has discharged a lien or assessment imposed upon it as a common burden, he is entitled as matter of right to have cotenant, who has received benefit, refund to him his proportionate share of amount paid.

8. Tenancy in common ⇐30

Payment by tenant in common of taxes assessed against the whole estate discharges the lien imposed upon the common interest and inures to benefit of cotenants, so that the one making payment is entitled to refund from cotenants of their proportionate shares of money paid.

9. Tenancy in common ⇐30

Though owner of undivided one-half interest in realty could not hold cotenant personally liable for expenses incurred in maintaining and improving realty, paying taxes assessed against the whole estate, and discharging the lien of a mortgage thereon, she was entitled to a lien against cotenant's interest in the realty for one-half of the amount of such expenses.

Appeal from Superior Court, Los Angeles County; A. L. Pierovich, Judge.

Action by Florence M. Conley and Vivian Conley, by Ellen E. Wright, their guardian ad litem, against Genevieve E. Sharpe and others to cancel certain deeds and to quiet title to real property, wherein Genevieve E. Sharpe filed a cross-complaint

seeking a money judgment for services rendered and money advanced on account of the plaintiffs and the real property. Upon the death of Genevieve E. Sharpe, George G. Sharpe, as administrator of the estate of Genevieve E. Sharpe, deceased, was substituted as defendant and cross-complainant. From a judgment that plaintiffs take nothing by their complaint, decreeing to named defendant and cross-complainant an undivided one-half interest in common in the realty, and awarding her a money judgment against plaintiffs, plaintiffs appeal.

Judgment modified and, as modified, affirmed.

Edward W. Fisher, of Los Angeles, for appellants.

Sidney Fischgrund, of Los Angeles, for respondents.

YORK, Presiding Justice.

Appellants, as owners of a certain parcel of real property, on August 21, 1936, executed and delivered a grant deed conveying all their interest therein to George G. Sharpe, and on the same day said George G. Sharpe and Flossie R. Sharpe conveyed all their right, title and interest in the said realty to appellant Florence M. Conley and respondent Genevieve E. Sharpe, as tenants in common.

Florence and Vivian Conley and Genevieve E. Sharpe were sisters; George G. Sharpe is the son of Genevieve E. Sharpe, and Flossie R. Sharpe is George's wife. Genevieve E. Sharpe died on December 9, 1941, and her said son George, as administrator of her estate, was thereafter substituted herein in her place.

By the instant action, through their guardian ad litem, appellants sought to have cancelled the deeds hereinabove mentioned and the title to the property thereby conveyed quieted in themselves. The complaint alleged the incompetency of appellants; that the deed by them to George was executed under duress and undue influence, without consideration and that respondents occupied the conveyed premises without payment of rent or accounting for rentals received from other tenants. It was also alleged that although respondent Genevieve E. Sharpe claimed to have advanced the sum of $2,358.38 in payment of funeral expenses for their father, as well as for appellants' food and for repairs, taxes and other expenses of the real property, appellants were not aware of the true amount so expended, and made offer to repay such sums, if any, as the court might decree were owing to said respondent after an accounting was made for that purpose.

Respondents denied generally the allegations of the complaint and alleged that respondent Genevieve E. Sharpe had incurred costs and expenses money in conection with the maintenance of appellants and the expenses of the property in a total amount of $4,073.

Respondent Genevieve E. Sharpe also filed a cross-complaint alleging that on August 21, 1936, appellants engaged her services to nurse and care for them and manage their property; that from said date to December 9, 1939, she performed services as personal attendant which, together with money expended on the real property were reasonably worth and amounted to $4,073, and after deducting therefrom $815 received as rental from said property, there remained a balance of $3,258 owing to her by appellants for which she asked judgment. In connection with her cross-complaint said Genevieve E. Sharpe filed a bill of particulars itemizing said expenditures.

After hearing the evidence and considering the report of a referee appointed to take evidence and make an accounting, the trial court found that appellants were of sound mind, not suffering under undue influence at the time the deeds were executed, and that there was a sufficient consideration for the same. That respondent Genevieve E. Sharpe, as a tenant in common, was under no obligation to pay rent; that she was chargeable with rent in behalf of respondent George G. Sharpe at $10 per month from August 20, 1936, to January 20, 1941, or a total of $410.

"XI. That the defendant and cross-complainant Genevieve E. Sharpe has nursed and cared for the plaintiffs * * * and has managed the property * * *. However, the money expended and the reasonable value of such nursing and care of the plaintiffs and the maintenance of the property is a consideration for the grant to the defendant and cross-complainant, Genevieve E. Sharpe, of a one-half (½) interest in and to the real property described * * *.

"That the defendant * * * has furnished money to the plaintiffs and cross-defendants for food and clothing and for light and water; that the said money so

furnished is part of the consideration for the grant to the defendant, Genevieve E. Sharpe, of the one-half (½) interest in and to the real property * * *.

"XII. That the defendant * * * has made certain payments of principal and interest due on a mortgage on said property, has paid the taxes on said property, and has paid for material and labor for repairing and preserving said real property * * * for which she is entitled to a credit for the sum of $2,129.68.

"That the defendant * * * has collected $815 rent from William Hausen and is chargeable with rent for the premises occupied by defendant and cross-complainants George G. Sharpe and Flossie R. Sharpe, at the rate of ten dollars ($10.00) per month from Aug. 20, 1936 to Jan. 20, 1941, in the sum of $410. After deducting the rent chargeable to the defendant, she is entitled to a credit of $904.68."

Judgment was thereafter entered decreeing that appellants take nothing by their complaint; that respondent and cross-complainant Genevieve had an undivided one-half interest as tenant in common with appellant Florence M. Conley in the property above referred to; and giving her judgment against "the plaintiffs and cross-defendants Florence M. Conley and Vivian Conley, in the sum of Nine Hundred four dollars and sixty-eight cents ($904.68) which sum is a lien and encumbrance upon the real property described as Lot 369, Tract 3992 * * *."

This appeal is prosecuted from such judgment, appellants contending that a conveyance made in consideration of a promise of support should be set aside and cancelled where it is shown that the grantee abandoned performance of such promise.

There is considerable diversity of opinion as to whether nonperformance by a grantee of his promise to furnish the grantor with support and maintenance is sufficient ground for the cancellation of a deed given in consideration for such promise. See 12 C.J.S., Cancellation of Instruments, p. 986, § 30; 9 Am.Jur. 376, § 31; Caramine v. Tegulias, 121 Conn. 548, 186 A. 482, 112 A.L.R. 670.

Appellants cite the following excerpt from Johnson v. Clark, 7 Cal.2d 529, 533, 61 P.2d 767, 769 as upholding their contention, which they claim is the rule generally followed in foreign jurisdictions:

"Ordinarily a grantor who has executed a deed absolute or other executed transfer in consideration of promises of the grantee is not entitled to rescind upon failure of consideration arising from the grantee's failure to fulfill his promises, but is limited to his right of action for damages for breach of contract. Lawrence v. Gayetty, 78 Cal. 126, 20 P. 382, 12 Am.St.Rep. 29; Williams v. Reich, 123 Cal.App. 128, 131, 10 P.2d 1030; 4 Cal.Jur. 785. However, an exception to this rule is made in many jurisdictions where the consideration for the deed or transfer is the grantee's promise to support the grantor. 5 Pomeroy's Equity Jurisprudence (2d. Ed.), p. 4755, § 2108; note, 34 A.L.R. 136; 25 Cal.Jur. 173; 4 R.C.L. 509; 6 Cal.Law Rev. 309."

In addition to the foregoing quotation intimating that California might follow the majority rule, it was held in the early case of Grimmer v. Carlton, 93 Cal. 189, 28 P. 1043, 27 Am.St.Rep. 171, that inasmuch as an agreement to support and maintain a grantor, in consideration of his conveyance, is one involving personal services and so cannot be specifically enforced, it is not sufficient consideration and the grantor is entitled to a cancellation of the conveyance. The Grimmer case was overruled as to this point in Norris v. Lilly, 147 Cal. 754, 82 P. 425, 109 Am.St. Rep. 188, but the court therein conceded that if the grantee in a deed fails to perform his oral promise to support the grantor, the latter may have a cancellation of the conveyance upon just and equitable terms.

However, it is stated in 9 Cal.Jur. p. 142, § 43: "No distinction has been made in California between a consideration of support and maintenance and any other consideration in applying the principles enunciated in the preceding paragraph (avoidance of a deed for want or failure of consideration). Thus, it has been held that where the grantor accepts the verbal promise of the grantee for support without any agreement or understanding that the failure to do the acts as promised should be a condition, or in any way affect the validity of the deed, or entitle him to a reconveyance, in the absence of fraud, actual or constructive, the grantor would have no right to rescind or to have the deed set aside. Schott v. Schott, 168 Cal. 342, 143 P. 595. On the other hand, it was said by way of dictum in a case of mixed consid-

eration, that if the grantee refuses to execute an agreement to support, the grantor may rescind, but this rescission would involve a cancellation of the deed only upon terms agreeable to equity. In such case equity would take cognizance of the value of the services rendered and the moneys paid, the valuation of the occupation of the land by the promisors, and reach its conclusion under the evidence as to the terms upon which a cancellation of the deed should be decreed. Norris v. Lilly, 147 Cal. 754, 82 P. 425, 109 Am.St.Rep. 188, overruling Grimmer v. Carlton, 93 Cal. 189, 28 P. 1043, 27 Am.St.Rep. 171, on the point that a deed given in consideration of support would be cancelled because the covenant could not be specifically enforced. See Cruickshank v. Vogh, 48 Cal. App. 393, 192 P. 86, which impliedly supports this dictum."

In 5 Cal.Jur. 10 year Supp. 141, the case of Lavely v. Nonemaker, 212 Cal. 380, 298 P. 976, is cited as authority for the rule "Grantor has no right to rescind where deed is executed pursuant to a verbal promise of support."

The Nonemaker case was one in which the plaintiff, a man well along in years and in a week and infirm condition, transferred to his daughter an undivided one-half interest in real property, solely in consideration of the latter's oral promise that she would properly care for him in her home for the remainder of his natural life. The trial court found the allegations of plaintiff's complaint as to fraud and undue influence were untrue; that the agreement had been breached; that there was no consideration for the conveyance and no valid delivery of the deed and ordered a cancellation of the deed.

[1, 2] The Supreme Court reversed the judgment of the trial court and held (212 Cal. at page 383, 298 P. at page 977): "It is settled that a deed without fraud in its inception conveys the title, and is not void for any failure of consideration, either in whole or in part. Tillaux v. Tillaux, 115 Cal. 663, 667, 668, 47 P. 691. Acts done subsequent to the execution and delivery of a deed cannot affect its integrity, and a subsequent failure of consideration or breach of a personal covenant not amounting to a condition, will not avoid the deed, if there was no fraud or false representation. Lawrence v. Gayetty, 78 Cal. 126, 20 P. 382, 12 Am.St.Rep. 29; Duckworth v. Watsonville Water, etc., Co. 170 Cal. 425, 434, 150 P. 58; Masero v. Bessolo, 87 Cal. App. 262, 271, 262 P. 61. Section 1689 of the Civil Code providing for the rescission of contracts for failure of consideration is without application to an executed conveyance, such as we have here, where actual performance by the grantee is not required as a condition. Lawrence v. Gayetty, supra.

"Of course, the circumstances of any particular case may be such as to warrant the conclusion that what purports to be a mere personal covenant is, in fact, and was intended by the parties to be a condition subsequent upon the happening of which the grantee is to be divested of his estate. Such a case is that of Downing v. Rademacher, 133 Cal. 220, 65 P. 385, 386, 85 Am.St.Rep. 160, wherein the grant was executed in consideration of the grantee's promise, evidenced by a contemporaneous written agreement, to work the mine transferred and to deliver to the grantor one-third of the proceeds derived therefrom. * * * The circumstances of the case at bar are not such as to take it out of the general rule. Neither the deed nor the asserted oral agreement either expressly or impliedly refers to the defendant's promise to care for the plaintiff as a condition affecting the validity of the deed, and the trial court has not found that it is such a condition. True such promise constituted the sole and only consideration for the transfer, but in this particular the situation is not unlike that where a conveyance is made solely in reliance upon the grantee's written promise to pay an agreed purchase price, or to subsequently render certain legal services, the breach of each of which promises it has been held gives rise only to an action for damages. Lawrence v. Gayetty, supra; Hartman v. Reid, 50 Cal. 485. The case of Schott v. Schott, 168 Cal. 342, 345, 346, 143 P. 595, presented a state of facts somewhat similar to those involved in this case. It is therein declared, in substance, that where the grantor accepts the verbal promise of the grantee for support without any agreement or understanding that the failure to do the acts as promised should be a condition, or in any way affect the validity of the deed, or entitle him to a reconveyance, in the absence of fraud, the grantor has no right to rescind or to have the deed set aside, but his only remedy for breach of the grantee's personal covenant is an action for damages."

The instant cause comes to this court upon a bill of exceptions, consequently, we do not have a full record of the evidence adduced at the trial. However, it appears that respondent and cross-complainant Genevieve E. Sharpe was called as a witness by appellants under section 2055 of the Code of Civil Procedure and that she testified, among other things, that at the time of the death of her father, James H. Conley, she was residing with him and appellant at 2579 East Poplar Place, Huntington Park; that shortly thereafter in a conversation between her and appellants she stated to them that "she wanted to leave the premises occupied by the three of them and for that reason she was planning to move"; that thereupon appellant Florence M. Conley, in the presence of Vivian Conley, told Mrs. Sharpe that if she would remain in the home and nurse and care for them and manage the property, they would convey to her an undivided one-half interest in the real estate at 2579–2583 East Poplar Place; that the witness, Mrs. Sharpe, stated to appellants that she would accept the offer and take care of appellants until they were well enough to take care of themselves and that she would manage the real estate. That thereafter said witness continued to reside on the property, nursed appellants when they were both ill, provided them with food and clothing, paid all of their bills and expenses incurred for the necessaries of life, collected the rents from the said property, paid all of the utility bills and repairs made on the property, made improvements which she paid for out of her separate funds, paid all the taxes, as well as the sum of $1,034.83 which constituted the balance due on the principal and interest of a note secured by a mortgage; that when the last installment was paid on said mortgage, appellants requested said witness to move from the premises; and that she then stated to appellants that she would vacate the premises and surrender her interest in the property provided appellants would reimburse her for the money she had expended for and on their behalf personally and also for the money she had expended in connection with the repairs, improvements, expenses of preserving and maintaining the real property, and also the taxes thereon, less the sum of $815 which was all the rent she had collected or received from the tenants during the time she was managing said property, all as set forth in the bill of particulars filed herein; that at no time did Florence M. Conley and Vivian Conley, appellants herein, offer to repay her the money she had so expended. In response to questions propounded to her by her own attorney, said witness testified that while both appellants were in poor physical condition in 1936 and during the time she resided with them, that they, and each of them, had sufficient mental capacity to understand their acts; could recall the nature of their property; had exceptionally good memories, and in the opinion of this witness, said appellant were mentally competent.

Appellant Florence M. Conley testified that in August, 1936, she had a conversation with respondent Genevieve E. Sharpe at which time the latter informed said appellant that she intended to move from the property at 2579 East Poplar Street, Huntington Park; and that thereupon said appellant stated to her sister Genevieve that if she would not move but would remain on the property and would take care of the witness Florence and her sister Vivian, that they would convey a one-half interest in the property to the said respondent Genevieve E. Sharpe; that thereafter a one-half interest in the property was so conveyed to said respondent.

From the foregoing resume of testimony, it appears that there was a conflict in the evidence as to how long respondent Genevieve E. Sharpe was to care for and support the appellants.

[3, 4] Neither fraud nor confidential relationship was pleaded. In fact, so far as is shown by the record, appellants were relying upon failure of consideration coupled with their alleged status of mental incapacity to effect a cancellation of the transfer of property. The evidence adduced upon this issue was insufficient to prove incompetency, and the court found against appellants thereon. Moreover, the pleadings did not raise, nor was the trial court called upon to decide whether respondent had failed, neglected or refused to fulfill the promise she made to support appellants. In other words, no showing was made that respondent abandoned performance of her oral agreement to support appellants and that issue cannot be considered for the first time on appeal. 2 Cal.Jur. 234; Newhouse v. Getz, 8 Cal. App.2d 113, 114, 47 P.2d 306.

[5] In any event, the facts and circumstances of the instant case present a

situation to which the ruling enunciated by the supreme court in Lavely v. Nonemaker, supra, is clearly applicable. The findings of the trial court upon this issue were sufficiently supported by the evidence.

Between the date of trial and the entry of judgment herein, to-wit, on December 9, 1941, said respondent Genevieve E. Sharpe died. Thereafter, appellants made their motion for a new trial on the ground, among others, that there was a failure of consideration for the deed in that the death of said respondent prevented the continuing performance of the obligations undertaken by her in consideration for said transfer. Appellants raise the same point upon this appeal, and contend that the trial court erred in denying their motion for a new trial.

[6] Under the conclusions heretofore reached, and in view of the fact that respondent was not maintaining appellants at the time of her death, there is no merit in the last-named contention; therefore, the denial of the motion for new trial was proper.

We believe the circumstances existing in the instant case are substantially different from those shown in Teel v. Bank of Eureka, 42 Cal.App.2d 807, 809, 110 P.2d 78, 79 where the court found that the deed was delivered upon condition that if the grantee "did maintain plaintiff during the remainder of her natural life, then said deed should be delivered to him, and if he failed to do so, he would have no right, title or interest in or to said property, and that said deed should be returned to plaintiff"; and that the determination reached herein is not in conflict with the decision in the cited case ordering a cancellation of the deed.

Appellants finally maintain that a tenant in common cannot be charged with the full amount of taxes, repairs and improvements on real property and the full amount of principal and interest paid by another cotenant without a specific agreement therefor.

It is shown by the record that respondent Genevieve E. Sharpe performed her oral agreement to support her sisters and manage the real property for them for a period of approximately three years. During this period, in addition to nursing and maintaining appellants, said respondent paid a balance due on the principal and interest of a mortgage against the property, as well as all taxes, repairs and improvements thereon, including the construction of an apartment over the garage "so as to provide an income or source of revenue to the parties."

The court found that respondent's nursing and care of appellants and her management of the real property was a consideration for the grant to her of an undivided one-half interest therein; and that the money she furnished for food, clothing, light and water was part of the consideration for such grant; or, as stated by the trial court in a memorandum of opinion filed herein:

"Genevieve E. Sharpe, by her cross-complaint, is not entitled to any moneys for nursing or for care and maintenance nor for managing the property, said services being consideration for her grant of one-half interest in the property;

"That Genevieve E. Sharpe is entitled to one-half of the money expended by her for funeral and hospital bills of James R. Conley, but that Genevieve E. Sharpe is not entitled to any moneys furnished to plaintiffs for food and clothing nor for light and water, these being part of the consideration for the granting of the one-half interest in the property;

"That the total amount due Genevieve E. Sharpe from plaintiffs by reason of her cross-complaint would be the remaining items as set forth in the bill of particulars, to-wit: two thousand one hundred twenty-nine and 68/100 ($2129.68) Dollars, less eight hundred fifteen ($815.00) dollars rent collected from William Hausen, and less four hundred ten ($410.00) dollars, rent chargeable on account of George Sharpe, making a balance due Genevieve E. Sharpe by her cross-complaint of nine hundred four and 68/100 ($904.68) dollars."

This did not take into account the fact that respondent, Genevieve E. Sharpe, was the owner of an undivided half interest in the realty and that, therefore, she would be only entitled to a refund from her cotenant of the latter's proportionate share thereof, or one-half of $904.68 which would amount to $452.34.

[7, 8] "The rule is that when one tenant in common has paid a debt or obligation for the benefit of the joint property, or has discharged a lien or assessment imposed upon it as a common burden, he is entitled as a matter of right to have his cotenant, who has received the benefit of it, refund to him his proportionate share

of the amount paid. As a matter of fact this property was joint property when these taxes and other charges against it were paid by plaintiff. In proportion to their interest all tenants in common are in duty bound to pay taxes, which in this state are a lien upon real property and their nonpayment subjects the land to sale in satisfaction of them. Either of the cotenants may pay the taxes assessed against the whole estate, and such payment discharges the lien imposed upon the common interest, and no matter whether one tenant paying it intended the payment to be for his own benefit or not, such payment in fact and in law essentially inures to the benefit of the other cotenants. It discharges the lien against the common estate for the common benefit, independent of any intention of the cotenant paying it, and as all other cotenants are entitled to the benefit of such payment, it is only right that they should refund to the one making it their proportion of the amount he has paid. Starks v. Kirchgraber, 134 Mo.App. 211, 113 S.W. 1149. This rule equally applies to expenditures other than taxes made for the common benefit." Willmon v. Koyer, 168 Cal. 369, 374, 143 P. 694, 696, L.R.A.1915B, 961. See, also, Rich v. Smith, 26 Cal.App. 775, 784, 148 P. 545; Jamison v. Cotton, 136 Cal.App. 127, 129, 28 P.2d 39.

Respondents admit they have "been unable to find any authority holding the cotenant personally liable for the expenses incurred by the other co-tenant and, therefore (have) no objection to the modification of the judgment entered in the above-entitled action so that the judgment only constitute a lien on the real property and not a personal judgment against the plaintiffs and cross-defendants."

[9] For the foregoing reasons, the judgment is modified by striking paragraph 3 thereof, to-wit: "3. That the defendant and cross-complainant, Genevieve E. Sharpe, have judgment against the plaintiffs and cross-defendants, Florence M. Conley and Vivian Conley, in the sum of nine hundred four dollars and sixty-eight cents ($904.68), which said sum is a lien and encumbrance upon the real property described as follows: Lot 369, Tract 3992, as per map recorded in book 42, page 67 of Maps, in the office of the County Recorder of Los Angeles County, State of California"; and by inserting in lieu thereof the following: 3. That the defendant and cross-complainant, Genevieve E. Sharpe, have judgment in the sum of four hundred fifty-two dollars and thirty-four cents ($452.34), which sum is a lien and encumbrance upon the one-half interest of plaintiff and cross-defendant, Florence M. Conley, in Lot 369, Tract 3992, as per map recorded in Book 42, page 67 of Maps, in the office of the County Recorder of Los Angeles County, State of California; and with such modification, the judgment is affirmed.

DORAN and WHITE, JJ., concur.



58 Cal.App.2d 48

FRESNO IRR. DIST. v. SMITH et al.
Civ. 3061.

District Court of Appeal, Fourth District, California.

April 8, 1943.

1. Deeds ⇐95

Where, in an instrument such as a deed, general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as the classes enumerated.

2. Contracts ⇐143

Court, in construing contract, must look at contract as whole and give each particular clause of contract qualification which it is evident from the other parts of the contract the parties to the contract intended.

3. Waters and water courses ⇐240

Where deed from canal company purported to grant all property of company specifically described therein and described parcels of land, canals, and telephone lines and contained subdivision in one sentence purporting to convey company's entire irrigation system, specifying what such system included, the several words "including", used in the last-mentioned subdivision, would be interpreted as relating only to things which were part

of the irrigation system and as not relating to strip of land running diagonally across two sections, which was not part of system.

See Words and Phrases, Permanent Edition, for all other definitions of "Include".

4. Appeal and error ⇐1008(3)

Where construction of deed by trial court, taking deed as whole and with due consideration to language used in deed, was reasonable, appellate court could not substitute another construction, though such other construction might reasonably have been adopted.

5. Deeds ⇐101

Subsequent acts of parties to an instrument, such as a deed, disclosing interpretation placed thereon by parties, are an important element which may be considered by trial court in interpreting instrument.

6. Waters and water courses ⇐247(1)

In action by irrigation district to quiet title to land, wherein plaintiff claimed through general words in deed and defendant claimed under subsequent specific grant from the same grantor, extrinsic evidence and practical construction by the parties sustained finding that parties to plaintiff's deed did not intend that title to land in dispute should pass to plaintiff thereby.

7. Adverse possession ⇐7(2), 8(1), 9

Where land held by state or any of state's subdivisions has been actually reserved for or dedicated to some specific public use, there can be no adverse holding thereof which can give title to the adverse claimant; but, where such land is not so reserved or dedicated, title may be acquired by adverse possession.

8. Adverse possession ⇐9

Where land allegedly held by irrigation district was neither reserved for nor dedicated to any public use, and could have been alienated by district, title to the land could be wrested from district by adverse possession.

Appeal from Superior Court, Fresno County; Dan F. Conway, Judge.

Action by Fresno Irrigation District against Sidney T. Smith and others to quiet title to realty. Judgment for defendants, and plaintiff appeals.

Affirmed.

L. B. Hayhurst and L. Nelson Hayhurst, both of Fresno, for appellant.

Wild & Carlson and R. F. Maxwell, all of Fresno, for respondents.

BARNARD, Presiding Justice.

This is an action to quiet title to a portion of two sections of land in Fresno County, being a strip 150 feet wide the center line of which begins at the southeast corner of one of the sections and runs northwesterly to the northwest corner of the other section.

In 1910, the Fresno Canal and Irrigation Company, which then owned the land, deeded these two sections to the defendant Smith excepting therefrom this 150-foot strip across both sections. Smith and his successors in interest fenced both sections, including the strip in dispute, paid all of the taxes thereon and remained in possession up to the trial of the action.

In February, 1917, the Fresno Canal & Land Company, as successor to the Fresno Canal and Irrigation Company, deeded its properties to the Fresno Canal and Land Corporation, this 150-foot strip not being specifically referred to but passing by an omnibus clause conveying "All properties * * * now owned by the Grantor."

On May 16, 1921, the Fresno Canal and Land Corporation deeded a part of its properties to the Fresno Irrigation District, which had been organized the year before. The strip here in question, which lies some miles outside the boundaries of the plaintiff district, was not specifically mentioned in this deed but is claimed by the plaintiff under an omnibus provision therein.

On October 8, 1921, the Fresno Canal and Land Corporation conveyed this 150-foot strip by grant deed to the defendant Smith for a consideration of $50. A certificate of title showing title to this strip in Smith was issued by the Fresno County Abstract Company on October 10, 1921. It is conceded that over a period of about eighteen years the plaintiff district made no claim to this strip of land and that no one connected with this district knew that the district might have any interest in the property until about two years before this action was tried, which was in February, 1941, at which time the defendant Smith

sought to obtain a quitclaim deed from the district. In this action, which followed, Smith and his successors in interest set up in their answers that they were the owners of the disputed strip of land; that the Fresno Canal and Land Corporation was the owner thereof on October 8, 1921; that they purchased the strip for a valuable consideration and the same was deeded to them on October 8, 1921; and that at that time they had no notice of any claim to the property on the part of the plaintiff. As further defenses it was set out that it was not the purpose or intention of either the grantor or the grantee in the deed of May 16, 1921, to convey the disputed strip to the plaintiff; that Smith and his successors have been in possession of the property since October 8, 1921, with no notice of the plaintiff's claims and have paid all taxes assessed against the property; and with the further pleading of laches and estoppel against the plaintiff.

The court found that the plaintiff is not and has not at any time been the owner of the disputed strip of land; that the Fresno Canal and Land Corporation appeared of record as the owner thereof on October 8, 1921; that on that date the defendant Smith, believing said corporation to be the owner of the land, purchased the same in fee for a valuable consideration and received a grant deed dated October 8, 1921, which was recorded on October 10, 1921; that Smith, at or before the time of said conveyance had no notice, actual or constructive, of any claim of the plaintiff affecting said land; that at the time of the delivery of the deed of May 16, 1921, by the Fresno Canal and Land Corporation to this plaintiff it was not the purpose or intention of either the grantor or grantee that said deed should convey the disputed property to the plaintiff; that on October 8, 1921, Fresno Canal and Land Corporation was and for many years had been the owner of this property; that on that date the defendant Smith purchased the same and entered into possession thereof and that ever since he and his successors have been in adverse, peaceful, exclusive, open, notorious, continuous and uninterrupted possession and occupation thereof for a period of more than eighteen years, with no notice of any claim on the part of the plaintiff, until this action was commenced, and that during all of said time they have paid all taxes and assessments levied against said property; that the plaintiff should have known of the claim of defendants for more than eighteen years prior to the commencement of this action; that the plaintiff, after such knowledge, permitted and allowed the defendants to expend money in good faith in reliance on the validity of their claim to said property without giving notice to the defendant of its claim until this action was filed; that many of the witnesses who were familiar with the facts in this connection have since deceased; and that during all of said period of time this property was not dedicated or devoted to any public use whatever. A judgment was entered that the plaintiff take nothing by this action and in favor of the defendants, and the plaintiff has appealed therefrom.

The first question raised is as to whether the court correctly construed the deed of May 16, 1921, whereby the Fresno Canal and Land Corporation deeded a part of its properties to the appellant. The resolutions passed by the stockholders and by the board of directors of the grantor corporation, authorize the execution and delivery of a deed conveying to the plaintiff district "the property, rights and franchises of this Corporation which are specifically described in" this deed. This deed starts out with a recitation that it is a grant of "all that property of Fresno Canal and Land Corporation which is more specifically described as follows:" The deed then contains four subdivisions. Subdivision I conveys eight specifically described parcels of land which do not include the land in dispute. Five of these are small parcels containing from a quarter of an acre to 3.62 acres, several of them being described as lying along certain ditches. One contains 55 acres, another is that part of a certain lot lying north of a certain canal, and the eighth is certain lots in the City of Fresno. Subdivision II conveys "All the following described canals, ditches and laterals * * * constituting a portion of or used in connection with Fresno Canal and Land Corporation's irrigation system." Then follows specific descriptions of 64 canals and ditches. Subdivision III conveys four specifically described telephone lines. Then follows Subdivision IV, which is material here and which reads in part as follows:

"Also, the entire irrigation system of Fresno Canal and Land Corporation including, in addition to the foregoing tracts and parcels of land, canals, ditches and laterals, and telephone lines, all other tracts and parcels of land, canals, ditches, and

laterals, and telephone lines, together with all dams, headgates, weirs, flumes, aqueducts, structures, drops, checks, reservoirs, rights of way, reservoir embankments, water rights, rights to the use of water, privileges, franchises and easements, options and rights and property and rights secured and to be secured thereunder, pumps, pipe, machinery, tools, furniture, books, records and maps, including also the Fresno Canal and Land Corporation's entire right, title and interest in and to all appropriations, filings, rights of way and other property and rights in connection with the so-called Pine Flat Project, and including also all other property and rights of Fresno Canal and Land Corporation, real, personal or mixed, tangible or intangible, corporeal or incorporeal, wherever located, subject, however to the following exceptions, to wit:"

Here follows seven numbered exceptions. The first six of these exceptions relate to the Laguna de Tache Grant irrigation system and water rights, a half interest in a weir in Kings River used jointly by the grantor and the Consolidated Canal Company, the headworks and gates of the Consolidated Canal Company, certain rights in the Lone Tree Channel ditch, certain water rights in connection with lands outside the boundaries of Fresno Irrigation District, and all moneys and accounts receivable, including water rentals due to the grantor in the operation of its canal system. The seventh exception gives the grantor the right to use any of the books, maps and records conveyed in Subdivision IV insofar as they relate to any of the properties owned or possessed by the Consolidated Canal Company or retained by the grantor.

The appellant contends that since the land in dispute was not mentioned in these exceptions title thereto passed to the appellant under the broad provisions of Subdivision IV of this deed, as above quoted, which purport to convey all other tracts and parcels of land and all other property and rights wherever located. It relies on Pettigrew v. Dobbelaar, 63 Cal. 396, and similar cases, in which it has been held that deeds are sufficient which merely describe the land conveyed as "all of the land owned" by the grantor. While this is the rule where the deed contains no words which limit the application of the general words, a different rule is sometimes applied in the construction of deeds where such general words follow the expression of a particular subject-matter which may have the effect of limiting the general words used. Such a rule was applied in McFadden v. Lick Pier Co., 101 Cal.App. 12, 281 P. 429, 431, a case not dissimilar in principle to the one now before us. In that case, the court said:

[1] "'It is the rule of construction that, where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated.' * * * In the very inception of the part of said paragraph relied upon by appellants, the subject of improvements and the removal of improvements is made the basis of all that is therein contained. * * * The word 'everything' is a general word following the particular statement of improvements placed upon the premises by the lessee, which the lessee was entitled to remove."

[2] In Lemm v. Stillwater Land & Cattle Co., 217 Cal. 474, 19 P.2d 785, 788, it is said: "A court must look at the contract as a whole and give to each particular clause thereof the modification or limitation or qualification which it is evident from the other parts of the contract the parties intended."

[3] If it had been the intention of the parties, by the deed of May 16, 1921, to convey all properties owned by the grantor with certain exceptions, it would have been a simple thing to have included in the deed a subdivision so stating, as was the situation in the cases relied upon by the appellant. Instead of doing that here, this deed starts out by stating that it conveys all property of the grantor "which is more specifically described as follows:" This limitation narrows the effect of the deed, and it clearly appears from the deed itself that the grantor was conveying only a portion of its properties to the grantee and that it was retaining other properties which were very substantial in nature. After thus specifically limiting the effect of the further provisions of the deed the next three subdivisions thereof convey certain specific parcels of land which would seem to be largely, if not entirely, useful in connection with the operation of the irrigation system which was being transferred to the grantee, together with certain canals, ditches, and telephone lines which are specifically described. After making these specific conveyances the deed, in its fourth

subdivision, purports to convey the entire irrigation system of the grantor which is further described as including (in addition to the parcels of land, canals and ditches, etc. which had been previously conveyed) all other parcels of land, canals, ditches, etc.; all rights in the Pine Flat project; and all other property and rights, real, personal or mixed, wherever located, subject to the exceptions which followed. All of Subdivision IV, down to the exceptions, is in one sentence without an intervening period. The thing conveyed is expressly said to be the entire irrigation system, and the several words "including" which follow in the same sentence should reasonably be interpreted as relating to the things which were a part of that system, which is the only thing conveyed in that subdivision of the deed.

The only thing Subdivision IV purports to convey is the particular irrigation system which the appellant was purchasing, the major portion of which had already been specifically conveyed in the prior subdivisions of the deed. Not only should this fact not be ignored but since the previous portions of the deed had conveyed the main parts of that irrigation system and since Subdivision IV goes on to convey "Also, the entire irrigation system" of the grantor, and then goes on to state that this includes parcels of land, canals, ditches, structures, rights of way, water rights and many other things which would naturally be a part of an irrigation system, but many of which things had previously been specifically conveyed in the prior portions of the deed, it seems reasonable to believe that Subdivision IV was intended to cover all those other portions of that irrigation system which seemed too numerous to specifically mention, and that it was intended thereby to fully cover by general language, and to include, all possible parts of this system and the property used in connection with the same, including even the rights in the Pine Flat project which might be appropriate and valuable to the system at some time in the future when the development of that project made these rights available for use, and including finally, all interests and rights, no matter how indefinite or whether real or personal, tangible or intangible, in the various ditches and laterals, structures, rights of way, water rights, easements and options, and in any and all other property which was a part of this irrigation system thus being conveyed in its entirety. The final clause of the omnibus provision seems, from the wording of the instrument, to have been intended as a catchall phrase to cover any and all property and rights and any partial or mixed interests which were a part of the irrigation system conveyed, and which might not be fully covered by the rather full but still general list of properties which precedes it.

That Subdivision IV was intended to cover only property which normally should be considered as a part of this irrigation system which is expressly conveyed in its entirety is further indicated because the property listed in the latter part of Subdivision IV as being excepted from the conveyance is all property which would naturally be otherwise considered as a part of the property of an operating irrigation system, it being thus specially provided that regardless of the purpose first expressed in the subdivision to convey an entire irrigation system and in spite of the later broad enumeration of the component parts of that system which were to pass to the grantee, the particular rights and properties named in the exceptions should not be included in the property conveyed.

[4] Taking the deed as a whole, and with due consideration to the language used, we think it appears that the construction placed thereon by the trial court is a reasonable one. Under such circumstances another construction, even though it might reasonably have been adopted, may not be substituted by an appellate court. Evans v. Citizens N. T. & S. Bank, 29 Cal.App.2d 133, 84 P.2d 218; Culley v. Cochran, 17 Cal.App.2d 498, 62 P.2d 168; Swerdfeger v. United Acceptance Corp., 9 Cal.App.2d 590, 50 P.2d 818.

We think, moreover, that the extraneous evidence upon the question of intention is sufficient to support the court's finding to the effect that the parties to this deed did not intend that the title to the land in dispute should pass to the appellant. While the appellant concedes that the land in dispute was never used as a part of the irrigation system of the Fresno Canal and Land Corporation, it is argued that all of the direct evidence in the record supports the conclusion that the parties intended that this disputed land should be included in the conveyance. The managing engineer of the appellant district testified that there was very little discussion as to the property that was to be transferred to the appellant, and that most of the discus-

sion took place with reference to whether or not the Pine Flat interests should be included; that finally, the spokesman for the grantor closed the discussion by stating that these interests would be included in the transfer and then went on to say that even the pens and pencils and the desk would be included. One of the only two original directors of the appellant district who were still living testified that a question arose about whether the Pine Flat project should be included in the deed, which held up the negotiations for a time; that this was settled; and that "as to what properties generally would be transferred * * * the statement was made that the Fresno Irrigation District would acquire all the assets and rights of the Fresno Canal and Land Corporation with the exception of some stipulated reservations in the deed." The only other living member of the original board of directors of the appellant district testified that he was present at the meeting when the deal was consummated; that the question came up as to what property the Fresno Irrigation District was to get; that the fixing of the purchase price was "a good deal like horse trading"; that "then the question came up as to what was to be turned over to the Fresno Irrigation District and the main point was the question as to the filings and whatever rights there were in the reservoir site of the Pine Flat project"; and that, finally, the spokesman for the grantor announced that they would sell for the stipulated price everything that the grantor had except their water rights and physical property in connection with the Consolidated district, the Laguna district and the Lone Tree Channel, which were outside the boundaries of the Fresno Irrigation District.

On the other hand, there is evidence that in drawing up the deed in question several lists of properties were used, one of which was drawn up shortly before this sale for the purpose of being used in connection with the application to the Railroad Commission for a change of rates and none of which included the land here in dispute. The managing engineer of the appellant district testified that in the negotiations for this sale the grantor corporation furnished them large maps of the entire situation that "became a part of the properties that were turned over to us," that from these maps it was easy to follow the various canals and branches enumerated in the deed, and that "and then in the end of the thing, the designation of things that were eliminated in the sale." He then spoke of the telephone lines mentioned in the deed and when asked whether those telephone lines were privately owned and used only "by the Irrigation District" he replied: "Yes. And in Paragraph 4 of the deed, there is a clause making—comprehending the entire irrigation system of the Fresno Canal & Land Corporation." He also testified that this 150-foot strip was not specifically mentioned at the time the deal was consummated. The chief engineer for the grantor corporation testified that he had never known that this disputed property was included in the conveyance and that "I remember that the omnibus clause was put in the deed and that was put there, for instance, to cover the right to take over these branch ditches."

[5] The subsequent acts of the parties which disclose the interpretation placed upon an instrument by the parties themselves, is an important element which may be considered by the trial court. Gramer v. City of Sacramento, 2 Cal.2d 432, 41 P.2d 543. It rather clearly appears that the grantor in this deed did not regard this disputed property as having been conveyed to the appellant as, about five months later, it sold and conveyed the property by grant deed to one of the respondents. While the appellant had at least constructive notice of this transfer it made no objection thereto and asserted no claim to that land for more than eighteen years. It also appears in the evidence that at the time this conveyance was made to the appellant the grantor corporation also owned other lands outside the appellant district which it later sold to private parties, and it does not appear that any objection or claim thereto was ever made by the appellant, although these lands were not mentioned in any exception in the deed.

The appellant district was organized shortly before the date of this deed for the purpose of taking over the irrigation system described in this conveyance. It may reasonably be inferred from all of the evidence, including the small amount of discussion that was had with reference to the particular properties that were to be conveyed, that the officers of the appellant district were interested in securing a conveyance of everything that went to make up this irrigation district and that would be useful to the operation thereof, and that they had little, if any, interest in any assets

or properties outside of the district that might be owned by the grantor corporation, other than those which were usable in connection with the irrigation system. The land in dispute was not only outside of the boundaries of the appellant district but there is evidence that because of the lay of the land this property could never be irrigated from the canals of the appellant district and that for any possible irrigation thereof the water would have to be supplied from those water rights and operative properties which were retained by the grantor corporation. There is some evidence that when the two sections containing this strip of land were sold to the respondent Smith in 1910, the strip in question was reserved from that deed because it was then thought that this strip might be used for a ditch to bring water from one of the canals in connection with which the rights were reserved by the grantor in the deed of May 16, 1921. The then secretary of the Fresno Canal and Irrigation Company testified that when Smith came in to buy these two sections in 1910 there was a conversation between Smith and the officers of the company expressing the idea that he was to pay for all of the land, that the company was to retain this right of way for a ditch in case they got water, and that if they did not get water the company was to deed the 150-foot strip to Smith.

[6] The remarks relied upon by the appellant as being direct evidence of an intention to include this disputed land in the conveyance made not only disclose that there was little discussion with reference to any specific property, and no discussion at all with reference to this particular property, but they were made in connection with discussions as to whether or not the grantor's rights in the Pine Flat project should be included in the conveyance. In view of the indefinite nature of this evidence with respect to the question of intention, with some conflicting evidence, with rather strong evidence of general circumstances, and with inferences which might reasonably be drawn therefrom, we think the extrinsic evidence on the question of the intention of the parties not only supports the finding made in that connection but confirms and supports the findings and conclusions of the court with respect to the construction that should be placed upon this deed.

[7, 8] Probably the judgment appealed from could also be sustained on the theory of adverse possession, although this is not necessary under the views above expressed. This issue was pleaded and the court, upon ample evidence, found all of the essential facts in favor of the respondents and as a conclusion of law found that the respondents have a good and valid title to the property in dispute by adverse possession and occupation. The appellant argues that since it is a public corporation title to any of its property could not be acquired by adverse possession. A number of cases are cited in support of this rule. The property involved in the cases cited was, respectively, tide lands, property deeded in trust for the purpose of holding agricultural fairs, property deeded for a drain and continuously so used, public commons, lands reserved for school purposes, a public street and the right to use certain ditches. In Richert v. City of San Diego, 109 Cal.App. 548, 293 P. 673, 676, this court stated the general rule: "Where land held by the state or any of its subdivisions has been actually reserved for or dedicated to some specific public use, there can be no adverse holding thereof which can give title to the adverse claimant." After thus stating the general rule it pointed out a well recognized exception as follows: "The law is likewise clear that, if land held by the state or any of its subdivisions is neither reserved for nor dedicated to some public use and may be alienated by its owner, title may be wrested from it by adverse possession." The land here in question had never been actually reserved for or dedicated to any public use, no reason appears why the appellant, if it owned the land, could not have sold it at any time, and no reason has been advanced why the principles of this exception to the general rule are not here applicable.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concurred.

58 Cal.App.2d 239

PEOPLE v. MURRAY.

Cr. 3682.

District Court of Appeal, Second District, Division 1, California.

April 19, 1943.

As Modified May 12, 1943.

1. Automobiles ⇐344

More than ordinary negligence must be shown in order to sustain a conviction under section of Vehicle Code dealing with negligent homicide. Vehicle Code, § 500, St.1941, p. 1414.

2. Automobiles ⇐344

"Reckless disregard of the safety of others", within section of Vehicle Code dealing with negligent homicide, is doing an act while recklessly ignoring the safety of others. Vehicle Code, § 500, St.1941, p. 1414.

See Words and Phrases, Permanent Edition, for all other definitions of "Reckless Disregard of Safety of Others".

3. Automobiles ⇐344

"Willful indifference to the safety of others," as used in section of Vehicle Code dealing with negligent homicide, imports an intentional lack of regard concerning the safety of others, or an intentional doing of something with knowledge that serious injury is a probable result. Vehicle Code, § 500, St.1941, p. 1414.

See Words and Phrases, Permanent Edition, for all other definitions of "Willful Indifference to Safety of Others".

4. Automobiles ⇐356

In prosecution for negligent homicide, question whether defendant drove his automobile with "reckless disregard of the safety of others" or with "willful indifference to the safety of others" within section of Vehicle Code dealing with negligent homicide, was a "question of fact" for determination by fact finder. Vehicle Code, § 500, St.1941, p. 1414.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

5. Automobiles ⇐355(13)

Evidence supported conviction of motorist for negligent homicide of pedestrian who was crossing an intersection. Vehicle Code, § 500, St.1941, p. 1414.

6. Negligence ⇐11

An actor's conduct is in "reckless disregard of the safety of another" if he intentionally does an act or fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize that actor's conduct not only creates unreasonable risk of bodily harm to the other, but also involves a high degree of probability that substantial harm will result to him.

7. Criminal law ⇐1159(2)

Where evidence is legally sufficient to support guilty verdict rendered, a reviewing court is not authorized to substitute its finding for that of jury

8. Automobiles ⇐357

In prosecution for negligent homicide, an instruction measuring required standard of conduct of defendant on basis of what would be apparent to ordinary, careful and prudent driver, was not erroneous as misleading jury as to quantum of evidence required to warrant a conviction. Vehicle Code, § 500, St.1941, p. 1414.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

John F. Murray was convicted of violating sections 480 and 580 of the Vehicle Code, St.1935, p. 170, St.1941, p. 1414, and he appeals.

Affirmed.

William G. Kenney and Ellis D. Reiter, both of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

WHITE, Justice.

Appellant was found guilty by a jury of violating sections 480 and 500 of the Vehicle Code, St.1935, p. 170, St.1941, p. 1414. Motion for a new trial was denied, and while this appeal was taken from the judgments of conviction on both counts and from the order denying a new trial, the validity of the guilty verdict on count 1 for violation of section 480 of the Vehicle Code is conceded and the appeal is therefore confined to the judgment predicated upon count 2 which charged a violation of section 500 of the Vehicle Code, negligent homicide, and from the order denying a new trial thereon.

At about 10 o'clock on the night of July 8, 1942, Winfield S. Wilson, a man sixty years of age, came to his death as a result of being struck by an automobile driven by appellant. At the time he was struck Mr. Wilson was walking across Santa Monica Boulevard from the north to the south side and was within the prolongation of the westerly curb line of Martel Street. The intersection was quite well lighted and the street lights were on. The victim was wearing a light suit and was leading a dog on a leash. He had just crossed the second set of street car tracks and was on the southerly side of Santa Monica Boulevard at the time of the impact. The force of the collision lifted the deceased into the air and at least five feet above the pavement and his body was thrown entirely across the intersection.

The accident was witnessed by a number of people who happened to be congregated at the intersection. Several men in a parked car about 15 feet from the intersection witnessed the accident as did two women who were parked in their automobile approximately 50 feet from the intersection. Another witness was driving his automobile along Santa Monica Boulevard following appellant's vehicle at a distance of some 30 or 40 yards. This witness testified that he could see the deceased pedestrian in the act of crossing the street when appellant's automobile drove straight on into the victim, knocked him some 80 feet and then drove on without changing either its speed or direction. As to the speed of appellant's automobile, there was testimony estimating it to be some 40 miles per hour while another witness placed the speed at from 40 to 50 miles per hour and still another estimated the rate of speed to be 50 miles per hour. There was testimony that on the evening in question and preceding the happening of the fatal accident, appellant was at the home of a friend at which place he arrived between 7 and 8 o'clock. Appellant's host testified that the two drank liquor during the course of the evening but could not recall either the kind or the amount which he or appellant consumed. Appellant left the home of his friend shortly before 10 o'clock. Appellant did not take the witness stand in his own behalf nor did he offer any defense.

Appellant first challenges the sufficiency of the evidence to sustain his conviction of violating section 500 of the Vehicle Code. This section, as amended in 1941, provides "When the death of any person ensues within one year as the proximate result of injuries caused by the driving of any vehicle *with reckless disregard of, or wilful indifference to, the safety of others,* the person so operating such vehicle shall be guilty of negligent homicide, a felony * * *". Prior to the 1941 amendment the section contained the phrase "in a negligent manner or in the commission of an unlawful act not amounting to felony" in place of the above-mentioned italicized language. The leading case on the interpretation of the Vehicle Code section in its present form is People v. Young, 20 Cal.2d 832, 129 P.2d 353, 356. Stated in a general way, the facts of that case were that defendant was driving an automobile about 25 or 30 miles an hour behind a street car which was traveling in the same direction about 20 to 25 miles an hour; the street car stopped gradually at a regular stopping place where there was no marked passenger safety zone on the pavement; defendant did not stop to the rear of the street car as required by section 571 of the Vehicle Code, but proceeded to pass the stopped street car and struck the decedent who had alighted from the right front door of the street car; there was a skid mark extending 47 feet from the place where the automobile stopped toward the point of impact; the incline of the street upon which the defendant was driving was from five to twenty percent. The defendant testified that the front of her car was past the door of the street car when decedent alighted and that he stepped on to the top of the front fender of her car; that she had no warning that the street car was going to stop and that it stopped suddenly.

In reversing a judgment of conviction in that case, the Supreme Court held that the evidence was not sufficient to establish a violation of section 500 of the Vehicle Code, saying in that regard, "The defendant * * * was merely negligent. * * * She may have been exceeding the speed limit but cannot be said to have been traveling at a particularly excessive speed. * * * The people's evidence shows that the street car stopped gradually, but defendant's failure to observe that was the lack of that care expected of a man of ordinary prudence, that is, ordinary negligence without a high degree of probability of injury to others. * * * Assuming defendant violated that rule [Veh.Code, Sec. 571], the mere violation thereof under the circum-

stances did not constitute wilful misconduct or reckless disregard of or wilful indifference to the safety of others."

Upon the authority of the Young case, supra, Division Three of this court set aside a conviction of violating Vehicle Code section 500 in the case of People v. Montes, Cal.App., 131 P.2d 581, 583, wherein the court said,

"The evidence in the present case was sufficient to justify a finding that defendant did not make the boulevard stop, did not yield the right of way to the decedent, and did not use due care to observe the car of decedent as it approached and entered the intersection, the view of which intersection was unobstructed for a distance of 250 or 300 feet in the direction from which decedent came.

"In the respects just mentioned the defendant was negligent. Defendant was not traveling at a particularly excessive speed as he approached the intersection, and the evidence is not clear as to the rate of speed he was traveling at the time of the collision. The circumstances under which the negligence of defendant occurred were not such that they amounted to recklessly ignoring the safety of others by intentionally doing acts with wanton and reckless disregard of their possible results, and the circumstances were not such that they amounted to an intentional lack of regard concerning the safety of others by intentionally doing something with knowledge that serious injury was a probable result."

[1-3] In People v. Young, supra, the Supreme Court points out that it has been held that the violation of a statutory duty alone does not constitute wilful misconduct; that inattention to the roadway ahead or speeding alone does not constitute wilful misconduct, and that colliding with a car at an intersection while driving 60 miles per hour does not of itself constitute wilful misconduct. As we read the Young Case we draw therefrom the impression that the language of the statute as now framed must be held to require that more than ordinary negligence be shown to sustain a conviction thereunder. That, as stated by the Supreme Court, the phrase "reckless disregard of the safety of others" as it appears in the Vehicle Code section means doing an act while recklessly ignoring the safety of others, or to state it in another way, the "intentional doing of an act with wanton and reckless disregard of its possible result", while the term "wilful indifference to the safety of others" imports an intentional lack of regard concerning the safety of others, or an "intentional doing of something * * * with a knowledge that serious injury is a probable * * * result".

[4, 5] We are impressed that in the consideration of prosecutions arising out of section 500 of the Vehicle Code the interpretation to be given actions and conduct of the defendant must turn on the circumstances of the individual case, and that decisions passing upon facts deemed sufficient or insufficient to warrant a conviction can be of little assistance other than to announce the definiton of the terms and phrases used in the statute. Therefore the question of whether the defendant herein drove his automobile "with reckless disregard of, or wilful indifference to, the safety of others" is essentially one of fact for determination by the fact finder. Can we, therefore, say that the actions and conduct of appellant herein while driving his vehicle amounted to a course of conduct which included the doing of something which should not be done, or intentionally failing to do something which he should have done, under circumstances disclosing knowledge, express or implied, that as a result of his recklessness, wantonness or wilfulness, injury to others would be the probable (as distinguished from a possible) result? In the instant case we feel the query must be answered in the affirmative. The record discloses testimony, undenied by appellant, that after spending a couple of hours at the home of a friend, drinking liquor, the kind and quantity of which appellant's host could not remember, appellant drove his automobile on a boulevard upon which, in addition to normal traffic, there was a two-way street car line, at a rate of speed variously estimated at from 40 to 50 miles per hour. When approaching an intersection across which a pedestrian was walking, attired in light clothing and leading a dog on a leash, and which intersection was well lighted, appellant continued to drive his vehicle at the same high rate of speed, turning neither to the right or left to avoid striking the pedestrian, but heading directly into the latter, who had crossed more than half way through the intersection at the time appellant entered the same. The testimony further shows that the pedestrian was plainly visible to the driver of an automobile following behind appellant's vehicle at a distance of some 30 or 40 yards. Surely it can not be

claimed that driving an automobile under the circumstances here present, 40 to 50 miles per hour down the center of a city boulevard, through an intersection well lighted, visible and occupied by a pedestrian who had the right of way, constitutes anything but a wanton, wilful and reckless disregard of the probable, as distinguished from the possible, result of a combination of speed, liquor and erratic driving.

Moreover, in the light of the evidence, the jury reasonably could have inferred that the deceased was crossing the street under circumstances that made him plainly visible to an alert driver and that the accident, in part, was the result of a neglect on the part of defendant to devote the proper attention to the operation of his car by keeping a lookout ahead at all times.

[6] In the cases of People v. Young, supra, and People v. Montes, supra, the court was careful to point out in the first mentioned case that "This is not a case where defendant had an opportunity to see the deceased for some distance but still continued on her course, thus showing an element of intent to cause injury or a high degree of probability thereof"; while in the last-cited case Division Three of this court called attention to the fact that as the defendant therein approached the intersection where the collision with another automobile occurred, he was not driving at an excessive speed. However, in the case with which we are here concerned, the appellant was operating his vehicle at an excessive speed, not only as he approached the intersection but as he passed through it; he did have an opportunity to see the victim in the intersection for some distance before appellant's vehicle entered the same. While in the aforesaid cases relied upon by appellant herein there were present facts and circumstances which removed from the sphere of "wanton and reckless disregard of probable results" defendant's conduct and actions and placed the same in the category of ordinary, or at most, gross negligence, which is insufficient to establish guilt under section 500 of the Vehicle Code, such is not the situation presented in the case at bar. In the instant case appellant's conduct comes within the definition of "reckless disregard of the safety of others" as that term is defined at page 500, Restatement of Torts, quoted with approval by the supreme court in People v. Young, supra, and reading as follows: "The actor's conduct is in reckless disregard of the safety of another if he intentionally does an act or fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize that the actor's conduct not only creates an unreasonable risk of bodily harm to the other but also involves a high degree of probability that substantial harm will result to him."

[7] The evidence being legally sufficient to support the guilty verdict herein rendered, a reviewing court is not authorized to substitute its finding for that of the jury.

[8] Finally appellant asserts error on the part of the trial court in giving to the jury the following instruction: "The defendant is charged under section 500 of the Vehicle Code, which provides that 'When the death of any person ensues within one year as the proximate result of injuries caused by the driving of any vehicle with reckless disregard of, or wilful indifference to the safety of others, the person so operating such vehicle shall be guilty of negligent homicide'.

" 'Wilful indifference to, the safety of others' relates to such conduct on the part of the driver of a vehicle as displays the intentional driving of the vehicle with indifference to the likelihood of injuries to other persons such as would be apparent to the ordinarily careful and prudent driver had he been in the position of the defendant.

" 'Reckless disregard of the safety of others' relates to the driving of a vehicle under circumstances which would cause the ordinarily careful and prudent driver to realize that such operation of such vehicle was then and there likely to cause injury to other persons and, without regard to such probable consequences, with continuance of such operation of the vehicle with a reckless indifference to the natural consequences."

Appellant bases his attack upon the quoted instruction on the ground that it allegedly measures the required standard of conduct of the defendant on the basis of what would be apparent to the ordinary careful and prudent driver. Appellant's contention in this regard is without merit. Just as the law prescribes a standard for measuring the conduct of people in arriving at a decision as to whether they are guilty of ordinary negligence, so too there must be a standard to measure the conduct of vehicle drivers prosecuted under section 500 of the Vehicle Code to deter-

mine whether such conduct was in "reckless disregard of", or with "wilful indifference to" the safety of others. That standard must of necessity consist of a comparison of the conduct of defendant driver with that of the average man, or to use the phrase with which we are so familiar, "the ordinary careful and prudent man" situated as the defendant was, seeing what he saw and knowing what he knew. The questioned instruction, therefore, did not mislead the jury as to the quantum of evidence required to warrant a conviction, but merely gave to the jury the universally applied standard from which they were to determine whether the actions and conduct of appellant amounted to only ordinary or gross negligence, or in the light of what ordinary prudence and care under the circumstances would dictate, amounted to such recklessness, wantonness and wilfulness as to approach that wilful misconduct in the driving of an automobile which is denounced by the Vehicle Code section under which this prosecution was instituted. Appellant does not venture to suggest any different standard for measuring the conduct of a defendant than that contained in the challenged instruction. Surely it can not be said that the conduct of a defendant should be measured by the actions of a careless man, an imprudent man, an intoxicated man, or one who is an incompetent driver.

The judgment from which this appeal was taken and the order denying a new trial are, and each is, affirmed.

YORK, P.J., and DORAN, J., concur.

21 Cal.2d 876

NARLIAN v. STATE BAR OF CALIFORNIA.

L. A. 18490.

Supreme Court of California.

April 23, 1943.

As Amended May 20, 1943.

1. Attorney and client ⇐57

Supreme Court is not bound by findings or recommendation made by local administrative committee in disbarment proceeding, nor their adoption by the Board of Governors of the State Bar, but will examine record carefully anew to ascertain weight of the evidence, and whether any charge has been proven against attorney which merits his disbarment.

2. Attorney and client ⇐46

The ultimate approval of persons concerned with attorney's handling of a client's funds does not validate previous censurable conduct of attorney in handling client's funds, nor prevent disbarment.

3. Attorney and client ⇐53(2)

In disbarment proceedings, evidence established that attorney was guilty of commingling money of a client with his own funds in violation of rule of professional conduct.

4. Attorney and client ⇐53(1)

In disbarment proceeding against attorney charged with commingling money of client with his own funds, it was appropriate to consider evidence of repeated disputes of attorney with clients with regard to money matters involving filing of several complaints with state bar and ensuing institution of formal disciplinary proceedings, one of which culminated in suspension.

5. Attorney and client ⇐58

An attorney is not entitled to any indulgence by reason of restitution of moneys wrongfully retained from his client or which was the subject of an objectionable accounting practice, especially where such restitution is made merely as a matter of expediency and under pressure.

6. Attorney and client ⇐58

Any attorney who is guilty of habitual misuse of his clients' funds should be deprived of the license under which he is authorized to practice law, and by which he has been recommended to the public as a person worthy of trust.

In Bank.

Proceeding by A. P. Michael Narlian, petitioner, against the State Bar of California, respondent, to review a recommendation of the Board of Governors of the State Bar that petitioner be disbarred from the practice of law.

Petitioner ordered disbarred.

Joseph Musgrove, of Los Angeles, for petitioner.

Jerold E. Weil and Stanley M. Arndt, both of Los Angeles, for respondent.

PER CURIAM.

This is a proceeding to review a recommendation of the Board of Governors of The State Bar that petitioner be disbarred from the practice of law.

By a notice to show cause issued in August, 1941, petitioner was charged with the commission of acts involving moral turpitude and with the violation of his oath and duty as an attorney. From findings of fact made at the termination of three hearings in this disciplinary matter, Local Administrative Committee No. 14 for the County of Los Angeles concluded that petitioner was guilty as charged and that, in addition, he had commingled the money of a client with his own funds, in violation of rule 9 of the Rules of Professional Conduct of The State Bar. The committee recommended disbarment. Thereafter petitioner's counsel and the examiner for The State Bar presented further argument to the Board of Governors, and it, "after full consideration and discussion of the record in the * * * proceeding," approved and adopted the committee's findings with but one slight alteration in recognition of an accounting credit due petitioner as the result of his payment of a delinquent sum sometime between the second and third hearings before the local administrative committee. Upon the findings as so modified the Board of Governors, by a vote of eight to five, made its recommendation to this court that petitioner be disbarred. In the resolution of the board this court was advised that in fixing the degree of discipline recommended the board took into consideration petitioner's past record. In his application for review petitioner challenges the sufficiency of the evidence to sustain the determination of the board, and in particular in this connection he questions the propriety of its recommendation based in part upon reference to previous charges of professional misconduct.

In the findings as modified, the facts involved in the present proceeding are recited substantially as follows: Sometime prior to May 6, 1939, petitioner was employed by one A. W. Elder to represent the latter in a divorce action between him and his wife, Olga E. Elder. By a property settlement agreement prepared by petitioner and executed by the parties on the date just mentioned, it was provided that A. W. Elder should pay to Olga E. Elder the sum of $270 as alimony, in regular monthly installments of $15, commencing on Apirl 1, 1939, and continuing until the full amount was paid. The agreement further provided that A. W. Elder should pay to Olga E. Elder $125 for attorneys' fees and $15 for court costs in the divorce action, such total sum of $140 to be payable as follows: $37.50 at the time of the execution of the agreement, $22.50 on May 1, 1939, and the balance of $80 in regular monthly installments of $10, commencing on June 1, 1939. Between the period of April 1, 1939, and August 5, 1940, Mr. Elder forwarded to petitioner various sums aggregating $449.50, with the understanding that petitioner would pay from such amount $270 to Mrs. Elder as her alimony pro rata and $140 as scheduled for her attorneys' fees and court costs. Although Mr. Elder's periodic payments to petitioner over these months were made substantially on the dates required by the property settlement agreement and were amply sufficient to satisfy the running contractual obligation with Mrs. Elder, during this time from the funds so collected petitioner remitted to her but $15, an installment forwarded in June, 1940, and to her attorneys only the aggregate amount of $107.50.

During the month of November, 1940, Mrs. Elder called on Mr. Elder at his office to ascertain why he had failed to make the scheduled payments. He informed her that he had paid to petitioner the sums required by the terms of the property settlement agreement, and in corroboration of such statement he showed her his canceled checks in the matter. In her presence he then telephoned to petitioner for an explanation of the situation, and in the course of conversation the latter assured him that he had the money and would make immediate payment to Mrs. Elder. After several unsuccessful attempts to secure an appointment with petitioner, Mrs. Elder had her sister-in-law arrange for the desired interview by using her own name and without disclosing their relationship. At the appointed time, which was on a day toward the end of November, 1940, Mrs. Elder and her sister-in-law saw petitioner at his office, and he stated to them that he was not sure what money was owing to Mrs. Elder under the agreement, that the bookkeeper in charge of his records was absent that afternoon, but that he would have the necessary information the following day. When Mrs. Elder called at the time suggested by petitioner, she was again met with the excuse that his bookkeeper's failure to return to work necessitated their waiting another day to settle the matter. Finally, on December 2, 1940, in response to Mrs. Elder's telephonic inquiry of him as to when he would pay the money due, petitioner said that checks in the proper amount would be forwarded to her by mail that afternoon. When she did not receive the checks in due course, Mrs. Elder, on December 4, 1940, lodged a complaint at the office of The State Bar. The next day, December 5, 1940, she notified Mr. Elder of her action in the matter, and by letter of the same date he advised petitioner of Mrs. Elder's report of her grievance to the bar association.

On December 6, 1940, petitioner mailed to Mrs. Elder's counsel at Napa, California, two checks: one payable to Mrs. Elder in the sum of $135 and one payable to her counsel in the sum of $120. In the accompanying letter of transmittal petitioner requested that the check for $120 not be deposited for a few days because petitioner was uncertain if his accounting in the matter was correct. On the date of drawing these checks petitioner did not have in the bank sufficient funds to cover either one. On December 16, 1940, the check for $135 was presented for payment, and on the same day petitioner deposited in his bank account that amount to cover said item. After payment of that sum from petitioner's account his balance in the bank stood at $1.15. The check for $120, endorsed to Mrs. Elder and deposited by her in the bank, was returned to her with the notation that payment had been stopped. Mrs. Elder thereupon attempted to communicate with petitioner and a few days later when she did see him at his office, he told her that payment on the $120 check was stopped because he wanted a signed satisfaction before the check was cashed. Petitioner did not give her the money at that time but told her to return a day or two later. On January 7, 1941, Mrs. Elder again went to petitioner's office and at his request

signed the following three documents: (1) A satisfaction of judgment as of the date just mentioned; (2) a letter dictated by petitioner and directed to her attorney, asking him to sign and file the satisfaction of judgment; and (3) a letter addressed to petitioner, all of which excepting the word "Jan." and the signatures of Mrs. Elder and a witness was in petitioner's handwriting. This last letter contains above Mrs. Elder's signature the following sentence: "This matter concluded to my satisfaction." Mrs. Elder was unable to remember whether these words were on the letter when she signed it, but an examination of the document indicated to the members of the committee that they were not. Mrs. Elder unquestionably received $70 that day, but it does not clearly appear when she received the $50 balance of the full sum of $120. She testified that it too was paid that day, but petitioner claimed that it was paid to her on some previous date, although he was unable to state how or when.

At no time between August 5, 1940, and January 7, 1941, did petitioner have on deposit in the bank funds sufficient to have paid Mrs. Elder or her attorneys the amounts due and which petitioner had received from Mr. Elder. Petitioner was unable to say what disposition he had made of any single payment forwarded to him by Mr. Elder, but he stated that he thought that his client's respective personal checks were cashed, the money accumulated and converted into cashier's checks. Included in such cashier's checks would be funds of petitioner and other clients. Petitioner testified that he stopped payment on the $120 check above mentioned because he had not received a satisfaction of judgment from Mrs. Elder's counsel, but in the letter of transmittal of December 6, 1940, accompanying the two checks under discussion he requested that the $120 one not be cashed for a few days until he had heard from Mr. Elder, and that "as soon as these amounts are paid you will be kind enough to file, or forward to me for filing, a satisfaction of judgment." At the time of the first two hearings before the committee there was still a balance of $22 due to Mrs. Elder's attorneys under the property settlement agreement, but such amount was paid prior to the last hearing in November, 1941. Petitioner was served with a subpoena duces tecum to produce before the committee his ledger and records referring to this matter, but he did not do so, stating that they apparently were in files which had been misplaced.

[1] Inasmuch as this court is not bound by the findings or recommendation made by the local administrative committee, nor their adoption by the Board of Governors (In re Shattuck, 208 Cal. 6, 279 P. 998; In re Petersen, 208 Cal. 42, 280 P. 124; In re Stafford, 208 Cal. 738, 284 P. 670, the entire record herein has been carefully examined anew to ascertain the weight of the evidence and whether or not any charge has been proven against petitioner which merits his disbarment. From such complete review the conclusion is inescapable that the findings, as modified, fairly reflect in their recital of the present factual situation the censurable nature of petitioner's conduct, and that the record as a whole fully justifies the recommendation which has been made in this matter. Petitioner's assertion that his inability to produce his pertinent files, allegedly mislaid in his office some three or four months prior to the disciplinary hearings, placed him at a disadvantage is manifestly a claim incapable of substantiation and consequently a negligible factor.

Countless discrepancies and weaknesses appear throughout petitioner's testimony and argument in his attempt to explain his failure to make prompt accounting of funds transmitted to him by Mr. Elder, his client, in satisfaction of the latter's contractual obligations. Petitioner claims that when Mrs. Elder called upon him at his office in November, 1940, and requested the sum of $255 as owing to her under the terms of the property settlement agreement, he did not give her that or any other amount because he was not certain whether the agreement covered payments for twelve or eighteen months. However, the governing contract was in writing, petitioner had a copy in his possession, and admittedly his files in the matter were at that time accessible in his office for inspection. Likewise without force as a basis for his refusal to comply on that occasion with Mrs. Elder's demand for her delinquent alimony installments is petitioner's present assertion of a then existent uncertainty on his part as to the amount of his own fee and the status of his receipts therefor in this matter. In the first place, petitioner's purported dubiousness on this phase of the Elder account would appear feigned in view of petitioner's letters to his client outlining in definite terms the fee charges, the corroborative

correspondence contained in petitioner's then available office records, Mr. Elder's positive statement at the disciplinary hearing that he had paid the balance of petitioner's agreed fee in April, 1939, and petitioner's prompt admission that his client's testimony as to the condition of their financial arrangements was unquestionably correct. Moreover, as a second consideration, the circumstance of a default in petitioner's fee receipts for his services would not permit his assertion of a personal claim to funds remitted to him by his client for discharge of the latter's obligations.

Petitioner now suggests that a desire to "make a better deal for his client" prompted him to accumulate the alimony payments as a basis for future negotiations. Mr. Elder testified that he assumed that petitioner was forwarding the money promptly to Mrs. Elder pursuant to the terms of the agreement, and petitioner himself admitted at the hearing that his dilatory method of accounting to Mrs. Elder was not a proper course of procedure. Moreover, in the Elder divorce action the property settlement agreement had been incorporated in the interlocutory and final decrees entered on May 31, 1939, and June 17, 1940, respectively, and petitioner's failure to remit to Mrs. Elder the alimony payments on the scheduled dates was exposing his client to prosecution in contempt proceedings. In this connection petitioner's present claim that his doubt as to whether the agreement was made a judgment warranted his delay in remitting the alimony payments will not bear close scrutiny. The certificate of the county clerk, here in evidence, discloses that petitioner admitted service of a copy of the interlocutory decree on June 2, 1939, and that he himself prepared and forwarded the final decree for filing in June, 1940. Furthermore, the original satisfaction of judgment signed by Mrs. Elder in petitioner's office on January 7, 1941, as above stated, referred specifically to the entry of the final decree by date, its location by page in the proper judgment book, and its provision relative to money payments. In this state of the record petitioner's dereliction in his duty to make prompt accounting of funds entrusted to his care for disbursement in specified channels is beyond question.

[2] It would serve no useful purpose to detail the petitioner's complaint that the adopted findings are unfair and partial because they do not include certain evidentiary matters in his favor. His points of reference constitute at most mere instances of conflict in the testimony, and they are wholly at variance with the substantial weight of the evidence. In connection with these alleged unjust omissions he particularly challenges the adequacy of the findings because of their failure to show that his termination of the Elder accounting matter met with the *final* approbation of the principal parties in interest. In the first place, it is highly questionable whether the record sustains petitioner's claim of satisfaction, and secondly, the *ultimate* approval of said parties would not validate previous censurable conduct in the handling of a client's funds. When queried on the subject of whether this matter was concluded to her satisfaction, Mrs. Elder testified at the disciplinary as follows: "Yes it was, except I was still *unsatisfied* with Mr. Narlian's action in the case, but so far as receiving the money, I did receive the money." Also of importance in this regard is the condition of the aforementioned letter of January 7, 1941, directed to Mrs. Elder's counsel and signed by her in petitioner's office upon her receipt of the balance of the money due her under the property settlement agreement. While this document, as introduced in evidence herein, contained immediately above her signature the sentence "This matter concluded to my satisfaction," Mrs. Elder was not certain that such document included these words when she executed it. She testified on the subject as follows: "I do not remember definitely whether they [said words] were there or not; I can't remember that they were." Moreover, upon examination the writing is readily susceptible of the interpretation placed thereon by the local administrative committee after inspection, to the effect that the words in question were not written there when Mrs. Elder signed the document. As to Mr. Elder's purported accord with petitioner's method of allocating and disbursing the funds forwarded in pursuance of the schedule fixed by the mentioned agreement, the undisputed evidence shows that Mr. Elder completed the specified payments in August, 1940, that his desire to avoid unpleasant transactions with Mrs. Elder had constituted a prime motivating factor in his prompt discharge of his contractual obligations as the terms of settlement required, that he had assumed that petitioner had been making timely transmittal of the alimony payments to Mrs. Elder, and that his first intimation to the contrary came as the result

of her complaint in his office in November, 1940. In the light of these considerations referable to Mr. Elder's understanding of this affair during the pertinent period covered by the agreement, his statement at the disciplinary hearing that he was "satisfied" with petitioner's services since "everything has been paid" and he was no longer in default, cannot reasonably be regarded as evidence of his *unqualified* approval of petitioner's accounting practice in this case. In fact, these references to the evidence at petitioner's instance demonstrate only an attempt on his part to evade the consequences of his financial irresponsibility in this matter and certainly do not establish the existence of any mitigating factors in his favor. Moreover, as above indicated, the *present* opinion of the principal parties in interest with regard to petitioner's conduct in the premises does not ameliorate the gravity of the charges subject of this disciplinary proceeding nor obviate considerations of petitioner's remiss performance of his professional duties. The point at issue is whether petitioner in his management of this affair has shown himself to be a person worthy of trust and duly appreciative of the ethics of the legal profession. Marsh v. State Bar, 2 Cal.2d 75, 39 P.2d 403.

[3] There can be no question under the evidence but that petitioner is guilty of a violation of rule 9 of the Rules of Professional Conduct, providing that "A member of The State Bar shall not commingle the money or other property of a client with his own * * *." 213 Cal. cxv. As was observed in Peck v. State Bar, 217 Cal. 47, 51, 17 P.2d 112, 114, "This salutary rule was adopted to provide against the probability in some cases, the possibility in many cases, and the danger in all cases that such commingling will result in the loss of clients' money." From the record here it appears that it was petitioner's policy to convert into cashier's checks all funds coming into his hands in connection with his legal practice; that small collections would be accumulated until they were sufficient in the aggregate to permit their transfer into checks of some sizable denomination, usually in round figures; that inasmuch as petitioner did not keep a bank account with any appreciable balance, he made indiscriminate use of these cashier's checks in the discharge of various obligations, whether they involved appropriate disbursements of moneys to clients or the satisfaction of his own business expenses, such as office rent and secretarial salaries; that his practice was to issue personal checks on his bank account in excess of the funds there standing to his credit, and upon the bank's notification of his office in due course of the consequent deficiency, cashier's checks in a suitable amount would be deposited to meet the charge against his account. When in connection with this financial practice petitioner was questioned at the hearing as to his disposition of the regular installment payments forwarded to him by Mrs. Elder in pursuance of the terms of the property settlement agreement, petitioner was vague and unconvincing in his attempt to correlate such sums with the purchase of any particular cashier's checks listed by him as acquired during the accounting period in question, nor did he know which ones of such checks had been cashed and which were outstanding. He finally concluded that the Elder moneys, though not separable in relation to the itemization of the cashier's checks, "might well be" comprehended therein. Petitioner admitted that he "did not have any trust account for trust funds." This evidence of petitioner's inability to distinguish with any degree of certainty trust moneys in his possession not only demonstrates his disregard of the prohibition of the pertinent rule above quoted, but also vitiates the effectiveness of his claim that during the entire time of delinquency in his accounting for the Elder payments as received by him, such sums were available for his disbursement as specified by the property settlement agreement. In addition, such assertion of financial responsibility as to his trust obligations for the period of default here involved is wholly inconsistent with petitioner's further line of argument that the *fear of attachment* prompted him, as a matter of protection for his clients, to convert their funds into miscellaneous cashier's checks for storage in his office rather than to deposit them in an appropriately designated bank account. If, while in his possession, moneys confided to his care were in fact exposed to the danger mentioned, petitioner's maintenance of a trust account for their proper segregation was more, rather than less, essential as a precautionary measure. Moreover, such situation serves to aggravate the gravity of petitioner's failure to transmit promptly to Mrs. Elder her installment payments so that they would not be endangered by unnecessary retention on his part.

At this point of discussion it is relevant to note in relation to the present charges brought against petitioner the reference in the adopted findings to his past conduct. The record in this matter discloses that between the years 1928 and 1941 six formal disciplinary proceedings were instituted against petitioner. Four of these were dismissed by the Board of Governors in accordance with the recommendations of the respective local administrative committees; in another, the trial committee recommended a suspension of six months, but the board, upon proof of restitution of certain moneys to the aggrieved client as directed in its resolution passed at a previous hearing in the matter, dismissed the complaint; and in the one remaining and of the most recent date the committee recommended a six months' suspension from the practice of the law, which measure of discipline the board reduced to thirty days. (A review of the latter disciplinary proceeding by this court was not sought.) Five of these six previous instances of complaint directly involved difficulties concerning money transactions and accounting practices between petitioner and his various clients. Because of their chronological significance here, two of the prior proceedings merit some passing comment. One relates to a disciplinary hearing in 1939, wherein petitioner's system of converting into cashier's checks clients' funds in his possession was examined by the trial committee and declared to be "not the best practice." Accordingly, in its findings and recommendation to the Board of Governors in April, 1939, the committee referred to its statement to petitioner that "it would be wise in the future to open a clients' account or trustee account in which funds belonging to clients should be deposited" and his response that "he intended to do so." Yet despite this criticism and his agreement to follow the committee's suggestion, petitioner in the very same month—April, 1939—in which he made his promise to correct his objectionable business methods began to accumulate in cashier's checks the Elder installment collections as they arrived at his office for disbursement under the terms of the property settlement agreement. The other prior disciplinary instance of particular relevancy here was heard by the local administrative committee in October and November, 1940, and ultimately resulted in petitioner's suspension of thirty days from the practice of the law in 1941, as above stated. From his testimony in that proceeding it appears that petitioner's inability to satisfy before November, 1940, a judgment obtained against him by his client (the complaining witness) in the preceding January, because of certain accounting defalcations, was due to "restricted collections" in petitioner's office during that year, and that he paid as soon as he could do so. There, too, the evidence disclosed petitioner's failure to keep a trust account and his resultant difficulties in his system of cashier's checks indiscriminately representative of his own and clients' funds. In that proceeding petitioner's admission of financial embarrassment throughout the major portion of the year 1940 as the reason for his failure to discharge promptly a judgment held against him by one of his clients is irreconcilable with his claim now that during the same period he had available ample funds to have satisfied Mrs. Elder's payments under the agreement.

[4-6] It is appropriate to take into consideration this previous record in determining what penalty should be imposed for the misconduct involved in the present proceeding. Mills v. State Bar, 6 Cal.2d 565, 58 P.2d 1273; Kennedy v. State Bar, 13 Cal.2d 236, 88 P.2d 920; Petersen v. State Bar, 16 Cal.2d 57, 104 P.2d 769; Hennessy v. State Bar, 18 Cal.2d 685, 117 P.2d 326; Cheleden v. State Bar, 20 Cal.2d 133, 124 P.2d 1. This evidence of repeated disputes with clients with regard to money matters involving the filing of several complaints with The State Bar and the ensuing institution of formal disciplinary proceedings, one of which culminated in the aforementioned suspension, discloses an habitual failure on the part of petitioner to appreciate the responsibilities of his profession rather than an isolated instance of dereliction in his duty followed by a firm determination to make amends. From the record it appears that on two of the occasions prior to the 1940 one above noted, it was only after disciplinary proceedings had been commenced that petitioner paid to his respective clients funds which he had improperly withheld from them. He has followed a like policy in the present situation by his delay of many months, and until after complaint was made to The State Bar by the aggrieved party, before transmitting installment payments entrusted to his care by his client for prompt disbursement in discharge of the latter's contractual obligations. An attorney is not entitled to any indulgence by reason of restitution of moneys wrongfully retained from his client, especially where

such restitution is made merely as a matter of expediency and under pressure. Herrscher v. State Bar, 4 Cal.2d 399, 49 P.2d 832; Maggart v. State Bar, 7 Cal.2d 495, 61 P.2d 451. The same principle is equally applicable here in circumstances involving like considerations with respect to an objectionable accounting practice. In concluding this discussion of petitioner's persistent digression from the ethical standards of the legal profession, the following observation made in Mills v. State Bar, supra, 6 Cal.2d at page 567, 58 P.2d at page 1274, is pertinent: "Whatever might be said in favor of a milder punishment for single misdemeanors not involving deliberate moral turpitude, there is no doubt in our minds that any lawyer who is guilty of habitual misuse of the funds of his clients should be deprived of the license under which he is authorized to practice law, and by which he has been recommended to the public as a person worthy of trust."

It is therefore ordered that petitioner be disbarred and that his name be stricken from the roll of attorneys of this state, the order to become effective July 7, 1943.



22 Cal.2d 61

McDANIEL et al. v. CLAVIN.

L. A. 18553.

Supreme Court of California.

April 24, 1943.

1. Commerce ⇐37

Where goods which originated in another state are placed in a warehouse and halt in movement is a convenient intermediate step in process of getting them to final destinations, they remain "in commerce" within meaning of Fair Labor Standards Act until they reach those points. Fair Labor Standards Act of 1938, § 1 et seq., and § 7, 29 U.S.C.A. § 201 et seq., and § 207.

See Words and Phrases, Permanent Edition, for all other definitions of "In Commerce".

2. Commerce ⇐37

When goods are not brought into state pursuant to a prior order by a customer and are stored in warehouses awaiting local sale, the practical continuity of movement is broken, and such goods are no longer "in commerce" within meaning of Fair Labor Standards Act. Fair Labor Standards Act of 1938, § 1 et seq., and § 7, 29 U.S.C.A. § 201 et seq., and § 207.

3. Commerce ⇐37

Where poultry dealer secured large portion of his poultry from other states and placed poultry in cold-storage warehouses awaiting local sale, poultry ceased to be "in commerce" and employee's activity in taking poultry from warehouse was simply a step in local distribution thereof and not covered by Fair Labor Standards Act. Fair Labor Standards Act of 1938, § 1 et seq., and § 7, 29 U.S.C.A. § 201 et seq., and § 207.

4. Commerce ⇐16

Where within a year and one-half employer made three poultry shipments to New York and twelve to Arizona, and employee assisted in preparation of one New York shipment and two Arizona shipments, interstate transactions, in relation to employer's local business and predominantly local character of employee's work, were so isolated and sporadic as to fail to establish that employee was engaged in "production of goods for commerce" within coverage of wage and hour provisions of Fair Labor Standards Act. Fair Labor Standards Act of 1938, § 1 et seq., and § 7, 29 U.S.C.A. § 201 et seq., and § 207.

See Words and Phrases, Permanent Edition, for all other definitions of "Production of Goods for Commerce".

In Bank.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by Louis McDaniel and others against Carl Clavin to recover overtime wages claimed to be due plaintiffs under provisions of Fair Labor Standards Act of 1938, 29 U.S.C.A. § 201 et seq. From a judgment for defendant, plaintiff Bernard Silver appeals.

Affirmed.

For prior opinion, see 128 P.2d 821.

Phillip Silver, of Hayward, for appellant.

Henry Haves, of Los Angeles, for respondent.

TRAYNOR, Justice.

Louis McDaniel and Bernard Silver brought this action to recover overtime wages that they claimed were due them on the ground that they were "engaged in commerce" and "in the production of goods for commerce" within the meaning of section 7 of the Federal Fair Labor Standards Act of 1938, 52 Stat.L. 1060, 29 U.S.C.A. § 201 et seq. Findings were waived by the parties. Plaintiff Bernard Silver appeals from the judgment for defendant.

The defendant operates a wholesale poultry business and usually obtained from brokers the poultry that he sold, much of which came from other states. In some cases the poultry was in cold-storage warehouses when purchased by defendant, sometimes it was en route, and sometimes it was ordered by the broker to meet defendant's needs as they arose. The out-of-state merchandise was purchased, not to fill particular orders, but for defendant's general stock, and was used to fill orders of retail dealers within the state as they were received. In all cases after defendant had taken title, the poultry was transferred to his account at the warehouse. It remained there until needed in his business, when it was picked up by one of defendant's employees, taken to defendant's place of business, thawed out, and sold to defendant's customers.

Plaintiff's duties included driving trucks, delivering merchandise from the warehouse to the plant and from there to defendant's customers, opening cases of frozen poultry, dressing poultry, and cleaning the premises. He contends that the storage of the poultry for defendant's account at the warehouse did not terminate its interstate journey and that he was employed in interstate commerce when he picked up the poultry there and brought it to defendant's place of business.

[1-3] The Fair Labor Standards Act was recently held inapplicable under such circumstances by the United States Supreme Court. Walling v. Jacksonville Paper Co., 63 S.Ct. 332, 87 L.Ed. 460; Higgins v. Carr Bros., 63 S.Ct. 337, 87 L.Ed. 468. It is not the entry itself of goods into a warehouse that terminates their interstate journey. "* * * If the halt in the movement of the goods is a convenient intermediate step in the process of getting them to their final destinations, they remain 'in commerce' until they reach those points. Then there is a practical continuity of movement of the goods until they reach the customers for whom they are intended." Thus, goods purchased for customers on special orders or pursuant to a pre-existing contract or understanding with them are "in commerce" within the meaning of the act, even though held temporarily in warehouses before delivery to customers. The "practical continuity of movement" on which the applicability of the act turns, however, is ordinarily broken when goods that are not brought into the state pursuant to a prior order, contract, or understanding are stored in warehouses awaiting local sales. The Jacksonville Paper Co. case involved activities similar to those of plaintiff. Some of the goods were brought across state lines to warehouses where they were stored in anticipation of local demands. It was held that employees who thereafter handled these goods were not covered by the act on the ground that it had not been shown "that the goods in question were different from goods acquired and held by a local merchant for local distribution." This qualification aptly fits the poultry stored by defendant in the present case. The evidence shows that defendant used the cold-storage warehouse as an adjunct to his plant, and that the poultry was left there until taken to meet the needs of local customers. Plaintiff's activity in taking the poultry from the warehouse was simply a step in the local distribution of the poultry and is not covered by the act. Higgins v. Carr Bros., supra; Jax Beer Co. v. Redfern, 5 Cir., 124 F.2d 172; Walling v. Goldblatt Bros., 128 F.2d 778; Jewell Tea Co. v. Williams, 10 Cir., 118 F.2d 202.

[4] Plaintiff contends that he worked upon poultry that was delivered to points outside the state and was therefore engaged in the production of goods for commerce within the meaning of the act. During the period of about a year and a half covered by this action the defendant made three shipments to New York and an additional number of shipments to Arizona, or a total of about fifteen shipments out of the state during the entire period. The plaintiff's testimony shows that he assisted in the preparation of poultry for one of the New York shipments and for one or two of the Arizona shipments. In view of the isolated and sporadic nature of these transactions in relation to defendant's predominantly local business and the predominantly local character of plaintiff's duties

it is evident that this work was too inconsequential a part of defendant's activities to bring them within the act. Walling v. Jacksonville Paper Co., supra; Goldberg v. Worman, D.C., 37 F.Supp. 778; Gerdert v. Certified Poultry & Egg Co., D.C., 38 F. Supp. 964; Lamb v. Quality Baking Co., (Tenn.App.) 3 Labor Cases, 60,084.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, CARTER, and SCHAUER, JJ., concurred.



21 Cal.2d 866

PETERSEN v. STATE BAR OF CALIFORNIA.

S. F. 16782.

Supreme Court of California.

April 22, 1943.

1. Attorney and client ⇐53(2)

Evidence authorized disbarment of attorney for retaining client's funds without authority for unreasonable fees for legal services. St.1939, pp. 354, 355, 357, §§ 6067, 6068, 6103, 6106.

2. Attorney and client ⇐46

In disbarment proceeding, it was no defense to attorney that transactions in question were undertaken by him through offices of one dummy corporation and that note was discounted by another dummy corporation, since attorney, assuming that he was acting in dual capacity, was nevertheless obliged to comply with required standard of justice, honesty and good morals.

3. Attorney and client ⇐54

In disbarment proceeding, attorney was not prevented from having a fair hearing before local committee because one of the three members retired because of disqualification, and remaining two conducted proceedings without appointment of third member.

4. Attorney and client ⇐54

Attorney's rights in disbarment proceeding were not prejudicially affected because but one member of the board of governors of the state bar examined record before local committee and other members of the board merely cast their concurring vote.

5. Attorney and client ⇐58

An attorney is not entitled to resign as of right during the pendency of disciplinary proceedings against him, and whether he is entitled to resign is a question primarily for board of governors of the state bar to determine.

6. Attorney and client ⇐58

Where attorney, after suspension for one act of dishonesty, and while he was under investigation for another which terminated in a second suspension, committed still further acts of a similar nature, board of governors of state bar did not abuse its discretion in rejecting attorney's proposa to resign from the practice of law without prejudice.

In Bank.

Application by Cedric W. Petersen, petitioner, against the State Bar of California, respondent, to review findings and recommendation by the Board of Governors of the State Bar that petitioner be disbarred.

Petitioner disbarred.

Cedric W. Petersen, of San Francisco, in pro. per.

Carl W. Wynkoop, of San Francisco, for respondent.

PER CURIAM.

The petitioner was charged with violations of his oath and duties as an attorney and of the commission of acts involving moral turpitude and dishonesty. Secs. 6067, 6068, 6103, 6106, State Bar Act, St. 1939, pp. 354, 355, 357. Notice was served on him on October 25, 1939. Protracted hearings extending over a period of nearly two years resulted in findings and a recommendation by the Board of Governors that the petitioner be disbarred. The matter is now before us on an application to review the findings and recommendation.

The petitioner is a native of Oakland, California, and is about fifty-two years of age. He was admitted to practice law in this state on December 13, 1913. Two prior proceedings terminated in disciplinary action. On August 27, 1929, he was suspended for one year on a showing that he had withheld and appropriated to his own use funds entrusted to him by a client. In

re Petersen, 208 Cal. 42, 280 P. 124. In September, 1938, he was again called to account on a similar charge which resulted in an order on August 14, 1940, suspending him for one year. Petersen v. State Bar, 16 Cal.2d 57, 104 P.2d 769.

The events leading to the present charges and recommendation may be summarized as follows: Early in 1939 the petitioner was employed by Peter Steinkellner to refinance the business of Peter Steinkellner & Co., Inc., a California corporation which was in financial difficulties. He received $125 to cover the costs and fees involved in the reorganization, but claims of creditors were to be met from funds obtained in the refinancing. He revised the articles of incorporation, caused a stockholders meeting to be held, and took the articles into his custody for the purpose of filing the same, but when he learned that the corporation had failed to pay its franchise taxes, and that the sum necessary to reinstate its franchise was about the amount deposited wih him for costs of reorganization, he did not file the papers. Thereafter he caused the Steinkellners to execute a note for $1,021.24 secured by a second deed of trust on their home in Marin County. Creditors' claims of $350 and $150 were authorized by Steinkellner to be paid out of the escrowed funds. The balance was turned over to the petitioner to apply to purposes stated. From that balance $150 was paid as a discount, $50 as a brokerage fee, and $290.64 to petitioner "on account." Petitioner also requested and received from Peter Steinkellner, Jr., the sum of $75 which he represented was needed to enable the company to meet the claims of creditors. Only one of the creditors, Pacific Gas & Electric Co., received from petitioner the payment of its claim which was in the sum of $14.62. The petitioner conducted some of the foregoing transactions through two companies, Investors Guaranty Corporation, and Associated Security Holders, Inc., of which he was president and in which he held controlling interests. Those companies kept no separate books of account, the work necessary to keep them going was done by the petitioner, and they obviously were mere dummies through which reorganization and refinancing could be conducted by him.

On May 4, 1939, the petitioner procured the signatures of the Steinkellners to a letter which they had not read, purporting to authorize the petitioner to apply the balance of the proceeds from the second trust deed and note to the indebtedness of the company "including attorney fees." He testified that subsequently Steinkellner orally authorized him to apply all the remaining funds to the payment of his fees for legal services. This was denied by Steinkellner. On August 15, 1939, upon the petitioner's recommendation, the corporation filed bankruptcy proceedings. Schedules prepared by the petitioner and signed by the Steinkellners, also without having been read by them, did not list the moneys turned over to the petitioner. Upon Steinkellner's informing the petitioner that he had no funds "other than the money you have," the petitioner advised him to take the pauper's oath in the bankruptcy proceeding. The petitioner applied $75 of the funds received by him to "bankruptcy fee." The foregoing services of the petitioner or his corporations were performed within four months of the commencement of the bankruptcy proceeding.

[1] The petitioner contends that the evidence does not support the conclusion that he was guilty of the violations charged; also that his conduct does not merit disbarment. He seeks to justify the charges of legal fees by contending that services performed by him covered a period of seven months and included also services in connection with the threatened closing of the Steinkellner factory, threatened bad check charges against the company and Steinkellner personally, in composing differences among the stockholders, in cooling the animosities of 71 creditors, in preventing the ousting of the company from the rented factory premises, and services in relation to attachment, labor and tax cases. Petitioner contends that he received but $403.82 on account and was forced to forego any further compensation. He urges that the committee stipulated that the fee charged was reasonable, and later reversed itself. Examination of the record does not support him. It discloses that the committee did not stipulate that the services performed by the petitioner were worth the sums retained by him. It stipulated only that if the petitioner performed the services which were assumed in a hypothetical question, such services would be worth $430 or more. That stipulation was made to save the time which would have been consumed in the examination of expert witnesses to be produced by the petitioner.

The findings are fully supported by the record. They include a finding that evidence in support of petitioner's authority

to retain the funds as payment on account of fees for legal services was unsatisfactory, and that the evidence of reasonableness was questionable. In one instance petitioner attempted to justify a charge of $305 in a matter involving a claim of $160, and a $50 charge for a police court matter in which he merely obtained a continuance.

[2] The petitioner contends that he did not undertake to refinance the Steinkellner corporation in his capacity as attorney at law. He contends that the financing was undertaken through the offices of Associated Securities Holders, Inc., and that the note was discounted by Investors Guaranty Corporation. Assuming that he was acting in a dual capacity, the petitioner was nevertheless obliged to comply with the required standard of justice, honesty and good morals. Jacobs v. State Bar, 219 Cal. 59, 25 P.2d 401. He attempts to excuse the failure to include the moneys received by him in the bankruptcy schedules because, so he claims, they were moneys received from Steinkellner personally, and not from the Steinkellner corporation. Nevertheless, the legal services listed by the petitioner, and to the payment whereof he applied the funds received for the most part, were services purportedly rendered on behalf of the corporation.

The petitioner argues in effect that this court should believe that the truth lies in the inferences drawn by the petitioner from his own testimony. He urges that Steinkellner was not worthy of belief. The record, however, discloses that the petitioner has not met the burden of showing that the findings of the board are erroneous or unsupported by the evidence.

[3] There is no merit in the further contention that the petitioner was prevented from having a fair hearing before the local committee for the reason that one of its three members retired because of disqualification, and the remaining two conducted the proceedings without the appointment of a third member. Rule 7 of the Rules of Procedure of The State Bar provides that unless otherwise ordered by the board a majority of a committee constitutes a quorum for the transaction of business. There was no disagreement between the acting members, and it appears that hearings were conducted fairly.

[4] The petitioner also contends that his rights were prejudicially affected by the fact that but one member of the Board of Governors examined the record before the local committee and that the other members merely cast their concurring vote. A somewhat similar contention was rejected in Shaeffer v. State Bar, 220 Cal. 681, 32 P.2d 140.

[5, 6] The petitioner states that he ceased practicing law on September 1, 1940; that on January 3, 1942, he became an inactive member of The State Bar; and that on January 15, 1942, he offered to resign from the practice of the law "without prejudice." He maintains that he is happy in his present employment which has been since December 7, 1941, the "organization and re-organization of civilian business and financial affairs necessary in the defense and war program." In this connection, and on a motion to include additional documents and letters in respect to his resignation proposal, it is shown that the board refused to accept the resignation unless it was tendered "with prejudice." The filing of further documents is unnecessary. They would not assist the court nor benefit the petitioner. An attorney is not entitled to resign as of right during the pendency of disciplinary proceedings. Whether he is entitled to resign is a question primarily for the board to determine. It has not been shown that the board abused its discretion in rejecting the proposal to resign "without prejudice." Here the petitioner, after he had been suspended for one act of dishonesty, and while he was under investigation for another which terminated in a second suspension, committed still further acts of a similar nature. Those facts, together with the other facts disclosed by the record, fully justified the action and recommendation of the board.

It is ordered that the petitioner Cedric W. Petersen be and he is hereby disbarred from the practice of law in this state and his name is stricken from the roll of attorneys of the State of California, this order to be effective thirty days from the filing of this decision.

21 Cal.2d 872

EASTMAN OIL WELL SURVEY CORPORATION et al. v. LANE-WELLS CO.

L. A. 18186.

Supreme Court of California.

April 23, 1943.

Rehearing Denied May 20, 1943.

1. Contracts ⇐147(2)

Broad language used in contracts should be read in the light of the subject matter of contract and the apparent intentions of the parties.

2. Patents ⇐218(1)

The term "royalty" ordinarily envisages a duty to make, and a corresponding right to receive, payments proportionate to the use of patented methods or machines.

See Words and Phrases, Permanent Edition, for all other definitions of "Royalty".

3. Patents ⇐219(5)

Where license agreement gave licensee right to use patented methods and devices identified in agreement itself as the subject matter of the agreement, presumably the contract schedule of royalty payments was based on licensee's use of patented methods and devices.

4. Patents ⇐218(1)

Where license agreement gave licensee right to use patented methods and devices for orienting oil wells in return for royalties which it was provided should be computed from and paid for all orienting services rendered by licensee, licensee's agreement to keep accurate account and render true statement to licensor of all services rendered under license limited the provision for computing royalties so as to indicate intention that royalties were not payable on transactions in which licensee did not use patented methods or devices.

5. Patents ⇐219(6)

Where trial court emphasized desire to have a full discussion of negotiations preceding execution of license agreement, it was reasonable to conclude that finding that license agreement was clear and unambiguous meant that court, having examined contract in light of the evidence, was convinced it was open to only one interpretation, and did not mean that evidence of surrounding circumstances was not considered.

6. Appeal and error ⇐1011(1)

Where evidence of circumstances surrounding execution of license agreement was in conflict and could give rise to varying inferences, trial court's finding that circumstances did not show intention of parties that licensee should pay royalties on all services rendered in orienting oil wells regardless of whether patented methods and devices were used was conclusive.

In Bank.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by the Eastman Oil Well Survey Corporation and others against Lane-Wells Company for a decree construing royalty provisions of a contract by which defendant licensed plaintiffs to manufacture and use certain patented devices for orienting oil wells and for a decree declaring that a certain other method of orientation perfected by plaintiffs was not covered by defendant's patents and was not an improvement thereon. From a judgment in favor of plaintiffs, defendant appeals.

Judgment affirmed.

For prior opinion, see 129 P.2d 408.

Raphael Dechter and B. L. Hoyt, both of Los Angeles, for appellant.

Houser & Houser, Swaffield & Swaffield, and Roland G. Swaffield, all of Long Beach, for respondents.

TRAYNOR, Justice.

Plaintiff, Eastman Oil Well Survey Corporation, brought this action for a declaration of its obligations under a contract with defendant, Lane-Wells Company. The contract gave plaintiff a license to use patented methods for orienting oil wells, i.e. discovering the angle and the direction in which they have been drilled. In return, plaintiff agreed to pay a royalty representing a percentage of what it charged its clients for orienting wells. After the execution of the contract, plaintiff perfected a new method of orientation, and seeks a declaration that it need pay no royalty on transactions in which it uses its own methods.

[1-4] Defendant relies on the language of the royalty clause of the contract, providing that, "Licensee Covenants and Agrees to pay to Licensor, * * * the following royalties: For each orienting survey of a well bore, a sum equal to sixteen and two-thirds percent (16⅔%) of the total charge made by licensee for such orienting service, but in no event shall such royalty be less than the sum of Twenty-

five Dollars ($25.00) * * *." Similar language appears in subsequent sentences. A royalty is specified "For orienting any tools," and likewise "For orienting pipe." The next clause provides that "It is expressly Understood and Agreed that the royalties herein provided shall be computed from and paid for all orienting services rendered by Licensee from and including January 1, 1938." This language, taken by itself, might be construed to require plaintiff to pay a royalty on any orienting service, whether or not the patented methods were used. Such broad language, however, is to be read in the light of the subject matter of the contract and the apparent intentions of the parties. Lemm v. Stillwater Land & Cattle Co., 217 Cal. 474, 19 P.2d 785; Hollander v. Wilson Estate Co., 214 Cal. 582, 7 P.2d 177. The term royalty ordinarily envisages a duty to make and a corresponding right to receive payments proportionate to the use of patented methods or machines. Tesra Co. v. Holland Furnace Co., 6 Cir., 73 F.2d 553; Western Union Tel. Co. v. American Bell Tel. Co., 1 Cir., 125 F. 342; Hubenthal v. Kennedy et al., 76 Iowa 707, 39 N.W. 694; Volk v. Volk Mfg. Co., 101 Conn. 594, 126 A. 847; and see 37 Words and Phrases, Perm.Ed., p. 809. The contract gave plaintiff the right to use methods and devices covered by patents identified in the contract itself as "the subject matter of this Agreement." Presumably the schedule of payments is based on plaintiff's use of the patented methods. See National Fireproofing Co. v. Imperishable Silo Co., 63 Ind.App. 183, 112 N.E. 403; Clancy v. Troy Belting & Supply Co., 2 Cir., 157 F. 554; Dodge Mfg. Co. v. Patten, 7 Cir., 60 F.2d 676; Tesra Co. v. Holland Furnace Co., supra. It would be an extraordinary schedule that would be based also on plaintiff's use of methods that were his own property, and the succeeding clause of the contract leads to the conclusion that no such departure from ordinary practice was intended: Licensee "Agrees to keep a true and accurate set of books of account showing, * * * All transactions in connection with all services rendered under this license * * * And further agrees to render a true statement in writing to the licensor * * * setting forth a true statement of each service rendered hereunder. * * *" The phrases "services rendered under this license," and "service rendered hereunder," are not the equivalent of "all orientation services"; they are limiting phrases that make it unnecessary to account for all services, and indicate that the royalty clause was not intended to apply to transactions in which plaintiff used its own methods.

Defendant itself relies less on the language of the instrument than on the circumstances surrounding the execution of the contract. Defendant had obtained a judgment against plaintiff for infringement of defendant's patents; an accounting had been ordered to determine damages, and plaintiff had commenced an appeal from this judgment. Defendant had several other suits for infringement still pending against plaintiff. There was evidence that plaintiff believed the judgment would be reversed and that the accounting would show that damages were not large; there was also evidence that defendant held the opposite belief. On the basis of defendant's description alone of the conferences, conversations and negotiations preceding the execution of this contract, it would be reasonable to conclude that plaintiff agreed to pay a royalty on all operations to avoid the imposition of a crushing judgment debt, and to obtain methods with which to operate. Plaintiff's evidence, however, indicates that it assigned the patents under which it was then operating to defendant, taking in return a license for the use of those patents and others owned by defendant as a reasonable compromise of a costly lawsuit. There was evidence that the conferences were concerned almost exclusively with those patents and that there was nothing to suggest that plaintiff pay for methods it might itself devise in the future. As a result of these conferences the contract involved in this suit was executed; defendant and plaintiff entered into a stipulation for the entry of a cash judgment in lieu of the accounting; defendant dismissed the other suits against plaintiff; and contracts were executed by which defendant gave plaintiff a license to use a certain tool, in exchange for a license to use a different tool designed for somewhat similar purposes. These licenses provided for royalties payable on each operation in which the tools were used.

[5, 6]. Defendant contends that the finding of the trial court that "* * * said License Agreement * * * is * * * clear and unambiguous * * *" shows that the evidence of the circumstances surrounding the contract was not even considered. This evidence was admitted over objection, after counsel for plaintiff had argued that it should not be used in

the interpretation of the contract. When counsel were about to argue its interpretation, the court emphasized its wish to have a full discussion of the negotiations preceding its execution. It is reasonable to conclude that this finding means that the court, having examined the contract in the light of all the evidence, was convinced that it was open to only one interpretation. Defendant, moreover, set forth the surrounding circumstances in detail in its first separate defense, and alleged as part of that defense that it was intended by the parties that plaintiff pay a royalty on all orientation services. The court found that the allegations of this defense, with minor exceptions, were untrue. This finding, clearly against defendant on the effect of the extrinsic evidence, is conclusive, since the evidence of surrounding circumstances was in conflict and could give rise to varying inferences. In re Estate of Platt, 21 Cal.2d 343, 131 P.2d 825; Medico-Dental Bldg. Co. v. Horton & Converse, 21 Cal.2d 411, 132 P.2d 457. It is thus of no avail for defendant to assail the finding that the contract was clear and unambiguous.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, CARTER, and SCHAUER, JJ., concurred.



21 Cal.2d 851

FRAZURE v. FITZPATRICK et al.
L. A. 18160.

Supreme Court of California.
April 19, 1943.

1. Trusts ⇐89(1)

Evidence supported finding that defendant held note and trust deed in trust for benefit of his uncle, since deceased, so as to warrant requiring defendant to turn note and trust deed over to administrator of uncle's estate. Civ.Code, § 853.

2. Appeal and error ⇐1071(6)

In action by administrator to recover for estate and to quiet title of estate in a note and trust deed held by decedent's nephew in his own name, nephew could not complain of trial court's failure to find upon question as to whether note and trust deed were community property of decedent and his surviving widow.

3. Parties ⇐80(5)

Even if surviving widow should have been made a party to an action by administrator of estate of a decedent to recover for estate and to quiet title of estate to a note and trust deed held by decedent's nephew in his own name, the misjoinder was apparent upon face of the complaint, and nephew by not demurring "waived" his objections. Code Civ.Proc. § 434.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

4. Limitation of actions ⇐201

In action by administrator to recover for estate and to quiet title of estate in a note and trust deed held by decedent's nephew in his own name, where trial court found that nephew held such property as trustee for decedent and faithfully performed his duties as such trustee up to death of deceased, there was no necessity for findings upon special defense of statute of limitations.

5. Evidence ⇐271(16), 276

Declarations made by deceased, in his own interest, or of those claiming under him, are commonly inadmissible, but may be admitted as an exception to general rule where failure to assert a claim or right may be construed against deceased as an implied negation. Code Civ.Proc. § 1946.

6. Evidence ⇐276

In action by administrator to recover for estate and to quiet title of estate in a note and trust deed held by decedent's nephew in his own name, where nephew maintained that under oral contract with decedent, the decedent was to make will in favor of nephew, two writings by decedent which were unsuccessful attempts to make testamentary disposition of his property were admissible as part of whole transaction and contract asserted by nephew. Code Civ.Proc. § 1850.

7. Appeal and error ⇐1050(1)

In action by administrator to recover for estate and to quiet title of estate in a note and trust deed held by decedent's nephew in his own name, even if admission in evidence of two writings by decedent was improper, error, if any, was not prejudicial to nephew where there was ample evidence to sustain judgment without the writings in question.

8. Executors and administrators ⇐153

In action by administrator to recover for estate and to quiet title in a note and trust deed held by decedent's nephew in his own name, where nephew maintained that, under his oral contract with decedent, decedent was to make will in favor of nephew, letter received by nephew from decedent expressing decedent's attitude toward his wife and other members of his family, which letter was dated two years prior to alleged oral contract, was properly refused admission as irrelevant.

9. Appeal and error ⇐1056(1)

In action by administrator to recover for estate and to quiet title in a note and trust deed held by decedent's nephew in his own name, refusal to admit four letters with reference to collections by nephew of payments upon the trust deed note did not prejudice nephew, where other evidence, including checks in payment of the collections, established fact that nephew had paid money to decedent, and letters could have had no further value to nephew than to establish such fact.

10. Executors and administrators ⇐153

In action by administrator to recover for estate and to quiet title in a note and trust deed held by decedent's nephew in his own name, finding that decedent was in actual, continuous, open and notorious possession of property for which the note and trust deed was given from date of its purchase in 1923 to date of its sale in 1937, was proper in establishing that decedent was equitable owner of such realty although nephew held fee title in his name.

11. Pleading ⇐147

A cross complaint is permissible only when a defendant seeks affirmative relief against any party relating to or dependent upon contract or transaction upon which the action is brought or affecting the property to which the action relates. Code Civ. Proc. § 442.

12. Pleading ⇐147

In action by administrator to recover for estate and to quiet title in a note and trust deed held by decedent's nephew in his own name, nephew's cross complaint based upon an alleged oral contract with decedent that decedent was to make will in favor of nephew in return for personal services to be performed by nephew alleged a cause of action distinct from transaction under consideration in complaint itself and was properly dismissed, even though parties in two controversies were the same and although much of the testimony might be identical.

13. Jury ⇐25(2)

Where trial court proceeded to hear testimony relative to complaint and answer thereto, after which there was a discussion as to the cross complaint, terminating in a dismissal of such pleading by court, and thereupon court announced that it was ready to receive evidence on defendant's counterclaim, and defendant's attorney then proceeded without objection to put on his evidence relating thereto without making a demand for a jury with respect thereto, defendant "waived" his right to a jury to hear counterclaim.

14. Appeal and error ⇐1046(5)

Record failed to establish any conduct on part of trial judge prejudicial to defendant's rights.

15. New trial ⇐114

Where trial judge who tried case was outside county upon vacation at time motion for new trial was presented, a judge other than the one who tried the case was authorized under statute to hear the motion. Code Civ.Proc. § 661.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Forman A. Frazure, as administrator of the estate of Alexander M. Frazure, deceased, against Harold P. Fitzpatrick, to recover for the estate and to quiet title of the estate in and to a promissory note and deed of trust held in his own name by defendant, wherein the defendant filed a cross-complaint and counterclaim. From an adverse judgment, the defendant appeals.

Affirmed.

For prior opinion, see 129 P.2d 137.

E. Llewellyn Overholt, of Los Angeles, for appellant.

Nixon A. Lange, of Huntington Park, for respondent.

PER CURIAM.

This cause was transferred to this court after decision by the District Court of Appeal, Second Appellate District, Division Two, not because of any dissatisfaction with the conclusion there announced, but for the sole purpose of deleting from the opinion certain language which we deemed,

in part, an incorrect statement of the law. This language we have therefore eliminated, and the balance of the opinion, which was prepared by Mr. Justice pro tempore Gould, we adopt as and for the decision of this court. It is as follows:

In this action Forman A. Frazure, as administrator of the estate of Alexander M. Frazure, his deceased father, seeks to recover for the estate and to quiet title of the estate in and to a promissory note and deed of trust held in his own name by defendant Harold P. Fitzpatrick, nephew of said deceased. Plaintiff prevailed, the trial court decreeing that the heirs and devisees of deceased were the beneficial and equitable owners of the note and trust deed, subject to the administration of decedent's estate; that plaintiff as administrator was entitled to the possession thereof and that defendant Fitzpatrick held the same in trust for said estate and, ordering defendant to assign the same and deliver possession thereof to said administrator and to account for the installments upon the trust deed note collected by him since the death of Alexander M. Frazure.

Defendant Fitzpatrick's counterclaim for $9,600 "on account of work and labor performed and for necessaries of life furnished by defendant to said decedent" was disallowed by the court in toto, and a cross-complaint upon a rejected creditor's claim asking the same amount for services rendered deceased in his lifetime was dismissed on the court's own motion.

Defendant Fitzpatrick appeals. Of the other defendants named in the action, California Trust Company, trustee under the deed of trust, defaulted, and Monroe C. Frazure, another son of decedent, filed only a formal written appearance in the case and took no steps therein after pronouncement of judgment.

Decedent Alexander M. Frazure came to Los Angeles in the year 1920. His wife and children remained at the family home in Gary, Indiana, and although his son Forman, respondent herein, followed him to California a few months later, decedent's wife refused to change her place of abode. For a few months decedent lived at the home of his wife's sister, mother of appellant, in Los Angeles, where he paid for his room and board. Later he stopped at rooming houses or hotels with his son.

In June 1923, decedent decided to purchase a house and lot in Los Angeles for $7,500, of which $2,500 was to be a cash payment out of funds then in the possession of decedent and the balance of $5,000 was to be represented by two promissory notes secured by mortgages upon the property purchased. An escrow was opened for the purchase of the property in the name of decedent. However, when the notes and mortgages were prepared and sent to decedent's wife in Indiana for her to join her husband in their signing and execution, she refused to do so.

At this juncture appellant became connected with the title to the property. According to appellant's own testimony as given at the trial, decedent, when his wife refused to sign the papers, said to appellant: "Alice [wife of decedent] has refused to sign the escrow papers, and refused to come out here, and refused to live with me, and I could not stand those cold winters back east * * *; and I have got to have a home to live in, and that is a nice place out there, and because you have done so much for me, and you got me this fine position with the school board, and it helped me out, so I will help you make the payments on it and it is your property * * * and if you let me collect the rent and stay there and have a place to live, and if you promise to take care of me and help me out the best you can the rest of my life, I will leave whatever I have to you, and whatever I have in my estate to you." Appellant, according to his narrative, protested that he was already deeply in debt and did not care to assume any further obligation. Nevertheless, so he testified, he yielded to his uncle's importunities and consented to take the property in his name and to assume liability for the indebtedness by signing the notes. Accordingly the name of the purchaser in the escrow was changed from decedent to appellant and title to the property was taken in the latter's name.

This is the transaction, the oral contract, upon which appellant bases his claim to the property. He had theretofore, he claims, rendered certain services to decedent in the matter of companionship and care, and at the time the house and lot were acquired he promised to allow the property to remain in his name, to look after it and be responsible for it, and to continue the personal services to his uncle. His testimony as to such an oral contract was corroborated by his mother, who stated she was present at the time of the colloquy in 1923. There is no other corroboration in the record.

As to the services theretofore rendered by appellant to his uncle, they consisted of the merest perfunctory courtesies which might be shown by one friend to another, even without the obligation of close relationship such as existed between appellant and decedent. The same may be said of so-called services rendered by appellant after the realty transaction. He at times took decedent riding in his automobile, visited him at the hospital, took him to a physician and occasionally entertained him at his home. The court was thoroughly justified in concluding that the "services" for which compensation and reward is here claimed were simply the courtesies which are commonly rendered by one human being to another without any promise or hope of payment, and are of no pecuniary value. They do not sufficiently bolster up appellant's claim that they constituted consideration for decedent's surrendering to appellant his property.

In March, 1937, the property was sold for $5,000, payable $800 in cash and $4,200 represented by a promissory note and trust deed payable in installments of $40 per month. The note and trust deed were made payable to appellant and remained at all times in his possession.

Alexander M. Frazure died in February, 1940, at the age of eighty years. His son was appointed administrator of his estate and as such brought the within action to recover the note and trust deed for the estate.

In spite of the fact that title to the property in question stood in the name of appellant, and the note and trust deed upon sale thereof were made payable to appellant and were retained in his possession, it is significant that decedent actually exercised complete control over the property from the time of its purchase in 1923 until his death in 1940. He paid the initial cash purchase payment as well as subsequent payments as they fell due; he lived in the house a portion of the time, and when it was rented he selected the tenants and collected the rentals; he reimbursed appellant for all taxes and assessments paid, and all payments on the note given on the sale of the property were turned over to decedent by appellant. In fact, appellant had difficulty in showing any item of disbursement from his own funds with reference to the property, and the court was justified in concluding, as it did, that decedent paid the entire purchase price and all expenses for upkeep out of his own money solely, and that appellant at no time contributed any part of the purchase money or expenses for upkeep out of his own funds. Such testimony as was given regarding appellant's expenditure for the benefit of the property at most created a conflict in the evidence, and with the court's determination upon that conflict it is not the province of this court to interfere.

[1] With the record in this condition, it is apparent that the trial court's determination of the case, disallowing appellant's claims and restoring the property to decedent's estate to which it rightfully belonged, accomplished the only fair, just and equitable solution possible in the premises. The same considerations dispose of appellant's main contention that the evidence was insufficient to sustain the judgment. Not only was the evidence sufficient, but it was compelling and the court's conclusion is fortified by the presumption, codified in section 853 of the Civil Code, that "When a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made." Case law is legion in support of this elementary principle.

[2] Aside from the principal contention as to the insufficiency of the evidence, appellant's argument concerns itself with a number of minor items. It is urged that the court failed to find upon the question as to whether the property in question was the community property of decedent and his surviving widow. Such matter, it is claimed, was placed in direct issue by the answer. But it is wholly immaterial to appellant whether or not the property is community or separate, and he may not complain if he is not injured by the failure of the court to make a finding thereon.

[3] Appellant also complains that the surviving widow should have been made a party to the action. If such be the case the misjoinder was apparent upon the face of the complaint, and appellant by not demurring waived his objection. Code Civ. Proc. § 434.

[4] As to the claimed necessity for findings upon the special defense of the statute of limitations, this point is disposed of by the court's finding that appellant held such property as trustee for decedent and faithfully performed his duties as such trustee up to the death of decedent, February 16, 1940. Inasmuch as there was no repudiation of the trust, the statute of limitations

could not be set in motion, and therefore no separate finding on that point was necessary.

[5, 6] The trial court admitted in evidence in behalf of respondent two writings, one unsigned and one signed "A. M. Frazure," identified as being in the handwriting of decedent, in which mention is made of the trust deed in controversy here as belonging to the writer of the documents, which, apparently, were unsuccessful attempts to make testamentary disposition of this and other property. These documents were found in decedent's tool chest. It may be conceded that commonly declarations of a person, since deceased, may be received under such circumstances as here obtain only when the declarations are against the interest of the person making them or those claiming under him, and not when such declarations are in favor of those who claim rights which would be upheld and sustained by the declarations, oral or written, which are sought to be introduced. Code Civ.Proc. § 1946. However, as noted in the case of Hotaling v. Hotaling, 187 Cal. 695, 203 P. 745, there are exceptions to this general rule, as where "failure to assert a claim or right may be construed against the party as an implied negation." In the case under review here, appellant maintained that under his oral contract with decedent the latter as the final act upon his part was to make a will in favor of appellant. This testamentary act being a part of the transaction alleged by appellant, evidence concerning such act or the omission thereof was admissible as part of the whole transaction and contract asserted by appellant. Code Civ.Proc., § 1850; Young v. Benton, 21 Cal.App. 382, 131 P. 1051; Whitlow v. Durst, 20 Cal.2d 523, 127 P.2d 530.

[7] Furthermore, appellant himself at a later point in the case on direct testimony testified concerning a conversation with decedent in which reference was had to a "will in my tool chest." Even conceding for the purpose of argument that the two writings were improperly admitted in evidence, the error, if any, may be disregarded in considering the case as a whole and was not prejudicial to appellant. Quite evidently the court rejected as unworthy of belief appellant's entire testimony, and there was ample evidence in the record to substantiate the findings and to sustain the judgment of the court without the writings in question.

[8] Error is likewise asserted by appellant because certain letters received by him from decedent were excluded by the court. One of these, dated two years prior to the alleged contract of 1923, expresses decedent's attitude toward his wife and other members of his family. This letter has no apparent relevance to any matter at issue in the present case and was written two years before decedent had his first transaction about the property in question. Obviously it was properly rejected by the court.

[9] Also, the court's action in refusing four letters with reference to collections by appellant of payments upon the trust deed note must be sustained. Other evidence, including the checks themselves, in payment of the collections established the fact that appellant had paid the money to decedent, and the letters could have had no further value to appellant than to establish that fact.

[10] Appellant contends that the court improperly injected the issue of adverse possession into the case by finding that decedent held the property adversely to appellant. As a matter of fact there was no issue of adverse possession presented by the pleadings. The suit was upon a resulting trust, and while the court found that decedent was in actual, continuous, open and notorious possession of the property from the date of its purchase in 1923 to the date of its sale in 1937, this finding is not addressed to any issue of adverse possession but, coupled with the finding that during said period appellant held title to said property in trust for decedent, is pertinent and proper in establishing that decedent was the equitable and beneficial owner of said realty although appellant held the fee title in his name.

In addition to the complaint and answer thereto, there was on file a cross-complaint and a counterclaim. The cross-complaint was before the court on written stipulation of counsel that it might be filed and tried at the same time as the issues joined in the complaint. The trial court, however, on its own motion dismissed the cross-complaint, and this action of the court is cited by appellant as error. The complaint itself sought to establish a resulting trust and to quiet title of the estate in the note and trust deed. The cross-complaint was brought upon a rejected claim theretofore filed by appellant against the estate of decedent, in which appellant asked judgment

for $9,600 and interest for services rendered to decedent from December 15, 1920, to February 15, 1940, a total of 232 months, at the rate of $40 per month for 228 months, and $100 per month for 4 months. The services alleged in the cross-complaint were for care, board, room and for acting as "companion, counsellor and benefactor to said decedent," said services having been rendered, it is alleged, at the special instance and request of decedent.

[11, 12] We are of the opinion that the court was justified in its ruling. The cross-complaint was based upon a cause of action dating back to December, 1920; the complaint itself related to matters having to do with the purchase of the house and lot in 1923, and appellant's defense upon that phase of the litigation was an alleged oral contract as of the date of the purchase of the property. Even if the parties in the two controversies are the same, and although much of the testimony might be identical upon the causes of action stated in the complaint and cross-complaint, those facts alone do not compel the court to entertain the cross-complaint. Here the contract for services alleged in the cross-complaint was entirely separate and distinct from the contract under consideration in the complaint itself; and a cross-complaint is permissible only when a defendant seeks affirmative relief against any party relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates. Code Civ.Proc. § 442; Mahan v. Millar, 56 Cal.App. 280, 205 P. 67.

As to the counterclaim, appellant asked for the sum of $9,600 for work and labor for decedent "within two years last past." The allegations of the counterclaim were specifically and generally denied in a separate "answer to counterclaim." Appellant had deposited jury fees and made written request for a jury trial in advance of the trial date and in due form. When the case was called for trial the following proceedings were had:

"The Court: The procedure, I think, to follow then is to try the issues framed by the complaint and the answer, that is, the equitable suit, and of course that is not a matter for a jury. And if the matter of the cross-complaint is decided favorable to the contentions of the defendant, then that matter, of course, can be tried as a separate jury case. So, at this time I am going to excuse the jury. * * *

"Mr. Overholt: At this time, on behalf of the defendant, I ask that the jury be allowed to try the issues of fact.

"The Court: Well, that question is purely within the discretion of the court, and the court is going to use that discretion contrary to the contention of counsel."

[13] The court then proceeded to hear the testimony relative to the complaint and answer thereto, after which there was a lengthy discussion as to the cross-complaint, terminating in a dismissal of that pleading by the court, and thereupon the court announced that it was ready to receive evidence on the counterclaim. Appellant's attorney then proceeded without objection to put on his evidence relating thereto. No demand was made for a jury with respect thereto, and in fact there is no suggestion in the record that the jury question was mentioned respecting the counterclaim. Under the circumstances it must be held that appellant waived his right, if any he had, to a jury to hear that phase of the case, and he cannot now complain.

[14] Appellant also claims that the trial judge was biased and prejudiced; that he "literally screamed and savagely shouted" at appellant while the latter was upon the witness stand. Nothing in the record, however, discloses any conduct on the part of the court which was prejudicial to appellant's rights; and insofar as it is possible to judge from the cold record appellant and his witnesses were afforded every opportunity to give their testimony untrammelled by interference or intimidation in any degree by the court. Such a remark as the observation of the court which appellant complains of, that his counsel "ought to be penalized for reading law books instead of playing poker," while not to be commended as contributing to the decorum of a courtroom, nevertheless was obviously uttered in a spirit of jocularity, and was in the same breath followed by a legal ruling respecting the admission of evidence favorable to appellant.

[15] Lastly, objection is made to the fact that the motion for a new trial was heard and denied by a judge other than the one who tried the case. It is admitted that the trial judge was outside the county of Los Angeles upon vacation at the time, and therefore the exact situation contemplated by section 661 of the Code of Civil Procedure, authorizing another judge to hear the motion, was presented.

We are satisfied from an examination of the entire record that appellant received a fair trial, that justice was accomplished by the lower court's determination of the case and that any other conclusion than the one reached would have been repugnant to equity and justice.

Judgment affirmed.



22 Cal.2d 64

DOBBINS v. TITLE GUARANTEE & TRUST CO.

L. A. 18580.

Supreme Court of California.

April 26, 1943.

1. Executors and administrators ⇐498

The statutory provision for apportionment of compensation among executors or administrators according to services actually rendered by each of them confers "jurisdiction" on probate court to apportion both ordinary and extraordinary compensation between co-representatives of decedent's estate in accordance with services performed by each, at least in absence of agreement between them as to such apportionment. Probate Code, §§ 900–902.

See Words and Phrases, Permanent Edition, for all other definitions of "Jurisdiction".

2. Executors and administrators ⇐498

The probate court, as necessary incident of its general power to apportion compensation of co-representatives of decedent's estate on basis of services performed by each, should determine validity and effect of any agreement between them affecting such matter, as better sound judicial policy dictates that all issues should be determined in one proceeding, rather than by piecemeal litigation. Probate Code, §§ 900–902.

3. Executors and administrators ⇐493

The probate court has "jurisdiction" in matters of compensation of representatives of decedents' estates and necessarily incidental and included powers. Probate Code, § 900.

4. Courts ⇐201

The probate court may determine validity and effect of contracts when ancillary to proper judgment by it.

5. Executors and administrators ⇐501

A probate court order, allowing one executor of will compensation for extraordinary services rendered by such executor, as alleged in co-executors' petition for settlement of their final account, distribution of estate and allowance of compensation, determined issue of apportionment of compensation between co-executors, though word apportionment was not used, nor any mention made of co-executors' agreement for equal apportionment of fees. Probate Code, §§ 900–902.

6. Executors and administrators ⇐501

A probate court order, allowing one executor of will entire compensation for extraordinary services rendered by such executor on settlement of co-executors' final account, was "res judicata" on issue of apportionment of such compensation between co-executors in action against executor awarded such compensation by other executor to recover half of amount thereof under agreement between them. Probate Code, §§ 900–902, 931.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

7. Executors and administrators ⇐501

A probate court order, allowing one executor of will entire compensation for extraordinary services rendered by such executor to exclusion of co-executor claiming half of amount thereof under agreement between executors, determined parties' rights under such agreement adversely to co-executor as necessary incident of adjudication on issue of apportionment of compensation between them by such order. Probate Code, §§ 900–902.

8. Judgment ⇐725(1)

A probative fact, bearing on main issue involved in action, is incident to judgment, which is "res judicata" on cause of action, so that new action may not be predicated on same probative fact.

9. Judgment ⇐592

An executor, claiming share of compensation for co-executors' services, either in proportion to services performed by claimant or under agreement with co-executor, has only one cause of action and

must present all grounds thereof at first hearing thereon, and any grounds which he could have, but did not present, may not furnish basis for second action against co-executor for part of compensation paid defendant. Probate Code, §§ 900–902.

10. Executors and administrators ⇐501

Co-executors' agreement, made before probate court's allowance of fees for their services, to divide equally all fees received by both or either of them, was properly a probative fact bearing on issue of apportionment of fees between them, but cannot prevail in defiance of probate court's order apportioning fees contrary to provisions of agreement. Probate Code, §§ 900–902.

In Bank.

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by Horace M. Dobbins against the Title Guarantee and Trust Company to recover half of an extraordinary fee paid defendant for extraordinary services rendered by it as co-executor with plaintiff of the will of Caroline W. Dobbins, deceased. Judgment for plaintiff, and defendant appeals.

Reversed.

For prior opinion, see Cal.App., 129 P.2d 422.

Arch H. Vernon, Earl E. Johnson, Gilbert E. Harris, M. J. Rankin, John O. Palstine, and Milo V. Olson, all of Los Angeles, for appellant.

Aaron Sapiro and Samuel De Groot, both of Los Angeles, for respondent.

CARTER, Justice.

In 1935, plaintiff and defendant were appointed co-executors of the will of Caroline W. Dobbins, deceased. An account current was filed in the estate proceedings by the two executors, claiming $7,287.33 as compensation, $4,000 of which had been paid; and further claiming that they had rendered extraordinary services for which they would claim extra compensation in the final account. That account was settled. Thereafter a final account and petition for extraordinary fees was filed. It was alleged in the petition that defendant had performed extraordinary services for which it was entitled to compensation in the sum of $15,000, and a prayer was made for that amount. It was signed for plaintiff by defendant and also by defendant and the attorneys for plaintiff and defendant. Notice of hearing therein was given by posting. The court approved the account and ordered that $15,000 be paid to defendant as co-executor for extraordinary services rendered by it. The ordinary fees were divided equally between the executors. The extraordinary fee of $15,000 was paid to defendant. Plaintiff commenced the instant action to recover one-half of the latter fees claiming that he was entitled thereto under an oral agreement between plaintiff and defendant made before the fees were awarded. The trial court found that the agreement had been made and that the issue had not been determined by the order of the probate court allowing extraordinary fees to defendant, and gave judgment in favor of plaintiff for $7,500.

[1-4] Whether or not a superior court sitting as a probate court has jurisdiction to determine the rights, as between co-representatives of an estate to the compensation awarded, where there is an alleged agreement between them relating to the division of the compensation, and the validity or invalidity of such an agreement, depends upon the power possessed by that court generally with respect to the apportionment of fees. Section 900 of the Probate Code authorizes the allowance of compensation to representatives of estates of deceased persons. Section 901 fixes the compensation on a percentage basis, and provides: "If there are two or more executors or administrators, the compensation shall be apportioned among them by the court according to the services actually rendered by each." Section 902 empowers the court to make further allowance for extraordinary services performed. The latter compensation is subject to the above-quoted provision with respect to apportionment among several representatives, inasmuch as that provision refers generally to compensation of several representatives not merely to ordinary compensation alone. It cannot be doubted that that clause confers upon the probate court jurisdiction to apportion ordinary or extraordinary compensation between co-representatives in accordance with the services performed by each, at least in the absence of an agreement between them. It expressly states that the court shall apportion the fees according to the services actually performed. It has been held that the probate court has such power and that a superior court cannot interfere with the exercise of it. Hope v. Jones, 24 Cal. 89. Any agreement with

relation to the division of fees even if it is to be carried into effect after the allowance is made by the court necessarily involves the very issue to be determined by the court, that is, the extent and character of the services rendered by each, and the portion of the compensation to which each is accordingly entitled. Both the agreement and the adjudication by the court cover the same subject matter. As a necessary incident of its general power to apportion the compensation on the basis of services performed, it should also determine the validity and effect of any agreement affecting that subject matter. Better sound judicial policy dictates that all of the issues should be determined in one proceeding, rather than by piecemeal litigation. If the agreement is invalid because violative of public policy or for any other reason, that should be settled in such proceeding. If the probate court made an apportionment on the only basis it could, according to the services performed, and ignored any agreement of the parties on the subject, its order might well be meaningless. Another court might decide that the agreement was valid and enforceable and thereby, in effect, apportion the fees in an entirely different manner. The result would be a vacation of the probate order, and render ineffective its judgment. It is not supposed that the jurisdiction of the probate court was to be so limited as to render the exercise of its power of apportionment ineffectual. Although no agreement was involved in the case of Hope v. Jones, supra, the court clearly set forth the scope of the power of the probate court in making an apportionment between co-representatives, 24 Cal. at page 93 as follows:

"The respondent seems to have rendered some service, and doubtless was entitled to some portion of the commissions, but *he has sought his relief in the wrong forum. He should have applied to the Probate Court.* If, as he contends, the allowance made to the appellant inures to his benefit, and the decree of the Probate Court does not assume to pass upon the question of apportionment, but only determines the amount of the allowance, it follows that *the question of apportionment was still open,* and he might and *should have applied to that Court for a further and supplemental decree,* designating and assigning to *each his proper share.* Then, upon the refusal of the appellant—the money being in his hands—to pay over his portion, he might have maintained this action.

"The District Court has no jurisdiction over the allowance or apportionment of the commissions of executors and administrators, and if it can interfere at all with the decree of the Probate Court, it can only do so as a Court of Chancery, and can go no further than to set aside the decree on the ground of *fraud,* or other like ground of equitable interference, and leave the parties to make another settlement in the Probate Court. (Searles et al. v. Scott, Administrator, etc., 14 Smedes & M., Miss., 94.) And it is doubtful whether it could interfere, even in such a case, unless all opportunity to move in the Probate Court to open the account, or appeal from the decree, has been lost. Until this has happened, it would seem the power of the Probate Court and the right of appeal are adequate to the relief sought." (Emphasis added.) The probate court has jurisdiction in matters of compensation of representatives of estates of decedents. Dougherty v. Bartlett, 100 Cal. 496, 35 P. 431; In re Estate of Kruger, 143 Cal. 141, 76 P. 891; Eastwood v. Stewart, 64 Cal.App. 614, 222 P. 369. It has powers necessarily incident to the power granted and included in the latter. See Waterland v. Superior Court, 15 Cal.2d 34, 98 P.2d 211. Under various circumstances the probate court may determine the validity and effect of contracts when ancillary to a proper judgment by it. In re Estate of Warner, 6 Cal.App. 361, 92 P. 191; In re Estate of Cover, 188 Cal. 133, 204 P. 583; In re Estate of Yoell, 164 Cal. 540, 129 P. 999; In re Estate of Dobbins, 36 Cal.App.2d 536, 97 P.2d 1051; Carr v. Bank of America, etc., Ass'n, 11 Cal.2d 366, 79 P.2d 1096, 116 A.L.R. 1282.

The case of In re Estate of Carter, 132 Cal. 113, 64 P. 123, 484, holds that the probate court has no jurisdiction to consider the effect or validity of an agreement for apportionment of fees; that such issue must be determined in an independent action. It is not significant that that case was decided before the grant to the probate court of statutory power to apportion, inasmuch as it endorses the principle stated in Hope v. Jones, supra, that that court had such power independent of statute. However, no reasons are given for the holding and we believe the foregoing discussion compels the overruling of that case. For the same reasons the approval of that case in Kelly v. Conroy, 91 Cal.App. 350, 266 P. 1022, is disapproved.

[5] The issue of apportionment of the compensation between plaintiff and defendant was presented and determined in the order of the court allowing the sum of $15,000 to defendant for extraordinary services. The petition for the settlement of the final account, distribution and the allowance of compensation was presented by plaintiff and defendant as co-executors. It was there alleged that the *executor-defendant* had performed extraordinary services, a detailed account of which were set forth; that the reasonable value of those services was $15,000. In the prayer it was requested that the sum of $15,000 be allowed to *defendant*. Objections were filed to the account by various persons on matters not here in issue and a hearing was had. Exhaustive findings of fact and conclusions of law were made by the probate court wherein it was declared that *defendant* had performed extraordinary services of the value of $15,000 and that *it* was entitled thereto. The same declaration appears in the order thereafter made. While it is true that the word apportionment was not used nor was any mention made of the agreement of the parties here in question, the only reasonable interpretation of the proceedings is that the compensation was apportioned by the order. It was therein determined that defendant, one of the two co-executors, had performed the special services. If it had performed them, it necessarily followed that plaintiff had not. In light of that determination the allowance of the entire fee was made *to defendant alone*. Such an allowance necessarily excluded any allowance to plaintiff. Hence, the exclusion was inescapably a determination on the issue of apportionment of the compensation. Plaintiff was to have none, defendant was to have all. It also follows that the same circumstances establish the distinction between this case and Kelly v. Conroy, supra. In the Kelly case the allowance was made in a lump sum to *both* representatives. Neither was excluded. The court there concluded that no apportionment had been made because it would not necessarily be implied that the compensation was divided equally between the co-representatives.

[6] The allowance of compensation to representatives of estates is made in and by the settlement of the final account. 11b Cal.Jur. 470. The order settling and allowing the account when it becomes final, is final and conclusive against all persons interested, with certain exceptions. Prob. Code, § 931; 11b Cal.Jur. 610, et seq. The order allowing the entire compensation to defendant was therefore res judicata upon the issue of apportionment of the compensation between plaintiff and defendant, co-executors.

[7-9] It also must be true that, as a necessary incident of the adjudication upon that issue, apportionment, the rights of the parties under the agreement to share the compensation must be deemed to have been determined adversely to plaintiff. An agreement on the apportionment of the fees and the validity thereof was a probative fact or item of evidence bearing upon that issue and was incidental thereto. A probative fact bearing upon the main issue involved is necessarily incident to the judgment; the judgment is res judicata on the cause of action. A new action may not be predicated upon the same probative fact. As stated in Ernsting v. United Stages, Inc., 206 Cal. 733, 737, 276 P. 103, 105:

"The claim that appellants have never had their day in court cannot be sustained, for it was their duty at the previous hearing to tender each item of evidence tending to support their claims, and if the decision was unfavorable to seek review by appeal." See, also, Henderson v. Miglietta, 206 Cal. 125, 273 P. 581. The situation is analogous to a cause of action which may be based upon several grounds. In such a case a judgment on the cause of action upon some of the grounds is a bar to a subsequent action on the same cause of action even though different grounds are advanced. See Panos v. Great Western Packing Co., 21 Cal.2d 636, 134 P.2d 242. The claim to the apportionment or a certain share of the compensation by one co-executor, is the basis of his cause of action which may be determined in probate. One of the grounds for his claim may be the proportion of the services performed by him, another may be an agreement with his co-representative on the subject. He has only one cause of action and must present all of his grounds at the first hearing thereon. Any grounds he fails to present, but could have, and did not, may not furnish a basis for a second action. The judgment in the first action is conclusive as to every matter which might be urged in support of that action. It is therefore immaterial that plaintiff did not in fact present the agreement for litigation in the probate proceeding.

[10] The court in the instant case found that the co-executors were appointed in February, 1935, four years prior to the or-

der making the allowance and that they entered into an agreement that they would "upon receipt of any money as fees, divide equally any and all fees that they or either of them would receive for services as co-executor of said estate; and that each one of them, * * * would receive one-half of any such fees; and that such agreement was in full force and effect during the years 1935, 1936, 1937, 1938 and 1939." It may not be successfully urged that such agreement was merely to divide the compensation after the allowance was made, and hence not pertinent on the issue of apportionment before the probate court. It contemplated that the fees would be divided and naturally the fees to which reference was made and the amount thereof could be only what the court allowed. The agreement was in full force during the entire probate proceeding, and had a direct bearing upon the issue of how the fees should be apportioned. It is not reasonable that the court could make an apportionment and the parties immediately nullify its action by their agreement contrary to the court's determination. The agreement was properly a probative fact bearing upon the issue of apportionment as determined by the probate court, but it cannot prevail in defiance of the order providing for the apportionment of fees contrary to its provisions.

The judgment is reversed.

GIBSON, C. J., and CURTIS, EDMONDS, TRAYNOR, and SCHAUER, J., concurred.



BAKER et al. v. BERREMAN et al.

Civ. 12276.

District Court of Appeal, First District, Division 1, California.

April 21, 1943.

Rehearing Granted May 21, 1943.

1. Appeal and error ⇐977(3, 5)
New trial ⇐6

The granting or refusal of a new trial is largely within discretion of trial judge to whom motion is addressed, whose order will not be disturbed on appeal in absence of a clear showing of abuse, particularly where the order grants a new trial.

2. Appeal and error ⇐933(1)

Since an order granting a new trial does not finally dispose of case but leaves it for retrial upon the merits, every legal presumption is indulged in support of such order.

3. Appeal and error ⇐977(3)

Where there is a reasonable or even fairly debatable justification for trial court's action in granting a new trial, such ruling will not be disturbed even if as a question of first impression the appellate court might be inclined to take a different view as to propriety of the action.

4. Appeal and error ⇐933(1)
New trial ⇐1

The law places judge to whom motion for new trial is addressed in the same position as judge who presided at the trial to exercise identical rights and powers, and the same presumptions must be indulged in support of his action upon the motion.

5. New trial ⇐88

Where army officer who was one of three eyewitnesses of automobile collision resulting in death for which recovery was sought, and who had arranged to be present at trial, was transferred the day trial began to another station the whereabouts of which was a military secret, trial court did not abuse its discretion in granting plaintiffs a new trial on ground of "accident or surprise" which ordinary prudence could not have guarded against. Code Civ. Proc. § 657(3).

See Words and Phrases, Permanent Edition, for all other definitions of "Accident or Surprise".

6. New trial ⇐102(3)

"Diligence" required of movement for new trial on ground of newly discovered evidence is relative term incapable of definition, and what would amount to due diligence under one state of facts may fall short of it under another state of facts.

See Words and Phrases, Permanent Edition, for all other definitions of "Diligence".

7. Appeal and error ⇐981

The reviewing court should hesitate to disturb a ruling granting new trial on ground of newly discovered evidence on ground that due diligence to discover evidence has not been shown, where ruling has any substance whatever on which to rest.

8. Appeal and error ⇐980

Where plaintiffs had definite assurance that witness would be present to testify at trial until it was too late to procure his deposition, the failure previously to take deposition did not show such lack of "diligence" as would warrant reversal of order granting a new trial on ground of accident or surprise. Code Civ.Proc. § 657(3).

9. New trial ⇐10

Where plaintiffs at time of trial did not know when, if ever, they would be able to produce as a witness or take the deposition of army officer who had assured them of his ability to attend trial, failure to move for a continuance when officer was transferred to a secret station on day trial began did not operate as a "waiver" of right to move for new trial on ground of surprise or preclude trial court from exercising discretionary power to grant such relief. Code Civ.Proc. § 657(3).

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

10. Appeal and error ⇐980

Testimony of army officer driving automobile which defendant passed shortly before colliding at intersection with automobile driven by deceased, and who, except for defendant and deceased's friend who was illiterate and afflicted with nervous disorder, was the only eyewitness of collision, could not be said to be merely "cumulative" so as to warrant reversal of order granting new trial on ground of surprise where officer was prevented from testifying by transfer to secret station the day trial began. Code Civ.Proc. § 657(3).

See Words and Phrases, Permanent Edition, for all other definitions of "Cumulative Evidence".

11. Appeal and error ⇐981
New trial ⇐104(1)

Trial court may grant a new trial on ground of "newly discovered evidence," even though such evidence is merely cumulative, if trial court in its discretion believes that such evidence had it been presented on the trial would probably have produced a different result, and such determination will not be disturbed by reviewing court except for manifest abuse of discretion.

See Words and Phrases, Permanent Edition, for all other definitions of "Newly Discovered Evidence".

Appeal from Superior Court, City and County of San Francisco; George J. Steiger, Judge.

Action by Mae Baker and another against William Berreman and others for the death of plaintiffs' son in an automobile collision. Verdict and judgment for defendants, and, from order granting plaintiffs a new trial, defendants appeal.

Order affirmed.

Cooley, Crowley & Supple and Robert L. Lamb, all of San Francisco, for appellants.

Felix Lauricella and George I. Hoffman, both of San Francisco, and T. B. Scott, of Modesto, for respondents.

KNIGHT, Justice.

Plaintiffs, the mother and father of John Ventura, deceased, brought this action to recover damages for the death of their son, which resulted from injuries sustained in a collision between the automobile he was driving and one driven by the defendant William Berreman. The accident happened and the action was brought in San Francisco. The trial took place before a jury, a verdict was rendered in defendants' favor, and judgment entered accordingly. Plaintiffs moved for a new trial; the motion was granted, and defendants appealed. The judge who heard and granted the motion was not the one who presided at the trial, the latter having died subsequent to the entry of the judgment in the action. Insufficiency of the evidence was not specified in the order as a ground for the granting of the new trial; but among the grounds urged in support of the motion therefor was "accident or surprise, which ordinary prudence could not have guarded against", Code Civ.Proc. § 657(3), due to the fact that an eye-witness to the accident, an army lieutenant, who had arranged to be present at the trial, was the day the trial began transferred to another station, the whereabouts of which were a military secret, and he was therefore unable to testify; and the single issue to be determined on this appeal is whether it was error for the trial court to grant the motion on that ground.

[1-4] It is well settled that the matter of granting or refusing to grant a motion for new trial is largely within the discretion of the trial judge to whom the motion is addressed, and that his order will not be disturbed on appeal in the absence of a clear showing of abuse. It is only in rare

instances and upon strong grounds that his determination will be disturbed (2 Cal.Jur. pp. 905, 906; Owings v. Gatchell, 32 Cal. App.2d 482, 90 P.2d 368), and this is especially so when such discretion is exercised in awarding a new trial, Pettigrew v. O'Donnell, 32 Cal.App.2d 502, 90 P.2d 93; 20 Cal.Jur. p. 215. Every legal presumption is indulged in support of such an order (Gray v. Robinson, 33 Cal.App.2d 177, 91 P.2d 194; Cooney v. Furlong, 66 Cal. 520, 6 P. 388), for the reason that the order does not finally dispose of the case, but leaves it for retrial upon the merits. Bonner v. Los Angeles Examiner, 17 Cal.App.2d 458, 62 P.2d 427; Pettigrew v. O'Donnell, supra. Therefore, where it appears that there is a reasonable or even fairly debatable justification for the action taken by the trial court in granting a new trial, its ruling will not be disturbed even if as a question of first impression the appellate court might feel inclined to take a different view from that of the trial court as to the propriety of its action. Ogando v. Carquinez G. School Dist., 24 Cal.App.2d 567, 75 P.2d 641; Kehlor v. Satterlee, 37 Cal. App.2d 116, 98 P.2d 759. Furthermore, the governing rules above stated are not altered by the fact that the judge who heard the motion was not the judge who presided at the trial. Altschul v. Doyle, 48 Cal. 535. The law places him in the same position as the latter; he exercises identical rights and powers; and the same presumptions must be indulged in support of his action in passing upon the motion. Churchill v. Flournoy, 127 Cal. 355, 59 P. 791; Hausmann v. Sutter Street Ry. Co., 139 Cal. 174, 72 P. 905.

[5] In view of the foregoing rules, it is our opinion that the record here presents no showing of an abuse of discretion by the trial court in granting the new trial which would justify a reversal of its order by this court. Among the facts shown by the affidavits filed in support of the motion and on which the trial court based its decision are the following: The cause was first set for trial on October 22, 1941. On October 10, 1941, plaintiffs' attorney delivered subpoenas to a process server for service on plaintiffs' witnesses, one of whom was Jack Burness, a resident of San Francisco. On October 16 the process server reported to plaintiffs' attorney that he was unable to serve the subpoena addressed to Burness for the reason that Burness had been inducted into the U. S. Army. The attorney immediately communicated with Burness' mother and was informed that Burness was stationed at Camp Roberts in San Luis Obispo County. Thereupon the attorney sent Burness a telegram asking him to be present at the trial, and Burness replied that he had arranged with his commanding officer to be excused from camp so that he might attend the trial and testify. On October 22, due to the congestion of the superior court calendar and at the request of the secretary of the court, the trial of the action was indefinitely postponed. On October 23 plaintiffs' attorney advised Burness by letter of the postponement and that he would notify him of the date of the trial when it was definitely settled. Thereafter counsel for both sides stipulated that the trial date be set for November 13; and Burness was so notified. On November 10 the secretary of the court again advised counsel that the matter would again have to be put over, and Burness was so notified by telegram and by letter. Meanwhile Burness had come to San Francisco and told plaintiffs' attorney that being a lieutenant it would be an easy matter for him to get leave to attend court and testify when the date of the trial was finally set. On December 30 Burness was still at Camp Roberts, and the date of trial had not yet been set, so the attorney by letter suggested that when the trial date was set Burness should come to San Francisco by plane. The next day, before Burness could reply, the secretary of the superior court informed plaintiffs' attorney that the matter would have to go to trial Monday, January 5, 1942, and the attorney telegraphed Burness to be present on that day. On Saturday, January 3, Burness telegraphed the attorney that he would not be present; and the attorney then sent Burness a telegram asking when he could appear, so that the trial might proceed on Monday and a continuance requested until Burness could appear. Burness' reply was not received until Monday, January 5, 1942, and the trial had already begun. In his letter Burness stated that he expected a change of station and his plans were indefinite. That night said attorney tried to reach Burness at Camp Roberts by phone, but was informed by the commanding officer that Burness had been transferred that day and that his whereabouts were a military secret. Thereafter said attorney kept in daily touch with Burness' mother to obtain information as to Burness' whereabouts, but up to the end of the trial she

was unable to furnish any information as to his whereabouts. The trial ended on January 8, 1942, without plaintiffs having the benefit of Burness' testimony. As stated, the jury returned a verdict in defendants' favor, and judgment was entered accordingly.

[6-9] Defendants contend that in order to establish a claim of accident or surprise the moving party must show that there was no lack of diligence in producing the evidence; and they argue that here plaintiffs' attorney, knowing that Burness was in the army, should have taken his deposition, or that when he learned that Burness would not be able to be present at the trial he should have asked for a continuance. But as stated in Heintz v. Cooper, 104 Cal. 668, 38 P. 511, and again in Brannock v. Bromley, 30 Cal.App.2d 516, 86 P.2d 1062, 1066: "'Diligence' is a relative term incapable of exact definition. What would amount to due diligence under one state of facts would fall absolutely short of it under another and different state of facts. It depends, therefore, so essentially upon the particular circumstances of each case, with all their distinct and varying phases and bearings, as they have appeared to the lower court at the trial and throughout the conduct of the cause, in determining whether diligence has been used in any particular instance, that this court should hesitate to disturb a ruling upon this ground where it has any substance whatever upon which to rest. The presumption is that the discretion has been properly exercised, and that presumption must be overcome by a clear want of facts before the order will be disturbed." Taking into consideration all of the circumstances here shown by the record, it cannot be said that the trial court was unwarranted in holding there was no lack of diligence on the part of plaintiffs. Up to the Saturday prior to the commencement of the trial on the following Monday, plaintiffs had definite assurance that Burness would be present at the trial to testify, and it was then impossible to procure his deposition for use at the trial. And it is quite obvious that it would have been futile to move for a continuance for the reason that plaintiffs did not know, and therefore could give the trial court no assurance as to when, if ever, they would be able to produce Burness as a witness at the trial or take his deposition. In those circumstances the fact that plaintiffs did not move for a continuance did not, as a matter of law, operate as a waiver of their right to move for a new trial upon the ground of surprise which ordinary prudence could not have guarded against, nor preclude the trial court from exercising its discretionary power to grant such relief. Laverne v. Dold, 17 Cal.App.2d 180, 61 P.2d 497; Whitfield v. Debrincat, 18 Cal. App.2d 730, 64 P.2d 960; Rodriguez v. Comstock, 24 Cal. 85.

[10, 11] Defendants also contend as an additional reason why a new trial should not have been granted is that Burness' testimony would have been merely cumulative and therefore would not have presented any different case to the jury. There is no merit in the point. While it appears from the affidavit subsequently procured from Burness that his testimony would in many respects be the same as that given by the only other two eye-witnesses to the accident, namely, Berreman, the defendant, and Allemany, who was riding with the deceased, it further appears, as plaintiffs contend, that on many vital points Burness' testimony would have supplied facts not covered by the testimony of the defendant. Moreover, as contended by plaintiffs, Burness and Allemany viewed the accident from entirely different angles, and it may be reasonably inferred that Burness would have been much more effective as a witness than Allemany, who was a close friend of the deceased and admitted he had been drinking before the accident, and who was illiterate and afflicted with a nervous disorder.

As supporting plaintiffs' contentions the record shows the following: The accident happened about 2:30 a. m. on a rainy night at the intersection of Fremont and Mission Streets in San Francisco. Berreman was travelling north on Fremont Street, and testified that at the time of the impact he was travelling at a speed of from 15 to 18 miles an hour; that he did not know in what direction deceased's car was travelling; that he did not even see an automobile when he drove into the intersection, nor did he know what portion of deceased's car he hit; that just before the collision he saw "a light object" in front of him but did not even know it was an automobile, nor in which direction it was travelling. Burness' affidavit shows that he would testify that he also was travelling north on Fremont Street, at about 20 miles an hour; that about three-quarters of a block from Mission Street defendant passed

him, obviously travelling in excess of 20 miles an hour; that defendant did not slow down, nor did he swerve to the right or left, but maintained the same line of travel up to the very point of impact; that as Burness approached the intersection he saw a light colored coupe enter the intersection from the right; that it was not travelling fast; that it entered ahead of defendant, and was struck squarely in the middle of its left side in the center of the intersection and spun around once or twice. Thus it is obvious that Burness' testimony would not be cumulative insofar as that given by the defendant was concerned. Allemany testified that the deceased's automobile in which he was riding approached the intersection from defendant's right and entered it ahead of defendant's automobile; that defendant was travelling about 30 or 40 miles an hour; that the lights on deceased's car were on; that there was a "bump" and deceased's car spun around and deceased was thrown out into the street. Plaintiffs argue, therefore, that the jury must have disregarded Allemany's testimony, or not believed him; whereas a proper presentation of the facts, by a young army officer who was a disinterested witness, would have probably brought about a different result. In any event, the rule is that even if the evidence is cumulative, the court is not thereby precluded from granting a new trial; that "The question before the trial court, even where the newly discovered evidence is simply cumulative, is whether if such evidence had been presented on the trial of the cause it would probably have produced a different result. The determination of that question is peculiarly within the province of the trial court. It is a matter addressed wholly to its discretion, and as a general proposition, whether its ruling is favorable or unfavorable on a motion for new trial based on newly discovered evidence which appears to be merely cumulative, that discretion will not be reviewed except for manifest abuse. * * * What the probable effect of this evidence would have been if presented to the jury upon the trial of the cause was a matter for the trial court to determine, and in granting such new trial it necessarily concluded that, had this evidence been presented to the jury in the first instance, the trial might have had a different result. It would not have granted it on such ground unless it so concluded." Cahill v. E. B. & A. L. Stone Co., 167 Cal. 126, 138 P. 712, 715. And where it is doubtful whether the evidence is cumulative, it then becomes a matter of discretion; and unless there has been a manifest abuse of it by the trial court, a reviewing court will not interfere. Brannock v. Bromley, supra, citing Kenezleber v. Wahl, 92 Cal. 202, 28 P. 225; see, also, Oberlander v. Fixen & Co., 129 Cal. 690, 62 P. 254. It is our conclusion that such interference in the present case would be unwarranted.

The order appealed from is affirmed.

PETERS, P. J., and WARD, J., concurred.



58 Cal.App.2d 208

McFALL v. McFALL.

Civ. 6830.

District Court of Appeal, Third District, California.

April 16, 1943.

Hearing Denied June 14, 1943.

1. Divorce ⇐27(1)

The statutory definition of "extreme cruelty" as a ground for divorce does not definitely limit the phrase, but merely describes it in general terms, leaving a wide range of discretion with trial court. Civ. Code, § 94.

See Words and Phrases, Permanent Edition, for all other definitions of "Extreme Cruelty".

2. Divorce ⇐27(1)

There is no well-defined test for determining whether certain acts or conduct constitute extreme cruelty, but each case must be determined according to its own particular circumstances. Civ.Code, § 94.

3. Divorce ⇐27(8)

The test of whether the making of defamatory statements by one party to marriage concerning the other constitutes extreme cruelty is not whether such statements were believed by others but their effect upon the complaining party. Civ. Code, § 94.

4. Divorce ⇐130

Trial court did not abuse its discretion in granting wife an interlocutory de-

cree of divorce on ground of extreme cruelty as shown by evidence of the continuing course of conduct of husband during the two years immediately preceding separation. Civ.Code, § 94.

5. Divorce ⇐27(3)

The infliction of grievous mental suffering, independent of physical injury, may constitute "extreme cruelty" as ground for divorce. Civ.Code, § 94.

6. Divorce ⇐184(10)

Whether, in a particular case, the ill-treatment of wife by husband was so unusual as to be beyond that misconduct which may be attributed to the ordinary weaknesses and passions of men, and whether such treatment caused grievous mental suffering to wife so as to constitute extreme cruelty as ground for divorce, are largely questions of fact to be determined by trial court whose findings in such respect will not be disturbed on appeal except for abuse of discretion. Civ.Code, § 94.

7. Divorce ⇐27(8)

That wife was admittedly a good friend of next door neighbor and incidents naturally resulting from such relationship did not justify husband's accusations of infidelity so as to preclude reliance on such accusations together with other conduct of husband as constituting "extreme cruelty" that would warrant granting wife a divorce. Civ.Code, § 94.

8. Divorce ⇐127(4)

Where alleged cruelty consists of successive acts, direct testimony of other witnesses to every act sworn to by complaining party is not necessary, but it is sufficient "corroboration" if a considerable number of important and material facts are so testified to by other witnesses, or if there is other evidence, circumstantial or direct, which strongly tends to strengthen and confirm complaining party's statements. Civ.Code, § 94.

See Words and Phrases, Permanent Edition, for all other definitions of "Corroboration".

Appeal from Superior Court, Calaveras County; A. L. Pierovich, Judge Assigned.

Action for divorce by Charles McFall against Carolyn Flaherty McFall, wherein defendant filed a cross-complaint asking a divorce on the ground of extreme cruelty. From a judgment granting an interlocutory decree of divorce to defendant and cross-complainant, plaintiff and cross-defendant appeals.

Judgment affirmed.

Blewett & Blewett, Robt. N. Blewett, and Stephen N. Blewett, all of Stockton, for appellant.

Gumpert & Mazzera, of Stockton, for respondent.

PEEK, Justice.

Plaintiff and cross-defendant appeals from a judgment granting an interlocutory decree of divorce to defendant and cross-complainant on the ground of extreme cruelty.

Plaintiff and defendant were married on June 29, 1929, and lived together as husband and wife, except for a few days separation in May, 1940, until June 22, 1940. There are two children, the issue of said marriage, a son aged ten years and a daughter aged six years.

At the time of the separation and for approximately three years prior thereto plaintiff had operated a service station at San Andreas. It appears that this business venture marked the beginning of a series of domestic quarrels which ultimately culminated in the present divorce action. The wife testified that they were in debt and that they had agreed that if she were working at the station it would aid in the solution of this problem. The husband, to the contrary, testified that he objected to his wife working at the station but that she continued nevertheless, and that because of the wife's activities in this regard it was necessary to hire girls to care for their two children, which was the source of other quarrels. Also it was during this unfortunate period that plaintiff and defendant rented a home next door to the person who was destined to become the main source of discussion and quarrels between them. The unhappy result of the friendship between defendant and this neighbor was an abiding conviction in the mind of the plaintiff that this acquaintanceship, at least insofar as defendant was concerned, was neither platonic nor maternal, and became a source of much defamatory comment by plaintiff, not alone to defendant, but to patrons of their oil station.

Plaintiff, by his complaint, and defendant by her cross-complaint, allege extreme cruelty in general terms. The defendant

bases her allegations upon a course of conduct on the part of plaintiff existing throughout the two year period immediately preceding the final separation of the parties.

Upon the conclusion of the hearing the trial court awarded the custody of the minor daughter to the mother and the custody of the minor son to the father. The community property was equitably divided between the parties.

On the issue of extreme cruelty the trial court made certain findings, and in particular found that plaintiff wilfully and wrongfully inflicted grievous mental suffering and anguish and bodily injury upon defendant; that plaintiff had, on numerous occasions, accused defendant of having illicit relations with a man other than plaintiff; had quarreled with defendant concerning their own sex relationship, and had in this connection degraded and cheapened defendant; that plaintiff had told persons other than defendant of defendant's alleged infidelity; that plaintiff had forbidden defendant to keep company with her friends or to bring her friends to their home; that on the 27th day of May, 1940, the plaintiff violently struck defendant in the face with his fist and defendant was knocked to the floor and rendered unconscious, and that defendant's face was bruised and swollen for several days following this assault.

The plaintiff, appellant herein, makes no complaint in regard to division of the property by the court, nor does he allege error in the order of the court awarding the custody of the children. Plaintiff's appeal is predicated solely on the contention that the evidence is insufficient to support the finding on the issue of extreme cruelty, and further asserts that no corroboration in support of material facts introduced on behalf of defendant appears in the record.

[1, 2] Extreme cruelty as a ground for divorce is defined in section 94 of the Civil Code as "the wrongful infliction of grievous bodily injury, or grievous mental suffering, upon the other by one party to the marriage." This section neither sharply defines nor definitely limits the phrase "extreme cruelty" but merely describes it in general terms, leaving a wide range of discretion with the trial court. Andrews v. Andrews, 120 Cal. 184, 52 P. 298. Nor is there any well defined rule which may be followed as a test in determining the question as to whether or not certain acts or conduct constitute extreme cruelty. Each case must be determined according to its own particular circumstances, by the good sense and judgment of the court, keeping always in view the intelligence, apparent refinement and delicacy of sentiment of the complaining party. Fleming v. Fleming, 95 Cal. 430, 30 P. 566, 29 Am.St.Rep. 124; Scheibe v. Scheibe, 57 Cal.App.2d 1019, 134 P.2d 841.

In Shaw v. Shaw, 122 Cal.App. 172, 9 P.2d 876, the judgment granting a divorce on the ground of extreme cruelty, upon circumstances somewhat similar to those presented in the instant case, was affirmed on appeal, and the language employed in the opinion of the court might well apply to the present case. In the Shaw case, the wife who was separated from her husband, an officer in the United States Navy, directed two letters to the Navy Department, falsely charging her husband of withholding information as to the whereabouts of their children, failure to send payments for her support, and immoral conduct with his housekeeper who kept house for the husband and the children. On page 174 of the opinion, in 122 Cal.App., 9 P.2d on page 876, the following language appears in answer to the contention that the above conduct on the part of the wife did not constitute extreme cruelty: "It is well settled that 'no arbitrary rule of law can be laid down as to what particular facts must be alleged and proven in order to justify a finding that the complaining party has suffered grievous bodily injury, or has undergone grievous mental suffering. A correct decision must always depend upon the sound sense and judgment of the trial court. "Whether in any given case there has been inflicted * * * grievous bodily injury, is a * * * question of fact, to be deduced from all the circumstances of each particular case, keeping always in view the intelligence, apparent refinement, and delicacy of sentiment of the complaining party." [Citing cases.] Therefore, in the case at bar, whether or not the acts and conduct of appellant inflicted grievous mental suffering, or grievous bodily injury, or both, upon the respondent, was a question of fact for the determination of the trial court from all the facts and circumstances in the case.'"

[3] Again, at page 175 of the opinion, in 122 Cal.App., 9 P.2d at page 877, the court declares that the determination of

the question as to whether defamatory accusations constitute extreme cruelty depends upon the manner in which the complaining spouse is affected. That language is as follows:

"Appellant insists that, because there is no evidence that the children or others believed in the truth of these insinuations, and because the naval authorities took no disciplinary action in the matter, the statements and letters did not inflict extreme mental cruelty. Although the belief by others of the truth of such accusations probably would, if known to respondent, have accentuated his mental suffering, it is not essential, for, in determining whether or not defamatory accusations constitute extreme cruelty, the test must be their effect upon the complaining spouse rather than their effect upon others.

"We cannot say that the trial court, who had the opportunity of observing the delicacy of sentiment and apparent refinement of respondent, acted in abuse of a sound discretion in determining that the conduct of appellant constituted extreme cruelty and inflicted grievous mental suffering upon him within the meaning of section 94, Civil Code."

[4] Considering the entire course of conduct on the part of plaintiff as shown by the evidence during the two year period preceding the final separation of the parties, it is beyond the province of this court to declare that the trial judge has acted in abuse of his sound discretion in determining that such conduct constituted extreme cruelty. Although specific acts on the part of plaintiff are necessarily relied upon in support of and as constituting to some degree the alleged wrongful conduct complained of, the trial judge in making his decision was not confined to any one specific act of alleged cruelty. The defendant did not rely on any one single act of cruelty, but relied upon a continuing course of conduct made up of various acts concerning which testimony was introduced.

[5, 6] Plaintiff seriously and at length contends that the judgment should be reversed in that only "one act of battery and accusations of misconduct" are disclosed by the record; that such a showing is insufficient to substantiate a finding of extreme cruelty, and that ill-treatment by a husband must be "so unusual as to be beyond * * * the ordinary weaknesses and passions of men." Andews v. Andrews, supra [120 Cal. 184, 52 P. 299]. Such might be the case were it not for the fact that the evidence as a whole was found by the trial court to be amply sufficient to support the judgment. Secondly, plaintiff fails to consider the entire statement of the principle in the Andrews case, which of itself completely answers his contention. The complete statement including the partial quotation by plaintiff is found on page 187 of 120 Cal., on page 299 of 52 P., and is as follows: "The general contention that the evidence and the facts found do not constitute, in law, extreme cruelty, within the meaning of the Code, cannot be maintained. There is no attempt in the Code to sharply define or to make definite limitations of the phrase 'extreme cruelty.' It is merely described in general terms to be 'the infliction of grievous bodily injury or grievous mental suffering upon the other by one party to the marriage.' This leaves a wide range of discretion in a trial court to the judge or jury. It is now established law that the infliction of grievous mental suffering, independent of physical injury, may constitute extreme cruelty. Barnes v. Barnes, 95 Cal. 171, 30 P. 298 [16 L.R.A. 660]; Smith v. Smith, supra [119 Cal. 183, 48 P. 730, 51 P. 183]; Fleming v. Fleming, 95 Cal. 430, 30 P. 566, [29 Am.St.Rep. 124]; Venzke v. Venzke, 94 Cal. 225, 29 P. 499. Whether, in any particular case, the ill-treatment of the wife by the husband is so unusual as to be beyond that misconduct which may be attributed to the ordinary weaknesses and passions of men, and whether such treatment caused grievous mental suffering to the wife, are largely questions of fact to be determined by the trial court. Its findings on such questions cannot be disturbed on appeal unless the evidence in support of the findings be so slight as to indicate a want of ordinary good judgment and an abuse of discretion by the trial court."

It is evident from the authorities cited that the trial judge is vested with great latitude in determining the weight and sufficiency of all evidence presented to him in an action of such character as the present one. The parties and the witnesses were before him and he was in the best position to judge their credibility and determine their motives. The trial judge's findings and conclusions in a contested action of this type, and in which much of the evidence is in conflict, should prevail unless there is a clear showing of an abuse of discretion.

[7] Although defendant was admittedly a good friend of the next door neighbor, such fact clearly does not support the conclusions of plaintiff insofar as justifying his conduct toward her. It is true that defendant had visited in this neighbor's home, had received one or two small gifts from him under innocent circumstances, and one occasion after a dance, had used his car to drive a girl friend home, but incidents such as these certainly do not form a sound basis in support of plaintiff's suspicions and accusations of infidelity on the part of defendant.

During the time that defendant worked at the service station with plaintiff, she frequently was given a ride to work by the neighbor in his automobile. This circumstance is cited by plaintiff as another incident justifying his suspicions. However, the defendant testified that the plaintiff approved, and there is no evidence in the record to the contrary.

The plaintiff, by his own admission, had for a considerable period of time prior to the separation of the parties, accused his wife of infidelity, even to a point of discussing it with other persons in the community. Human nature and gossip being what they are, it is not unreasonable to assume that many others had knowledge of the accusations. The test, however, is the effect upon the complaining spouse, not necessarily the effect upon others, even though believed by them as stated in Shaw v. Shaw, supra. The trial judge had the parties before him with the evident opportunity to observe the effect of such accusations and conduct upon defendant. He has seen fit to resolve such questions of fact in her favor. Under such circumstances we cannot say that he acted in abuse of a sound discretion, and it is our opinion that we would be unwarranted in so holding.

A final and abundant source of argument has been found by both parties in the fact that the trial judge, during the course of the trial and after agreement between both counsel, conversed with the two minor children in his chambers. Even assuming that the defendant would be entitled to a presumption that the statements of the children were in support of the findings and judgment it is nevertheless unnecessary to further consider the question, as the record otherwise contains substantial evidence to support the allegations of extreme cruelty and the findings and judgment of the court in accordance therewith.

[8] There is no merit in the contention of plaintiff that there is not sufficient corroboration of material evidence. The plaintiff, by his own admissions, corroborated the testimony of defendant in some of the more important particulars. In 9 Cal.Jur. 738, section 96, the satisfaction of the rule requiring corroboration in such a case as the present one is well stated as follows:

"Where the cruelty consists of successive acts, it is not necessary that there should be direct testimony of other witnesses to every act sworn to by the plaintiff; but it is sufficient corroboration if a considerable number of important and material facts are so testified to by other witnesses, or if there is other evidence, circumstantial or direct, which strongly tends to strengthen and confirm the statements of the plaintiff."

As clearly indicated, the record contains sufficient corroboration of the necessary material allegations contained in the cross-complaint of defendant.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concurred.



58 Cal.App.2d 250

GAINE v. AUSTIN et al.

Civ. 6825.

District Court of Appeal, Third District, California.

April 19, 1943.

1. Appeal and error ⇐931(1), 989

On appeal, District Court of Appeal is to disregard conflicts of evidence, to accept as true evidence supporting the findings, and to draw all reasonable inferences which tend to support the judgment.

2. Principal and agent ⇐123(3)

Evidence supported finding that, in receiving sum which plaintiff distributee had agreed to accept for mortgage, attorney

acted as distributees' agent and that mortgage was satisfied. Civ.Code, § 2299.

3. Principal and agent ⇐99

Agency may be implied from the facts of a particular case, and, if a principal by his acts has led others to believe that he has conferred authority upon an agent, he cannot assert as against third persons who have relied thereon in good faith that he did not intend to confer such power.

4. Principal and agent ⇐170(3)

Where, if an attorney had merely assumed authority to act for mortgagee's distributees in regard to sale of mortgaged realty and in handling the moneys received by him, distributees did not repudiate the authority and, after attorney had advised plaintiff distributee that he had satisfaction of mortgage formerly executed which could be used with the sale and after plaintiff had been told by attorney that the latter had sum which plaintiff had agreed to accept for mortgage, no objection was made, and, some four months later, plaintiff discharged attorney, "ratification" of attorney's receipt of the sum was implied and mortgage was satisfied.

See Words and Phrases, Permanent Edition, for all other definitions of "Ratification".

5. Principal and agent ⇐170(3)

As respects a principal's "ratification" of his agent's acts, quiescence of the principal is tantamount to acquiescence.

6. Principal and agent ⇐105(2)

Where plaintiff distributee of mortgagee did not deny that attorney was actually employed by him and suggestion that mortgagor sell the mortgaged realty originated with plaintiff, and, through the attorney, plaintiff advised the parties that he would accept, and furnished the attorney with papers sufficient to close the deal, and plaintiff admitted that he had not advised attorney not to accept and mortgagor not to make the payment to the attorney, attorney had "actual authority" to receive the payment for plaintiff and to deliver the papers to mortgagor's grantee. Civ.Code §§ 2299, 2315, 2316.

See Words and Phrases, Permanent Edition, for all other definitions of "Actual Authority".

7. Principal and agent ⇐99, 123(1)

An agent's authority may be proved by circumstantial evidence, and it may likewise be implied from circumstances. Civ. Code, §§ 2300, 2315–2317.

8. Principal and agent ⇐105(2)

Where purchasers of mortgaged realty and mortgagor justifiably believed that attorney was agent of mortgagee's distributees with authority to close the sale, to receive the agreed sum for the mortgage, and to deliver the papers in his possession to the purchasers to close the deal, there was an "ostensible agency" of the attorney to deliver the papers and to accept payment of the mortgage for plaintiff distributee. Civ.Code §§ 2300, 2315–2317.

See Words and Phrases, Permanent Edition, for all other definitions of "Ostensible Agency".

9. Principal and agent ⇐99

A principal may not deny the authority of his agent where his own conduct has invited those with whom he is dealing to assume that the agent possessed such authority, and, where he has clothed the agent with apparent powers, strangers in dealing with the agent may assume that such powers are possessed.

10. Principal and agent ⇐160½

Where purchasers of mortgaged realty justifiably believed that attorney was agent of mortgagee's distributees in delivering papers in his possession and accepting payment of the mortgage for plaintiff distributee to close the deal, purchasers paid attorney nothing, and there was no circumstance which should have put them on notice that attorney might not be acting for plaintiff in good faith, as between plaintiff and purchasers, the loss from attorney's conversion of the money was required to fall upon plaintiff.

11. Estoppel ⇐72

As between two innocent persons one of whom must suffer, the loss should fall on the principal who has armed the agent with apparent authority and thus enabled him to obtain the advantage of the person with whom he trades, rather than on the purchaser where the agent acts within the apparent scope of his authority and there is nothing in the transaction to put the purchaser on notice that the agent is exceeding his authority.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Action by Charles Frederick Gaine against Dorothy St. Louis Austin and others to foreclose a mortgage wherein a cross-complaint was filed. From an adverse decree, plaintiff appeals.

Affirmed.

Clark, Nichols & Morton and Clark, Nichols & Eltse, all of Berkeley, and Nelson & Ricks, of Eureka, for appellant.

Mahan & Mahan and Blaine McGowan, both of Eureka, and Carl L. Christensen, Jr., of Washington, D. C., for respondents.

ADAMS, Presiding Judge.

Plaintiff herein sought to foreclose a mortgage given by Mary Costa to secure her promissory note for $7,400 executed October 6, 1930, to Wilhelmina C. Zehndner, and a renewal note and mortgage executed on October 6, 1935. Plaintiff's complaint alleged that defendants Dorothy St. Louis Austin and her husband, W. G. Austin, had acquired title to the property secured by said mortgage, and that they had mortgaged some to defendant Riella, but that Mary Costa's notes and mortgages had never been paid and satisfied, and that the rights of defendants in the property mortgaged were inferior and subordinate to the rights of plaintiff.

Defendants answered alleging that the notes described in plaintiff's complaint had been paid and the mortgages therein referred to fully satisfied; that Mary Costa had by deed transferred a portion of the lands described in said mortgages to defendant Dorothy St. Louis Austin who was the owner thereof subject to the mortgage of defendant Riella, and that said Mary Costa was the owner of the remaining portion of said lands. Defendants also filed a cross-complaint seeking to quiet their title against all claims of plaintiff and praying for a decree that the notes and mortgages had been fully paid, satisfied and discharged. The action was tried by the court, sitting without a jury, findings favorable to defendants and cross-complainants were filed, and a judgment for them entered as prayed. Plaintiff has appealed, contending here that the findings are not sustained by the evidence.

[1] For a clear understanding of the case, a somewhat lengthy recital of the facts seems essential, though we are mindful that on appeal we are to disregard conflicts of evidence, accept as true evidence supporting the findings, and draw all reasonable inferences which tend to support the judgment of the trial court. Burgess v. Security-First National Bank, 44 Cal.App.2d 808, 113 P.2d 298.

The evidence shows that after the original note and mortgage of October 6, 1930, had been executed Wilhelmina C. Zehndner died, and said note and mortgage were distributed to plaintiff and his wife, Emilie H. Gaine, together with notes and mortgages executed by one Dias and one Nixon; and by the same decree of distribution certain real property, consisting of a part of what was known as the Zehndner Block, in Arcata, Humboldt County, was distributed to the minor son of plaintiff, plaintiff thereafter managing same as guardian of the son's estate. While the Costa note and mortgage were acquired by both plaintiff and his wife, plaintiff conveyed his interest therein to his wife, but at all times thereafter acted for her in all transactions involving same, and his acts were ratified by her. She reconveyed to him just prior to the institution of the present action.

One Casper N. Torp, of Arcata, was attorney for the administrator of the Zehndner estate, and subsequently, and up to the month of August, 1937, he acted as attorney for the Gaines in various matters relative to the above-mentioned property in Arcata, the business transacted consisting in trying to collect, and in some instances collecting, interest on the three mortgages, the preparation of leases of buildings in the Zehndner Block, and the renewals of the three mortgages. As the Gaines lived in Oakland there was considerable correspondence between Torp and plaintiff in connection with these matters; there were also personal conferences when plaintiff visited Arcata. As the relationship between the Gaines and Torp as principals and agent is the real issue in the case we shall set forth rather fully the substance of their correspondence.

Mary Costa experienced difficulty in meeting her interest payments, and on March 9, 1934, she wrote to the Gaines stating she had a purchaser for there acres of the land mortgaged, and asking their consent to sell, the amount received to be paid on the mortgage. Plaintiff thereupon wrote to Torp asking him to ascertain if such a sale would impair the value of the remaining acreage and what would constitute a fair price per acre. To this letter Torp replied, advising that he had gone out to see Mrs. Costa relative to the sale of her property and had found that she

did not have a definite offer and had not named a price; also that she would rather sell enough to pay off the whole mortgage.

On November 15th plaintiff wrote to Torp, enclosing the Mary Costa mortgage, saying: "Mrs. Costa has requested a renewal and I informed her that I would forward the papers and the information to you. You may interview her and arrange for the renewal on the following basis. * * * I will send the three notes to you, Dias, Costa and Nixon, when I receive the new notes and mortgages."

On the same day plaintiff wrote to Mary Costa stating that he had forwarded to Torp the old mortgage and instructions regarding renewal, advising her of his terms, and saying: "If these terms meet with your approval you may arrange with Mr. Torp for the renewal." On November 27th plaintiff again wrote her demanding payment of interest, and concluding: "If we are going to have to wait for the interest each time it is due I will have to instruct Mr. Torp to make the new mortgage 6% the same as the old one was." On November 27th he wrote to Torp stating that he had not received the Dias, Nixon and Costa mortgages and asking what was causing the delay. On November 30th Torp replied, making reference to the Dias and Nixon mortgages and stating, as to Mrs. Costa, that she would have no money until she rented her place, but was to let him know in a few days.

On December 2nd plaintiff wrote Torp, making reference to the Dias renewal and stating:

"I will enclose the old notes for Nixon and Mary Costa and suggest that you send the satisfactions to us to be signed so that you may record the new mortgages for us. * * *

"I have wondered if Mrs. Costa has ever thought of selling her ranch. I don't know whether she could realize enough at this time to make it worth her while but if she is going to have difficulty obtaining good tenants it might be worth while offering the suggestion to her."

On December 16th Torp wrote plaintiff acknowledging receipt of "the old notes of Nixon and Mrs. Costa," and stating that as suggested by plaintiff he had prepared a release of the old mortgage against Nixon, and also a release of the old Costa mortgage, which it would be necessary for plaintiff to sign, and stating that on receipt of them he would have them recorded when the new mortgages were put on record. He made reference to Mrs. Costa's payment and further stated: "I have spoken, before, to Mrs. Costa about selling her place and she would like to do that if she can obtain a fair value for it, but the way property has been selling during the past few years she has been unable to find a buyer." On December 23rd plaintiff replied, enclosing the executed releases for the Costa and Nixon mortgages. The satisfaction of the Costa mortgage was dated December 20, 1935, and signed by both plaintiff and his wife.

On January 7, 1936, Torp wrote plaintiff that he had received the satisfaction of mortgage for Nixon and Costa, that the former had been recorded but that he would hold the latter until the new mortgage was executed.

On February 11th plaintiff wrote Torp stating that no interest had been received from Mary Costa and that this interest would have to be paid immediately or they would not be interested in the new mortgage. In a letter of February 14th Torp forwarded to plaintiff the Dias and Nixon mortgages and stated that he would do his best to close the Costa mortgage within a few days. To this letter plaintiff replied, stating that if it were not possible for Mary Costa to make payment, "we had better consider some other form of settlement."

On July 25th Torp wrote plaintiff stating that he had talked with Mrs. Costa but that she was unable to make payment until she had collected for her hay, that she was still endeavoring to sell her place, and the day before had brought a party into the office who would like to buy it and assume the mortgage, but that this buyer would not be able to pay anything on the principal. He concluded, "Trusting that I may hear from you relative to this matter so that Mrs. Costa will know whether to negotiate with these people any further, I am. * * *"

On September 26th, in response to a letter from plaintiff dated July 14th, Torp advised that the sale of the Costa property had not materialized, but that Mrs. Costa had arranged to rent for one year. Reply to this letter was made by plaintiff on December 12th, wherein he stated: "We are determined that this matter shall be disposed of definitely and am instructing you now to proceed with it. If there is any possibility of Mrs. Costa doing anything

soon you may wait until Jan. 2nd 1937 but no longer."

On January 2, 1937, Torp again wrote plaintiff stating that he was advised that Mrs. Costa had deposited six months' interest with the bank to apply on plaintiff's mortgage; that Nilsen, who had purchased her hay, had not yet sold same but had guaranteed that when sold the money would be paid to plaintiff; also that Mrs. Costa would receive her rent in April and thought that the whole matter could be cleared up by that time. He then inquired whether, under these circumstances, plaintiff wished to let the matter rest until April.

On February 23rd Torp wrote plaintiff advising that a man had called upon him relative to buying the Costa place and had requested Torp to write plaintiff in regard to discounting the mortgage for a cash settlement. On March 10th Torp again wrote stating that the prospective buyers of the Costa property had been in several times to see if Torp had heard from plaintiff relative to a reduction of the amount due on the mortgage if cash were paid; and he asked that plaintiff advise him whether he cared to make any proposition in that respect. On March 12th Gaine replied, acknowledged receipt of Torp's letters of February 23rd and March 10th, and stated: "We are agreeable to an adjustment of the Costa matter only to this extent. We will accept $7500.00 as full settlement of principal and interest. * * * We will allow an adjustment of $529.87 or $7500.00 net. If this deal does not materialize we are not inclined to show Mrs. Costa any more leniency and want you to proceed with the foreclosure as quickly as possible."

On April 6th Torp wrote plaintiff: "Your letter of the 12th of March, stating that you would accept $7,500 in full settlement of the Mary Costa mortgage, was received. This is a very substantial reduction and Mrs. Costa is very grateful to you as it enables her to make this sale and gets her out of debt." He then went on to say that the sale was to have been closed the preceding Saturday and the buyer was ready to pay over the money, but that a little difficulty had been encountered regarding a boundary line and the title company was unable to write the description of the twenty acres being purchased until that matter had been adjusted. He added: "I still have the satisfaction of mortgage that was signed by you and Mrs. Gaine when we were trying to adjust this mortgage before, and the same can be used now without making it necessary to prepare a new one. I am sorry this matter is running past the sixth of this month but this time Mrs. Costa is in no way to blame. However, I thought it best to drop you a line today so that you will know the transaction will be closed in the very near future."

On April 19th plaintiff wrote Torp: "I trust that the deal is going thru, as originally planned. Please let me know just what the status of this matter is."

On the same day Torp wrote to plaintiff, stating that the transaction for the sale of a portion of the Costa property had been closed, but that in order to clear the title the title company had instructed that proceedings to quiet title be instituted. He added: "The papers have all been executed and the buyers have placed $7500.00 with me in escrow to be paid to you as soon as the title is cleared." Apparently plaintiff made no reply to this letter and gave Torp no instructions about the money.

The sale of a portion of the Costa property referred to in the above correspondence was made to Mrs. Dorothy St. Louis Austin, one of the defendants in this action. The evidence shows that in January, 1937, learning that the property might be for sale, she went to see Mrs. Costa who told her there was a mortgage on the place. Her husband, defendant W. G. Austin, and her father Eugene St. Louis, had previously visited the premises, and Mrs. Costa had referred them to Torp, as also had Mr. Sorensen at the bank who told them that Torp handled Gaine's business in Arcata. They went to see Torp and asked him if he handled Gaine's business, and when he said that he did, asked if it would be possible to have the mortgage reduced. Torp said he would write to or confer with Gaine, and subsequently told them that Gaine would take $7,500, that he had all the papers from plaintiff and was ready to do business. In the meantime Mrs. Costa had agreed to $7,600 as the price of the 20 acres to be purchased and they had paid her $50 on account.

On April 10th, Mrs. Austin, her husband and her father went to Torp's office, paid him the sum of $7,550, and received from him the note and mortgage of October 6, 1930, the satisfaction of same executed by plaintiff and his wife, the renewal note and mortgage of October 6, 1935, which

had never been recorded, and a deed executed by Mrs. Costa which Torp had previously prepared and had executed by Mrs. Costa. Payment by Mrs. Austin was made by four checks one of which was drawn by defendant Riella payable to Mr. St. Louis, and endorsed by him over to Torp, another was Mr. St. Louis' check, and the other two were drawn by Mrs. Austin on two different bank accounts, and made payable to Torp. The $3,000 check of Riella represented a loan of that amount, made by the latter, which was secured by a note and mortgage drawn by Torp, and executed by Mrs. Austin, for preparing which Mr. St. Louis paid Torp $6. Mrs. Costa's note was endorsed by Torp: "Paid April 10, 1937. Casper N. Torp, Attorney for Emilie H. Gaine."

After delivery of the papers to Mrs. Austin, Torp said that he would have the satisfaction of mortgage recorded, and it was handed back to him for that purpose. He also told them that certain defects in the title had been discovered, but that Mrs. Costa would pay for having the title cleared. He prepared an agreement to that effect, and Mr. Austin took it to Mrs. Costa and secured her signature, she being ill and unable to appear. Torp subsequently filed suit to quiet title, the action being prosecuted in Mrs. Austin's name since the title was then in her. He gave Mrs. Costa $50 out of the amount received by him, and appropriated the remainder to his own use. He did not record the satisfaction of mortgage, and, after his conversion of the money was discovered, turned it over to the title company, which in turn gave it to plaintiff.

Defendants claimed at the trial that this evidence established that in receiving the $7,500 which plaintiff had agreed to accept in payment of the note and mortgage, Torp acted as the attorney for and agent of Mrs. Gaine, and that payment to Torp constituted payment to her and a complete satisfaction and discharge of the indebtedness of Mary Costa to said Emilie H. Gaine. The trial court so found, stating in its findings: "* * * that said payment was made by said Mary Costa to one Casper N. Torp * * *; that at the time of said payment to said Casper N. Torp and in receiving said payment, said Casper N. Torp was acting as attorney and agent for said Emilie H. Gaine * * * and had theretofore been, and at the time of receiving said payment was, expressly authorized and impliedly authorized by said Emilie H. Gaine * * * to receive and did receive said payment for and on behalf of, and as agent and attorney for said Emilie H. Gaine * * *; that prior to the time of the making of said payment, said Casper N. Torp had been and at the time of the making and of his receiving said payment was, expressly and impliedly authorized to receive said payment in full payment, satisfaction and discharge of said promissory notes and mortgage, and did receive said payment of said sum of $7500.-00 in full payment, satisfaction and discharge of said promissory notes and mortgage; that in making said payment to said Casper N. Torp said defendant Mary Costa did make said payment to said Emilie H. Gaine * * * and did thereby make said payment in full payment, satisfaction and discharge of said promissory notes and mortgage * * *."

On this appeal plaintiff contends that the finding of the trial court as to Torp's agency is not sustained by the evidence, that neither express nor ostensible agency was shown, and that there was no evidence of ratification of Torp's acts by the Gaines; that Torp was acting as agent of the seller rather than the agent of Gaine. His principal argument is that as the Austins had no communication with Gaine prior to the sale, and had not been shown any letters or other communications between Gaine and Torp, an element of ostensible agency was lacking.

[2-5] We believe that the evidence is sufficient to show not only ostensible but actual agency of Torp for plaintiff. He acted for Gaine not only in the Costa matters, but apparently in all his dealings in regard to the Nixon and Dias mortgages, and the rentals of the Zehndner Block. He at times received money from Dias and Mrs. Costa for interest, and forwarded same to plaintiff, who at no time objected to his so doing. Torp himself testified that he gave receipts as attorney for Mrs. Gaine, that it was his understanding that he was acting as plaintiff's attorney in his dealings in regard to the sale and in handling the money received by him; that said money came into his hands as attorney for Mrs. Gaine. And the correspondence between plaintiff and Torp itself certainly supports an inference, to say the least, that Torp was the agent of plaintiff and his wife in the matter, which inference the trial court was authorized to draw. Agen-

cy may be implied from the facts of a particular case, and if a principal by his acts has led others to believe that he has conferred authority upon an agent, he cannot be heard to assert, as against third persons who have relied thereon in good faith, that he did not intend to confer such power. Safeway Stores v. King Lumber Co., 45 Cal.App.2d 17, 22, 113 P.2d 483. The evidence further shows that if Torp merely assumed authority to act, neither plaintiff nor his wife at any time repudiated Torp's authority, and after the latter had advised plaintiff on April 6, 1937, that he had the satisfaction of mortgage formerly executed which could be used in connection with the sale, and after he had been told by Torp that the latter was in possession of the $7,500, no objection was made; and it was not until August, 1937, that plaintiff notified Torp that he was not to be his attorney in any further matters. While it was not necessary in this case to establish ratification by the principal, since there is ample evidence of actual agency, ratification could well have been implied. Quiescence is tantamount to acquiescence. Ford v. Lou Kum Shu, 26 Cal.App. 203, 210, 146 P. 199; Bissell v. King, 91 Cal.App. 420, 428, 267 P. 356.

[6] Section 2299 of the Civil Code provides that an agency is actual when the agent is really employed by the principal. It is not denied by plaintiff that Torp was actually employed by him, but he contends that he was not authorized to receive moneys for him. However, section 2315 of the Civil Code provides that "An agent has such authority, as the principal, actually or ostensibly, confers upon him," and section 2316 provides that actual authority is such as a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess; and if plaintiff did not intentionally confer authority on Torp to receive said moneys and deliver the papers in his possession to the Austins, he allowed Torp to believe himself possessed of such authority. The suggestion that Mrs. Costa should sell originated with plaintiff, through Torp he advised the parties he would accept, and he furnished Torp with the satisfaction of mortgage and other papers sufficient to close the deal. He admitted that he never advised Torp not to accept payment; and he never advised Mrs. Costa not to make payment to Torp.

[7] An agent's authority may be proved by circumstantial evidence (MacDonnell v. California Lands, Inc., 15 Cal.2d 344, 347, 101 P.2d 479; Sweet v. Watson's Nursery, 33 Cal.App.2d 699, 704, 92 P.2d 812; Smith v. Schuttpelz, 1 Cal.2d 158, 161, 33 P.2d 836); and it may likewise be implied from circumstances. Robinson v. American Fish, etc., Co., 17 Cal.App. 212, 217-219, 119 P. 388; Anglo-California Bank v. Cerf, 147 Cal. 393, 399, 81 P. 1081.

[8] As to the ostensible agency of Torp, section 2300 of the Civil Code provides that "An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him"; and under section 2317, "Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess." That the Austins and Mrs. Costa believed that Torp was the agent of plaintiff and his wife, with authority to act in the premises, is apparent. Mrs. Austin testified that they went to Torp and paid him the money because he had all plaintiff's papers to close the deal, and "he was representing the Gaines." Mrs. Costa testified that before talking to the Austins about selling, she had talked to Torp to find out if Gaine would sell, that she told him to write to Gaine to see if he wanted to sell; that she told the Austins to do business with Torp because Gaine had written a letter to Torp to do all the business with him—that Torp "was the one that did all the business dealings with Gaine." And Mr. Sorensen at the bank also advised Mr. St. Louis and Mr. Austin to see Torp, as the latter "handled Gaine's business in Arcata"; and Torp testified that when Mr. St. Louis came to see him he told him that he had the necessary papers to complete the deal and that he was acting as plaintiff's attorney in the matter.

[9-11] Under these circumstances we cannot say that Mrs. Austin was not justified in believing that Torp was plaintiff's agent and possessed the authority to deliver the papers in his possession and accept payment of the mortgage for plaintiff. The law forbids a principal to deny an authority of his agent where his own conduct has invited those with whom he was dealing to assume that the agent possessed such authority; and where he has clothed the agent with apparent powers, strangers

in dealing with the agent may assume that such powers are possessed. Robinson v. American Fish, etc., Co., supra. As in Tosi v. Northern Calif. Bldg., etc., Ass'n, 3 Cal.2d 274, 278, 44 P.2d 333, defendants believed that Torp was plaintiff's agent; they paid him nothing for his service; there was no circumstance that should have put them on notice that Torp might not be acting for plaintiff in good faith, and as was said in Carter v. Rowley, 59 Cal.App. 486, 489, 211 P. 267, 268: "As between two innocent persons, one of whom must suffer, the loss should fall on the principal who has armed the agent with apparent authority and thus has enabled him to obtain the advantage of the person with whom he trades, rather than on the purchaser, where the agent acts within the apparent scope of his authority and there is nothing in the transaction to put the purchaser on notice that the agent is exceeding his authority."

The judgment is affirmed.

PEEK and THOMPSON, JJ., concurred.



58 Cal.App.2d 897

GRANDE v. DONOVAN (TURNER, Intervenor).

Civ. 14012.

District Court of Appeal, Second District, Division 2, California.

April 28, 1943.

Appeal and error ⇐773(2)

Where time for filing of brief had elapsed and an order to show cause why appeal should not be dismissed for want of prosecution had been issued, but on return day thereof no good cause was made to appear why appeal should not be dismissed, appeal was dismissed. Rules of Supreme Court and District Courts of Appeal, rule 5, § 3.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Daisy Grande, also known as Daisy M. Grande, a widow, against James Donovan and another wherein John W. Turner intervened. From an adverse judgment defendants appeal. From an order terminating proceedings on appeal and denying defendant's motion to be relieved from default in procuring a transcript on appeal, the defendants appeal.

Appeal dismissed.

James Donovan, of Los Angeles, for appellants.

Russell Scott, of Salinas, and Bettin & Wait, of Los Angeles, for respondents.

PER CURIAM.

January 11, 1943, the transcript on appeal was filed. Thereafter, the time for filing of briefs having elapsed, an order to show cause why the appeal should not be dismissed for want of prosecution was issued, returnable April 28, 1943. On the latter date no good reason appearing why the appeal should not be dismissed, it is hereby ordered that, pursuant to the provisions of section 3, Rule V, Rules of the Supreme Court and District Courts of Appeal, the appeal from the order herein be, and the same hereby is, dismissed.



58 Cal.App.2d 221

HAMILTON v. JUNCTION CITY MINING CO. et al.

Civ. 12181.

District Court of Appeal, First District, Division 2, California.

April 19, 1943.

Rehearing Denied May 19, 1943.

Hearing Denied June 17, 1943.

1. Trusts ⇐44(1)

In action to establish and enforce trust in shares of corporation's stock and accrued dividends thereon, evidence *held* sufficient to establish trust for plaintiffs in portion of compensation agreed to be paid one who was not party to action for effecting sale of another defunct corporation's property to promissor, who formed corporation mentioned in trust instrument. Civ.Code, § 2221.

2. Trusts ⇐21(1)

Where trust did not involve real property, failure of trust agreement to set forth precise terms of trust or specify beneficiaries' names was immaterial. Civ. Code, § 2221.

3. Appeal and error ⇐1073(7)

In action to establish and enforce trust for benefit of parties advancing money for purchase of mining claims as necessary preliminary to sale of defunct mining corporation's property, trial court's determination of beneficiaries' respective interests by adding to amounts so advanced amounts previously advanced by them to corporation did not warrant reversal of judgment for plaintiffs, in absence of resulting prejudice to any appealing defendants found to be also beneficiaries of trust.

4. Trusts ⇐51

Innocent beneficiaries of trust in portion of compensation agreed to be paid real estate broker for procuring sale of defunct mining company's property to promissor should not be deprived of their rights under trust agreement on ground that consideration for agreement between broker and purchaser was illegal because of broker's lack of license, where he transferred such portion of compensation to another in trust and there was no showing that beneficiaries knew of such lack or had reason to believe that broker would not obtain license.

5. Appeal and error ⇐843(2)

In action to establish and enforce trust, where trial court rejected defendants' theory that defendant trustee was also trustor of trust created out of her own property and there was ample evidence sustaining trial court's finding that trustee had discretion respecting distribution of trust property, defendants' contention, proceeding on such theory, that discretion to distribute property in manner designated by trustee was consistent with existing trust, need not be discussed on appeal.

6. Trusts ⇐374

In action to establish and enforce trust, where defendant trustee did not plead or present evidence that she properly incurred any expenses in performance of trust, trial court did not err in refusing to provide for trustee's expenses in judgment for plaintiffs. Civ.Code, § 2273.

7. Costs ⇐230

In action to establish and enforce trust, defendants, on appeal from judgment for plaintiffs, could not complain of any error respecting costs, as plaintiffs, being "prevailing parties", were entitled to their costs. Code Civ.Proc. § 1033.

See Words and Phrases, Permanent Edition, for all other definitions of "Prevailing Party".

8. Appeal and error ⇐709

On appeal from judgment establishing trust, where record does not disclose that any order taxing costs was made or, if so, that trustee appealed therefrom, error, if any, in disallowing any items of trustee's costs, cannot be considered.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Affirmed.

Action by Frances B. Hamilton, as executrix of a will, and others against the Junction City Mining Company, Mary E. Smith, as trustee, and others to establish and enforce a trust. From a judgment for plaintiffs and certain defendants against defendant Smith, she appeals.

L. C. Smith, of Redding, and A. Dal Thomson, of San Francisco, for appellants.

Treadwell & Laughlin, Charles A. Wetmore, Jr., and Russell E. Barnes, all of San Francisco, for respondents.

SPENCE, Justice.

Plaintiffs, claiming to be the beneficiaries of a trust mentioned in a certain instrument dated April 14, 1934, brought this action seeking to establish and enforce said trust. The subject matter of the trust consisted of certain shares of the common stock of defendant Junction City Mining Company, a corporation, formed in 1934 by defendant Sorensen, together with the dividends which had accrued thereon. Said shares had not been issued by said corporation and the dividends thereon had not been paid prior to the commencement of this action. After the filing of answers and cross-complaints by various defendants, an offer of compromise was made and accepted pursuant to the provisions of section 997 of the Code of Civil Procedure and a judgment was thereupon entered on June 7, 1939, directing the defendant Junction City Mining Company to issue the stock and to pay the accrued dividends to de-

fendant Mary E. Smith, as trustee. This judgment terminated the litigation as to defendants Junction City Mining Company and Sorensen but the litigation proceeded between plaintiffs, as alleged beneficiaries, defendant Mary E. Smith, as trustee, and certain defendants who also claimed to be beneficiaries of the trust. On August 18, 1941, judgment was entered upon the findings of the trial court whereby it was decreed that defendant Mary E. Smith held 7 per cent of the shares of the Junction City Mining Company together with the dividends which had accrued thereon in trust to distribute the same among the plaintiffs and certain defendants in proportion to the advances made by them respectively as found by the trial court. Defendant Mary E. Smith, as trustee, and other defendants appeal from the last mentioned judgment.

The background of this litigation is found in the financial failure of a mining corporation know as Madrona Dredging Company and the attempts of various persons interested in said corporation to recoup some of their losses. That corporation was formed about 1926 for the purpose of dredging for gold at a location on the Trinity River. Joseph Penso, who is not a party to this action, sold stock in said corporation to various persons who are parties to this action. After the corporation ceased operations about 1930, an unsuccessful effort was made to rehabilitate it. Defendant Mary E. Smith was not a stockholder but was a creditor of the corporation in a sum in excess of $50,000. She held a deed of trust upon the realty and a chattel mortgage upon the equipment of the corporation to secure the indebtedness. She stated that she would have to foreclose whereupon several stockholders talked with her concerning a possible sale of the property to a prospect who had been previously mentioned by Joseph Penso. She was agreeable to a sale and expressed the hope that enough could be realized so that others might benefit by it. She apparently did not desire to have any dealings with Joseph Penso and therefore certain stockholders got in touch with Joseph Penso and sought his assistance. They advised him that any purchaser would have to deal directly with defendant Smith. No purchaser was found at that time and defendant Smith foreclosed and became the owner of all the corporate property.

Thereafter Penso worked for several years with the financial assistance of plaintiffs, who were residents of Chico, and later with the financial assistance of other persons, who were residents of Stockton, in an endeavor to work out a sale which would benefit those lending their financial assistance as well as defendant Smith. Penso did not believe it feasible to make an advantageous sale of the former Madrona property without additional property so he proceeded to obtain about fifteen other claims owned by various persons. This involved extended negotiations and considerable effort and expenditure. Penso worked for about a year on a sale to one Taylor who took an option given by defendant Smith for a sale at $48,000. This deal was not consummated. He later interested defendant Sorensen and a sale was ultimately made in 1934 for the sum of $48,500, which sum was received by defendant Smith.

During Penso's negotiations with Sorensen, the latter agreed to pay Penso a "commisison" or "compensation" of 13 per cent, which arrangement was known to defendant Smith. The understanding was that of this 13 per cent, 6 per cent was to go "to the people in Stockton that finished the financing, and seven per cent to the Chico people." Mr. Sorensen agreed to pay the 6 per cent in cash. When this 6 per cent was later paid, Penso received $1,600 out of the sum paid and the balance went to the "people in Stockton." This litigation involves only the remaining 7 per cent. The 7 per cent was provided for in the agreement of April 14, 1934, after a conversation between Penso, defendant Smith and the attorney for Sorensen. It was understood by all that the 7 per cent was "to take care of the people in Chico" and Penso so advised plaintiffs.

The agreement of April 14, 1934, was the option agreement executed by defendant Smith and Sorensen. The only portion of said agreement which is pertinent here read as follows: "That in event he (Sorensen) forms a California corporation and assigns to said corporation this agreement or all of the properties and rights purchased under this agreement, that immediately after the transfer to said corporation of this agreement or of all of said properties and rights, that there will be issued to Smith as Trustee seven (7) per cent of all of the issued common stock of said corporation to be formed by Sorensen,

which stock will when issued be fully paid and non-assessable, and if the Division of Corporations of the State of California shall not require that said stock be escrowed, then the certificates representing said shares shall immediately upon their issuance, be delivered to Smith as Trustee, and if said transfer to said corporation is not made, then Smith, as Trustee, shall have a seven (7) per cent interest in the operation conducted with the properties and rights purchased."

It should be noted here that the written agreement of April 14, 1934, did not set forth the precise terms of the trust or specify the names of the beneficiaries thereof. Sorensen thereafter formed the Junction City Mining Company. He transferred his option contract to said company and thereafter the sale by defendant Smith of the former Madrona property to said company was consummated in the latter part of 1934. A permit was obtained for the issuance of 7 per cent of the stock of the corporation to defendant Smith, as trustee, but, as above stated, the stock was not actually issued until after this action was commenced by plaintiffs.

In 1938, there was considerable correspondence between the corporation commissioner and defendant Smith regarding the permit for the issuance of this stock to defendant Smith as trustee. The commissioner advised defendant Smith that the file did not disclose for whom she was acting as trustee and that the commissioner's information was that the stock remained unissued because of the claim that the consideration for the agreement had not been received by the company. Defendant Smith replied that "There was a large indebtedness against the former company at the time of my foreclosure and a group of people advanced money for the sale of the property and the proceeds of this 7 per cent will reimburse them for advances and help pay the indebtedness." Later in the correspondence, defendant Smith wrote, "I am not prepared to make a list of names and amounts under the trusteeship * * *," and still later she wrote, "This whole arrangement was entirely voluntary on my part and I reserved the right to approve the bills. The trust covers any bills against the former dredging company which have my approval." It will be noted that defendant Smith's first reply stressed the beneficial interest of a group of people who "advanced money for the sale of the property" while her later reply made no mention of that group, but stressed a claimed reserved right on her part to make the creditors of the former company whose claims she might approve the beneficiaries of the trust.

The main issue presented to the trial court, as set forth in plaintiffs' brief and conceded by defendants to be there set forth with "admirable clarity" was "whether this trust arose from property rights of Joseph Penso in favor of those who advanced money to him, or whether it came from property of Smith and was held by her for the benefit of such creditors of Madrona Dredging Company as she saw fit to favor." The trial court decided this issue in favor of plaintiffs and entered its judgment accordingly.

[1] On this appeal, defendants contend that the evidence is insufficient to establish a trust in favor of plaintiffs. Defendants apparently now concede that a trust was created as they state in their briefs, "That she (defendant Smith) is a trustee is not disputed by us" but they claim that certain of the appealing defendants rather than plaintiffs were the beneficiaries of the trust. In other words, the gist of defendants' contention is that the evidence was insufficient to establish that plaintiffs were beneficiaries of the trust which was admittedly created. We find no merit in this contention. It is entirely clear that the subject matter of the trust represented a portion of the compensation which Sorensen had agreed to pay to Penso in connection with the sale transaction. It is also clear that the persons intended and indicated at all times by Penso as beneficiaries of that portion of his compensation were the group in Chico who had advanced money to him to assist in making the sale. This group included plaintiffs and certain defendants, all of whom were decreed by the trial court to be the beneficiaries.

The somewhat unusual method adopted in creating the trust, having as its subject matter a portion of the compensation of Penso, is explained by the evidence. Defendant Downing, one of those decreed to be a beneficiary, was one of a group who urged defendant Smith, when she was threatening foreclosure to permit the group to get Penso to attempt to make a sale of the property. She consented and the group sought Penso's help and offered him and thereafter gave him financial assistance for that purpose. It was defendant Down-

ing who later "first asked Miss Smith to act as trustee and protect the Chico people." This was apparently agreeable to Penso, who arranged with Sorensen and defendant Smith to embody the above quoted provision in the agreement of April 14, 1934. Thus the trust was created, not out of the property of defendant Smith but out of the compensation due from Sorensen to Penso, for the purpose of carrying out Penso's commitments to the people in Chico who had advanced money to him in connection with his efforts to consummate the sale of the property of defendant Smith. Penso, rather than defendant Smith, was the trustor, and the consent of defendant Smith became necessary only for the purpose of evidencing her willingness to have a portion of Penso's compensation from Sorensen arranged for in her agreement with Sorensen and for the purpose of evidencing her willingness to act as trustee as suggested by one of the beneficiaries of the trust, which suggestion was agreeable to Penso.

The evidence shows that while Penso was present during the negotiations for the agreement of April 14, 1934, all persons present, including defendant Smith, agreed that the 7 per cent provision of the agreement was "to take care of the people in Chico" and it is a reasonable inference from the evidence that defendant Smith and Sorensen as well as Penso then understood and agreed that the persons who were to be the beneficiaries of the trust thus created were the persons in Chico who had advanced money to Penso in connection with the sale transaction. The purpose of the trust was obviously to have the trustee receive the subject matter of the trust, to-wit: a specified portion of the compensation due from Sorensen to Penso to be represented either by 7 per cent of the stock of a corporation which might be formed or "a seven per cent interest in the operation conducted with the properties and rights purchased," and to have the trustee distribute the same to the beneficiaries at such time as the distribution thereof might become feasible. At the time the trust was created, it was not certain that a corporation would be formed or, in the event a corporation should be formed, that a permit to issue the stock would be granted by the corporation commissioner without requiring that the stock be escrowed. Hence, the creation of the trust as indicated was a convenient means of providing for the handling of the interests of the several beneficiaries, each of whom was entitled to only a proportionate interest.

[2] Section 2221 of the Civil Code provides that "* * * a voluntary trust is created, as to the trustor and beneficiary, by any words or acts of the trustor, indicating with reasonable certainty: 1. An intention on the part of the trustor to create a trust, and, 2. The subject, purpose and beneficiary of the trust." As the trust did not involve real property, it is not contended that any writing was required for the purpose of creating the trust and therefore the fact that the agreement of April 14, 1934, between defendant Smith and Sorensen, did not set forth the precise terms of the trust or specify the names of the beneficiaries is immaterial. We are satisfied that the evidence showing the words and acts of Penso, as trustor, as well as the words and acts of defendant Smith and Sorensen at or about the time of entering into the agreement of April 14, 1934, indicated "with reasonable certainty" the intention on the part of Penso, acquiesced in by defendant Smith and Sorensen, to create a trust and the subject, purpose and beneficiaries of the trust as required by said section 2221 and we are further satisfied that such evidence was sufficient to establish a trust in favor of plaintiffs.

[3] In this connection, defendants also contend that "the findings as to the respective interests of the plaintiffs and some of the defendants are not sustained by the proof." Our review of the record leads us to the conclusion that while no books were kept by Penso showing the amounts which the various plaintiffs and defendants advanced to him, there was sufficient evidence to show the respective amounts so advanced as found by the trial court. But defendants take exception to the method adopted by the trial court in determining the respective interests of the parties as beneficiaries of the trust. The method adopted by the trial court was to add to the amount advanced to Penso by each beneficiary the amount previously advanced by such beneficiary to the Madrona corporation. The total amount so advanced to Penso and to said corporation by all beneficiaries exceeded $64,000 and each beneficiary was decreed to be entitled to share in the distribution of the subject matter of the trust in the proportion that the total advances of such beneficiary bore to total advances of all beneficiaries. It is true that Penso never advised those ad-

vancing money to him of the exact manner in which he intended to protect their interests or of the exact manner in which their respective interests would be determined in any money or property which might be received as a result of his efforts. It is also true that the evidence showed that it was Penso's intention to have each beneficiary share in the subject matter of the trust in the proportion that such beneficiary's advances to Penso bore to the total of all beneficiaries' advances to Penso without regard to the advances of the various beneficiaries to the Madrona corporation. It does not appear, however, that the error, if any, in the adoption of the above mentioned method by the trial court resulted in any prejudice to any appealing defendants who were found to be beneficiaries of the trust. The only alleged prejudice suggested by defendants is prejudice to defendant Shalz who made no advances to Penso. But under the findings of the trial court which are sustained by sufficient evidence, the only persons who were entitled to share as beneficiaries of the trust were the persons who had made advances to Penso. Hence, any alleged prejudice to defendant Shalz, who was not entitled to any share in the subject matter of the trust, cannot be considered.

[4] Defendants further contend that "the claim of plaintiffs rests upon an illegal consideration and is therefore to be rejected." This contention is based upon the fact that Penso was not a licensed real estate broker. We may assume, without deciding, that the fact that Penso was not a licensed real estate broker, might have affected the right of Penso to recover any compensation from Sorensen under his original agreement with Sorensen. The fact remains, however, that the portion of Penso's compensation which is involved here has been admittedly transferred in trust to defendant Smith, as trustee, and the judgment from which this appeal was taken was one establishing the rights of plaintiffs and certain defendants as beneficiaries of the trust and was not one establishing any right of Penso. If Penso acted as a real estate broker, as claimed by defendants, rather than as an independent operator, as claimed by plaintiffs, there is no showing that plaintiffs knew that Penso had no broker's license or that plaintiffs had any reason to believe that he would not obtain any license that might be required. Penso has long since parted with all claim to the subject matter of the trust and plaintiffs were in no sense in pari delicto with him if he violated the law in contracting for compensation from Sorensen without first obtaining a license. Penso's compensation having been paid and the trust having been admittedly created, we are of the opinion that no innocent beneficiary should be deprived of his rights merely because of the claimed illegality of the consideration in Penso's original agreement with Sorensen.

[5] Defendants further contend that "the discretion to distribute the property in a manner to be designated by the trustee is entirely consistent with the existence of a trust." This contention does not require discussion as it proceeds upon the theory that defendant Smith was the trustor, as well as the trustee, of a trust created out of her own property. This theory was rejected by the trial court and the theory of plaintiffs, above discussed, was accepted. There was ample evidence to sustain the trial court's findings showing that defendant Smith, as trustee, was not given any discretion with respect to the distribution of the trust property.

[6-8] Finally defendants contend that "the trial court erred in refusing to make any allowance to the defendant trustee for expenses." But the defendant trustee did not set forth or pray for any expenses in her pleadings and she did not present any evidence on the trial concerning any such expenses. The findings and judgment were filed on August 18, 1941. On the same day, defendant Smith filed an unverified document in the action entitled "Second Account of Mary E. Smith, Trustee," in which she claimed credit for disbursements amounting to $11.77. On September 2, 1941, defendants filed a document entitled "Defendants' Memorandum of Costs and Disbursements." The costs of all defendants, as therein set forth and amounting to $363.78, included, besides ordinary costs of litigation, certain items of taxes and traveling expenses. The judgment provided "That the said trustee pay from said trust property the costs of plaintiffs in this action taxed at the sum of $——, and the costs of defendant Mary E. Smith, as trustee, in this action taxed at the sum of $——."

We find no error in the refusal of the trial court to provide in the judgment for the trustee's expenses under section 2273 of the Civil Code as there was no pleading

or proof that the defendant trustee had "actually and properly incurred" any expenses in the performance of the trust. Nor does the record disclose any error of which defendants may complain with respect to costs in the action. Plaintiffs were the prevailing parties and were entitled to their costs. Code of Civil Procedure, section 1033. The trial court did provide, however, in the judgment for the payment of the costs of defendant Mary E. Smith, as trustee, but not for the payment of the costs of the other defendants. The memorandum of costs filed on September 2, 1941, purported to be filed on behalf of all defendants without showing any segregation of the costs of the trustee. But if the costs were taxed and any items of costs of the defendant trustee were improperly disallowed under the circumstances, the defendant trustee's remedy would have been by an appeal from the order taxing costs. The record does not disclose however that any such order was made or that any such appeal was taken. Therefore the alleged costs of the defendant trustee, as distinguished from the expenses contemplated by section 2273 of the Civil Code, cannot be considered on this appeal.

The judgment is affirmed.

NOURSE, P. J., concurred.



58 Cal.App.2d 445

BIXBY v. HOTCHKIS et al. (two cases).

Civ. 13963, 13964.

District Court of Appeal, Second District, Division 2, California.

April 30, 1943.

Hearing Denied June 28, 1943.

1. Trusts ⇐9

Instrument by which settlor vested the entire title to trust estate in trustee for a period of 20 years providing that, at expiration of period, trust estate and accumulations should be distributed to settlor if living and otherwise to his heirs at law and that trust should be deemed irrevocable during 20-year period, created a valid irrevocable "trust" in absence of any provision contrary to public policy. Civ.Code, § 2280.

See Words and Phrases, Permanent Edition, for all other definitions of "Trust".

2. Trusts ⇐9

The creation of a voluntary trust for the benefit of trustor or his heirs at law is not prohibited by law.

3. Trusts ⇐136

The creation of a voluntary trust for benefit of trustor or his heirs at law is not rendered invalid by a provision conferring upon trustee discretionary powers in management and control of trust estate.

4. Trusts ⇐59(1)

A voluntary trust may be revoked by trustor, unless expressly made irrevocable by instrument creating it. Civ.Code, § 2280.

5. Trusts ⇐59(1)

Where instrument creating voluntary irrevocable trust provided for distribution of trust estate and accumulations at expiration of 20 years to trustor or in event of his prior death to his heirs at law, trustor was not the sole beneficiary so as to be entitled to revoke trust. Civ.Code, § 2280.

6. Trusts ⇐59(4)

Where instrument creating trust named a successor trustee in event of resignation of first named trustee, such resignation did not indirectly effect a revocation of trust, since it was resigning trustee's duty to protect trust estate pending settlement of her account and discharge as trustee and delivery of corpus of trust to her successor. Civ.Code, § 2260.

7. Trusts ⇐162

It was the duty of resigning trustee to defend trust against attack by trustor until such time as the validity of trust should be established, trustee's accounts settled, and arrangement made for transferring trust property to another trustee. Civ Code, § 2260.

8. Trusts ⇐225, 227

Trustee was entitled to reimbursement out of trust estate for necessary expenses incurred, including reasonable attorney fees, in protecting and conserving trust property against trustor's attacks on the validity of trust and was entitled to a

"lien" upon the trust property for such reimbursement. Civ.Code, §§ 2260, 2273.

See Words and Phrases, Permanent Edition, for all other definitions of "Lien".

9. Trusts ⇐225

Part of the expense of making a daily transcript of trial of proceedings involving validity of a voluntary trust and settlement of trustee's account was chargeable against trust estate.

10. Trusts ⇐225

An allowance of $25 per day for services of an expert accountant in connection with settlement of trustee's account was not excessive and was properly chargeable against trust estate.

11. Trusts ⇐225

An allowance of $30 for traveling expenses of a resident of San Francisco, who came to Los Angeles to testify for trustee in proceeding involving validity of trust and settlement of trustee's account, was reasonable and properly charged against trust estate.

12. Trusts ⇐225

Trustee was properly credited with payments of premiums on policy insuring life of trustor's father which had been assigned to and for the benefit of trustor and his sisters, where trustor had agreed to such payments and father's financial condition was such that payments were properly made in interest of the trust property.

13. Evidence ⇐253(1)

Where trustor charged that indenture creating voluntary trust had been prepared under direction of a certain defendant and its execution brought about as result of a conspiracy between various defendants, the circumstances supporting preparation and execution of trust indenture became material, and evidence of conversations between various defendants in trustor's absence was admissible.

14. Jury ⇐13(18)
Trial ⇐4

In trustor's action for possession of corpus of trust estate, trustee's cross-complaint seeking to establish validity and irrevocability of trust, alleging the existence of a dispute as to trustee's account, claiming indemnification for expenses, and presenting her resignation as trustee and asking for appointment of a successor trustee, presented issues of purely equitable cognizance that must be determined before trustor's right to possession of corpus could be tried, and the determination in equity of such issues adversely to trustor did not improperly deprive trustor of right to "trial by jury".

See Words and Phrases, Permanent Edition, for all other definitions of "Trial by Jury".

15. Jury ⇐12(1)

The right to a "trial by jury" should be determined by the nature of issues to be tried as framed by pleadings as a whole when action is ready for trial, and not from a consideration of allegations of complaint alone.

16. Trusts ⇐227

An allowance of $22,000 for services of trustee's attorney in trial lasting from May 26 to August 8 involving validity of a trust covering property valued at three-quarters of a million dollars and the settlement of trustee's account was not excessive.

17. Trusts ⇐315(2)

Allowance of $3,100 for services of trustee of property valued at three-quarters of a million dollars was not excessive.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Separate actions by Fred H. Bixby, Jr., against Katharine Bixby Hotchkis and others to recover possession of certain corporate stock, damages for its detention, and dividends thereon allegedly received by named defendant for plaintiff's benefit. In each action the named defendant filed a cross-complaint naming plaintiff and others as cross-defendants, and asking that a trust created by plaintiff be declared a valid and subsisting irrevocable trust, that cross-complainant's accounts as trustee be settled and approved, and that trust estate be turned over to a successor. The actions were consolidated for trial. From judgments in favor of cross-complainant, plaintiff and Jane Bixby, one of the cross-defendants, appeal.

Judgment affirmed.

A. Brigham Rose, of Los Angeles, for plaintiff, cross-defendants, and appellants.

Sherman Anderson and Newlin & Ashburn, all of Los Angeles, for defendants, cross-complainant, and respondents.

W. J. WOOD, Justice.

Plaintiff is prosecuting appeals from two judgments in actions which he commenced on November 22, 1940, and which were consolidated for the purpose of trial. In each action defendant Katharine Bixby Hotchkis filed a cross complaint and the appeals are from judgments rendered in her favor on the cross complaints.

In one of the actions, which plaintiff entitled a claim and delivery action, he alleged that he is the owner and entitled to the possession of 10,703¾ shares of the capital stock of the Fred H. Bixby Company, of the value of $750,000; and that defendant Katharine Bixby Hotchkis took possession of the stock within three years before the commencement of the action without plaintiff's consent and is withholding the stock against his will. Judgment was asked for the possession of the stock and for $25,000 damages for its detention. In the other action plaintiff named as defendants Katharine Bixby Hotchkis, her husband, Preston Hotchkis, Sherman Anderson and Fred H. Bixby Company, a corporation. He attempted to set forth four causes of action in his complaint, but each alleged cause of action appears to be a claim for the sum of $23,465.66, dividends received by Mrs. Hotchkis from the stock mentioned in the complaint in the other action, which defendants are alleged to have received for the use and benefit of plaintiff.

Upon the filing of the cross complaints Fred H. Bixby and Florence Green Bixby, parents of plaintiff, and Jane Bixby, wife of plaintiff, were made cross defendants by order of the court. In her cross complaints Mrs. Hotchkis alleged that prior to June 8, 1934, plaintiff was the owner of 10,453¾ shares of the capital stock of the Bixby Company, represented by certificates Nos. 1 and 55; that on June 8, 1934, plaintiff voluntarily executed a trust instrument, a copy of which is attached to each cross complaint, whereby an irrevocable trust was created for the period of 20 years, Mrs. Hotchkis being named as trustee; that pursuant to the terms of the trust instrument the certificates Nos. 1 and 55 were assigned and transferred to Mrs. Hotchkis as trustee and were surrendered to the corporation, which issued in lieu thereof and delivered to Mrs. Hotchkis certificate No. 9 for 10,453¾ shares of the company stock in the name of Mrs. Hotchkis as trustee for plaintiff; that thereafter plaintiff's father caused to be issued from his own holdings and delivered to Mrs. Hotchkis as trustee 250 shares of the stock of the Bixby Company which were added to the corpus of the trust with the knowledge, approval and consent of plaintiff; that the trust has not been terminated and that she holds the stock by virtue of the trust instrument and in pursuance of its terms. Upon filing the cross complaints Mrs. Hotchkis resigned as trustee. She further alleged that Title Insurance and Trust Company, named in the trust instrument as her successor in case of her resignation, has declined to accept appointment as successor trustee of the trust until settlement by the court of her accounts as trustee; that the new cross defendants brought into the action are the heirs at law of plaintiff. She further alleged that plaintiff claims that the trust instrument is invalid and that an actual controversy exists regarding her legal rights and duties as trustee; that these matters cannot be determined in an action at law and that equity alone has jurisdiction over the controversy, which can be determined only by a declaratory judgment or other decree of a court of equity. She asked that the trust created June 8, 1934, be declared a valid and subsisting irrevocable trust; that her accounts be settled and approved; that the trust estate be turned over to Title Insurance and Trust Company or to a successor to be appointed by the court.

The instrument of June 8, 1934, gave to the trustee plenary powers in the management of the trust. The instrument further provided: "The whole title, legal and equitable, in fee, to the trust estate, is and shall be vested in the trustee, as such title in the trustee is necessary for her due execution of this trust. The beneficiary or beneficiaries take no estate or interest therein and the interests of all beneficiaries hereunder are personal property only, consisting of the right to enforce the due performance of this trust. . . . Upon the expiration of the term of this trust, hereinabove specified, to-wit, a period of twenty (20) years from the date hereof, my trustee shall distribute, or cause to be distributed, my trust estate, together with all accumulations in the manner following: (a) The whole thereof to me personally if I be living at the time. (b) In the event that I should die prior to the expiration of said period the whole thereof to my heirs at law in accordance with the laws of succession of the State of California then in effect. It

is hereby declared to be my express intention to make the within trust irrevocable during the twenty (20) year period specified, and the same shall, therefore be deemed to be an irrevocable trust for all intents and purposes. In case of the death or inability to act of the said Katharine Bixby Hotchkis, as trustee, or her resignation as such trustee I hereby appoint Title Insurance and Trust Company, of Los Angeles, California, to act as her successor as such trustee."

In his answers to the cross complaints defendant alleged that he signed the trust instrument "by reason of the coercive suggestions on the part of his said sister, the cross-complainant, that if he did not sign he would be disinherited by his father; * * *"; and that "its harsh and illegal provisos were prepared by the connivance of the husband of cross-complainant and other relatives, and were made and incorporated with the object and design to defraud cross-defendant * * *".

The issues presented by the cross complaints and the answers thereto were decided by the trial court in favor of the cross complainant, Mrs. Hotchkis. At the time he signed the trust instrument plaintiff was twenty-four years old. He is the only son of Fred H. and Florence Green Bixby. He has three sisters, the eldest of whom is Mrs. Hotchkis. The Fred H. Bixby Company is a family corporation and sometime prior to the execution of the trust instrument in question Mr. Bixby, Sr., had given a large portion of his stock in the family corporation to each of his four children. Before the execution of the trust instrument plaintiff had lost large sums of money at gambling, had indulged in drinking to excess and had issued checks for which he had no funds in the bank. This caused family concern lest he would dispose of holdings in the company to people who were not members of the family. As a result of consultations in which plaintiff and various members of the family took part, plaintiff executed the trust instrument and delivered the stock certificates to his sister as trustee. The court expressly found: "It is true that said trust was voluntarily created by plaintiff and that it was so created because of his own improvidence and instability of character which plaintiff himself recognized and which, as he knew, threatened the dissipation of his assets unless same were placed in trust for him; that said trust is and at all times has been a benefit to plaintiff; that plaintiff now possesses and manifests the same personal characteristics, and that a termination of the said trust at this time would not be for plaintiff's benefit, but would be a detriment to him and his future. * * *" All of the findings are amply sustained by the evidence. Indeed, in view of the overwhelming evidence in support of the allegations of the cross complaint both in quantity and quality and the undisputed conduct of plaintiff, together with his own admissions, it is difficult to perceive how any other findings could have reasonably been made.

[1-5] The trial court did not err in holding that the instrument of June 8, 1934, created a valid irrevocable trust. There is no legal prohibition against the creation of a voluntary trust for the benefit of the trustor or his heirs at law. Nor is the creation of such a trust rendered invalid by a provision conferring upon the trustee discretionary powers in the management and control of the trust estate. Gray v. Union Trust Co., 171 Cal. 637, 154 P. 306. Nothing appears on the face of the instrument which would justify a holding that it created a spendthrift trust and the court expressly found that the trust is not a spendthrift trust. No rights of creditors are involved. The trust instrument contains no provision against public policy such as was under review in McColgan v. Walter Magee, Inc., 172 Cal. 182, 155 P. 995, Ann.Cas.1917D, 1050, relied upon by plaintiff. In 1931 section 2280 of the Civil Code was amended to provide: "Unless expressly made irrevocable by the instrument creating the trust, every voluntary trust shall be revocable by the trustor by writing filed with the trustee. * * *" Prior to 1931 there was no right of revocation unless expressly reserved. Under the amendment revocation may be brought about in the absence of a provision making the trust irrevocable, but in the case now before us the document clearly states that the trust is irrevocable for the period of twenty years. Moreover, contrary to the assertion of plaintiff upon which he bases his claim of right to revoke the trust, plaintiff is not the sole beneficiary, for it is provided in the instrument that in the event of plaintiff's death prior to the expiration of the twenty year period the estate at the end of the period is to pass to plaintiff's heirs at law. One who creates a voluntary trust is not the sole bene-

ficiary if he manifests an intention to create a contingent interest in others, such as his heirs at law. Restatement of the Law of Trusts, Comment b, p. 1039; Gray v. Union Trust Co., supra.

[6-8] The trial court properly ruled that the resignation of Mrs. Hotchkis as trustee did not indirectly effect a revocation of the trust and that it was her duty to protect the trust estate pending the settlement of her account and the delivery of the corpus of the estate to her successor. After Mrs. Hotchkis entered upon the management of the trust, it was her duty to continue to manage the property until her discharge as trustee. Cauhape v. Barnes, 135 Cal. 107, 112, 67 P. 55. The trust instrument expressly provided that in the event of her resignation Title Insurance and Trust Company should act as her successor. Clearly there was a manifest intention of making the trust irrevocable regardless of the refusal of Mrs. Hotchkis to continue as trustee. It was but natural that when plaintiff attacked the account of Mrs. Hotchkis as trustee, the corporation named as her successor should refuse to accept the trust until the settlement of the trustee's account. Moreover, plaintiff was attacking the validity of the trust itself and it was the clear duty of the trustee to defend the trust until such time as the validity of the trust should be established, her accounts settled and arrangements made for transferring the trust property to another trustee. Gray v. Union Trust Co. supra; In re Estate of Hubbell, 121 Cal. App. 38, 40, 8 P.2d 530. Since it was her duty to protect the trust, it is obvious that she continued to be vested with the necessary powers for the protection of the trust during the period between her resignation and the transfer of the trust property to her successor. In section 2260 of the Civil Code it is provided that a resigning trustee must use at least ordinary care to secure the appointment of a trustworthy successor before accepting his own final discharge. For protecting and conserving the trust property and defending it against attack Mrs. Hotchkis is entitled to reimbursement for necessary expenses incurred, including reasonable attorney fees. In re Estate of Scrimger, 188 Cal. 158, 168, 206 P. 65; McMurray v. Sivertsen, 28 Cal.App. 2d 541, 83 P.2d 48. Her right to indemnification out of the trust property for expenses actually incurred in defending the trust is expressly provided by section 2273 of the Civil Code. To the extent that she is entitled to indemnity she has a lien upon the trust property, a lien which the trial court properly accorded her in its judgment. Restatement of the Law of Trusts, sec. 244c.

[9-12] We find no error in the rulings of the court settling the account of the trustee. Objections are made by plaintiff to an allowance for part of the expense of a daily transcript of the trial of the proceedings, to the payment of $200 to Mr. Windes and to the payment of $30 to Mr. Chandler. The court did not abuse its discretion in deciding that a daily transcript was proper. Mr. Windes, an expert accountant, was in attendance for eight days and an allowance of $25 per day for such services is not excessive. Mr. Chandler is a resident of San Francisco who came to Los Angeles to be a witness at the trial. The allowance of $30 was for his traveling expenses and it cannot be considered as unreasonable. The court was not limited to the statutory fees allowed witnesses in passing upon reasonable expenditures of the trustee in bringing a witness from a distant city. Plaintiff also complains that the court erred in crediting the trustee with certain payments of insurance premiums on the policy on the life of plaintiff's father, which had been assigned to and for the benefit of plaintiff and his sisters. The evidence showed that plaintiff agreed to these payments. Moreover, it was shown in evidence that the father's financial condition was such that the payments were properly made in the interest of the trust property.

[13] Plaintiff contends that the trial court erred in permitting conversations between various defendants when plaintiff was not present. Plaintiff had charged in his answers to the cross-complaints that the trust indenture had been prepared under the direction of defendant Preston Hotchkis and that its execution had been brought about as the result of a conspiracy between various defendants. The circumstances supporting the preparation and execution of the trust indenture thus became material and important. Mrs. Hotchkis and the other defendants had the right to disprove the charges of conspiracy by the evidence admitted by the court.

It is contended by plaintiff that the trial court erred in holding that the causes of action set forth in his complaints were barred by sections 338, subd. 3 and 4, 339

subd. 1, and 343 of the Code of Civil Procedure. We find no occasion for discussing this point. Our ruling that the trust indenture in question created a valid irrevocable trust and our conclusions reached on the points presented by the litigation as above set forth make it unnecessary to decide whether plaintiff's causes of action were barred by the statute of limitations. Regardless of any view that might be taken on this point the judgments against him must be affirmed.

[14, 15] There is no merit in plaintiff's contention that he was improperly deprived of the right of a jury trial on at least one of his causes of action. The right to a trial by jury should be determined by the nature of the issues to be tried as framed by the pleadings as a whole when the action is ready for trial. It is not to be determined by the allegations of the complaint alone. O'Dea v. Hibernia Savings & Loan Soc., 119 Cal.App. 622, 7 P.2d 318; Woolsey v. Woolsey, 121 Cal.App. 576, 9 P.2d 605. The cross complainant presented issues for adjudication in an action in equity. She sought to have established the validity and irrevocability of the trust and to quiet the trustee's title to the stock. She averred the existence of an actual controversy calling for a declaratory judgment, the estoppel of plaintiff to deny the trust, an existing dispute as to the trustee's account and a claim for indemnification for expenses. She presented her resignation to the court for confirmation or acceptance and asked for the appointment of a successor trustee. These actions were clearly equitable in their nature. The determination of these issues was necessary before it could be determined whether plaintiff had the right to recover possession of the stock. Plaintiff did not have the right to oust the court of its equity jurisdiction in an action of purely equitable cognizance by presenting to the court an additional issue claimed to be triable before a jury, which could not be settled until after the equity issues were determined. The course followed by the trial court in the present litigation is in line with the recognized practice in such cases in the courts of California. Fish v. Benson, 71 Cal. 428, 12 P. 454; Swasey v. Adair, 88 Cal. 179, 25 P. 1119; Thomson v. Thomson, 7 Cal.2d 671, 62 P.2d 358, 117 A.L.R. 1.

[16, 17] Plaintiff complains that the allowances made by the court for trustee and counsel fees are excessive. The trial court awarded the sum of $3,100 to Mrs. Hotchkis for her services as trustee from the date of the establishment of the trust in 1934 to the time of the trial of the actions and awarded to her as counsel fees for the services of her attorney in the present litigation the sum of $22,000. The trial of the actions involving property valued by plaintiff at three-quarters of a million dollars lasted from May 26 to August 8. Mrs. Hotchkis and her counsel were compelled to make a defense to vicious charges against her, which were shown to be unfounded. During the trial plaintiff's counsel pursued a reprehensible course of conduct in which he frequently heaped vituperative abuse upon the trustee and upon her counsel, a course of conduct which has been followed to some extent in this court. The trial court acted well within its discretion in fixing the amount of counsel fees. The award to the trustee is more vulnerable to criticism that it is inadequate than it is to the charge that it is excessive.

Other points made by plaintiff are not of sufficient importance to justify discussion herein. We are satisfied that plaintiff was given a fair trial and that the court properly determined the issues presented.

The judgments are affirmed.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.



58 Cal.App.2d 84

CHURCHILL v. KELLSTROM et al.

Civ. 6819.

District Court of Appeal, Third District, California.

April 9, 1943.

1. Adverse possession ⇐90
Taxation ⇐200

If tract originally constituting portion of ranch, and adjoining defendants' railroad station, were properly a part of measure of defendants' gross receipts tax, it was exempt from further taxation, and payment of county or other taxes by ranch

owner who claimed tract by adverse possession was immaterial.

2. Contracts ⇐318

Forfeitures are abhorred but waivers are favored.

3. Eminent domain ⇐300

Evidence that lot adjoining defendants' railroad station was used by freight customers as place to turn vehicles and as means of access to depot and loading platforms was sufficient to sustain finding that defendants devoted the property to a "public use" necessary and incidental to shipping service, so that title vested in the defendants and original owner of land became entitled to compensation for its loss.

4. Eminent domain ⇐63

Where property has been devoted, by railroad, to use incidental and necessary to the public good, it becomes vested in the utility.

5. Eminent domain ⇐63

An owner of land cannot be deprived thereof under rule that, where property has been devoted to use incidental and necessary to public good by utility, it becomes vested in the utility, unless a substantial public use is involved.

6. Eminent domain ⇐63, 280

The fact that the owner of land permits utility to use the land for purpose necessary and incidental to public good does not give utility title or right of way or "estop" owner from maintaining action for damages.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

7. Eminent domain ⇐69

Private property may not be taken even for benefit of public without just compensation.

8. Appeal and error ⇐931(1)

Knowledge of facts secured by judge or jury in viewing premises may be presumed on appeal in support of findings or judgment.

9. Adverse possession ⇐114(1)

In action to quiet title to land originally constituting portion of ranch and adjoining defendants' railroad station, evidence was insufficient to sustain judgment for ranch owner on ground that the defendants had not been in possession of the tract adversely to ranch owner for period of five years or for period of more than one year continuously before commencement of action and had not paid all taxes assessed on the land at any time prior to the commencement of action.

10. Eminent domain ⇐69

If public interest prohibited ranch owner from asserting her title to lot which adjoined defendants' railroad station, because of public service to which the lot had been put under color of title by the defendants, the ranch owner was entitled to just compensation for appropriation of her property on theory of "reverse condemnation", unless her right thereto was barred by limitation or unless she waived her right or could be deemed guilty of laches in asserting it.

See Words and Phrases, Permanent Edition, for all other definitions of "Reverse Condemnation".

11. Eminent domain ⇐308

In action to quiet title to lot which originally constituted part of plaintiff's ranch property and which adjoined defendants' railroad station, if court should determine that the lot had been taken for public use, damages could be awarded plaintiff under general prayer for relief.

Appeal from Superior Court, Napa County; Hilliard Comstock, Judge Assigned.

Action by Mary Alice Churchill against Mrs. Oscar F. Kellstrom and others to quiet title to land. From an adverse judgment, defendants Southern Pacific Railroad Company and another appeal.

Reversed and new trial ordered in accordance with opinion.

Paul DeFord, of San Francisco, for appellants.

King & King and Percy King, Jr., all of Napa, for respondent.

PEEK, Justice.

The defendants Southern Pacific Railroad Company and Southern Pacific Company, hereinafter referred to as the Southern Pacific, appeal from certain portions of the judgment quieting plaintiff's title to a small parcel of land 53 feet wide by 285 feet long adjoining the Southern Pacific Oakville station premises. The de-

fendants, other than the appellants herein, did not contest the action. The only issue is the title to said parcel. Appellant specifically attacks that portion of the judgment wherein plaintiff's title is quieted subject to the appellants' public use thereof; that appellants have not been in adverse possession for any period of more than one year; that appellant is liable to plaintiff for damages for trespassing thereon, and that defendants should compensate plaintiff for such use, and in the words of the trial court "may, upon issues being made and tried, be compelled so to do."

[1] Both the plaintiff and defendants claim title under a common grantor, the To-Kalon Vineyard Company. The Vineyard Company by deed dated December 19, 1906 and recorded in the office of the County Recorder of Napa County on December 20, 1906, conveyed to the San Francisco, Vallejo & Napa Valley Railroad Company, "a right of way for the purpose of a railroad to be operated by electricity or other motive power except steam, over, along and upon and across" a portion of the Caymus Rancho, including the lot in controversy. This deed further contained a condition subsequent requiring the grantee to construct its line within two years after the date of the deed, and to continuously operate said road with electricity or other motive power, except steam, and also provided that in case of failure to observe and perform all or any of the conditions or upon abandonment of said road or the operation of the same, the said right of way would "revert" to the grantor. Thereafter by a deed dated October 10, 1917 and recorded in the office of the County Recorder in Napa County on February 6, 1918, the San Francisco, Napa & Calistoga Railway, successors in interest to the San Francisco, Vallejo & Napa Railroad Company, the grantee in the deed heretofore referred to, purported to convey the fee title to the lot in controversy to the defendant Southern Pacific Railroad Company, lessor of the defendant Southern Pacific Company. By a deed dated November 27, 1918, and recorded December 20, 1918, in the office of the County Recorder of Napa County, the Vineyard Company conveyed said ranch to the plaintiff, the description in said deed included the lot in controversy. Plaintiff's complaint is in the usual form of a suit to quiet title, alleging that the plaintiff is the owner in fee of the ranch; that she has been in adverse possession for twenty years, claiming to own in fee, and has paid all taxes on the ranch during the five years continuously next preceding the filing of the complaint. The Southern Pacific alleges that it was and for a period of more than five years continuously before the commencement of the action had been in adverse possession and ownership of said lot, claiming under color of title, using it for a public use and purpose connected with and necessary to the maintenance of a railroad for the transportation of freight and passengers, and had paid all of the taxes thereon during such period.

The record discloses that the lot in controversy is an uncultivated partly fenced strip adjoining defendants' station, and has been used by appellants' freight customers as a place to turn their trucks and other vehicles and as a means of access to the depot and loading platforms. The further testimony of the Southern Pacific was that the lot had been oiled and graded, presumably to assist in the movements of the trucks, and that a small structure had been built a short distance from the station. There is also evidence that the lot was included as part of defendants' operative property for the purpose of taxation although the plaintiff testified that she had paid all of the taxes levied against the ranch property. We do not feel it necessary to determine the correctness of any assessments or payments of taxes made herein, for there is ample evidence of payment by both parties. However, if the property were properly a part of the measure of defendants' gross receipts tax it was exempt from further taxation (Central Mfg. Dist., Inc., v. State Board of Equalization, 214 Cal. 288, 294, 5 P. 2d 424; Morgan Adams, Inc., v. Los Angeles County, 209 Cal. 696, 289 P. 811) and plaintiff's payment of county or other taxes would be immaterial (Owsley v. Matson, 156 Cal. 401, 104 P. 983; Cummings v. Laughlin, 173 Cal. 561, 562, 160 P. 833; Pereira Farms Corp. v. Simas, 69 Cal.App. 159, 230 P. 976, 132 A.L.R. 238 note).

[2] Unfortunately the record is devoid of any substantial evidence from which it can be ascertained whether or not the condition subsequent contained in the deed of December 19, 1906 occurred. That is, if or when there was a failure to operate trains over said right of way by means other than steam. We have been able

to find only a casual mention of the date of abandonment in the record, once by the daughter of plaintiff who, in reply to a question if she had ever heard of the claim of the Southern Pacific to the lot, said in part, "with the clause thereto attached that if it were abandoned it would revert to Mrs. Churchill." A second mention is found in the statement of plaintiff's counsel in reply to a statement by defendant's counsel after he rested his case. "It has been only about a year ago." By virtue of the statements of the court both during and immediately after the conclusion of the trial and in fact, the actual findings of the court, there is a strong implication that the question of forfeiture under the covenant contained in the 1906 deed was prominent in the eyes of the court. Both in law and in equity forfeitures are abhorred but by the same token waivers are favored. It would seem, therefore, that for a proper determination of such fundamental questions evidence more substantial than the statement of counsel and the observation by plaintiff's daughter that the deed contained a reversionary clause would be necessary. Particularly is this true when more than twenty years have elapsed since the date of the defendants' deed and the filing of the plaintiff's complaint.

Also it is difficult to understand by what evidence or by what means the court reached the conclusion it did that plaintiff and her predecessors had been in "actual, exclusive and adverse possession of said lot for more than 20 years and had paid all taxes of every kind." It may have resolved the very casual conflict in the evidence as to the extent of defendants' use of the premises in favor of the plaintiff or may have concluded that any use by the defendants for a period in excess of one year was merely permissive, but if it were the latter it is difficult to reconcile such a conclusion with the direct testimony of the plaintiff, who stated she knew nothing of the use by the Southern Pacific of the lot in controversy.

[3-6] There is ample evidence to support the finding that the Southern Pacific has devoted the property to a public use, and that such use is necessary and incidental to its shipping service and facilitated the loading and unloading of freight. Therefore, it properly was held to be within the well established rule that where property has been devoted to use incidental and necessary to the public good it becomes vested in the utility. In this instance the use of space adjacent to the station for the turning and backing of large trucks loaded with grapes would be no different from the use of space similarly located for the loading of cattle. Hill v. Barner, 8 Cal.App. 58, 96 P. 111. However, an owner cannot be precluded unless a substantial public use is involved. Stone v. Cordua Irr. Dist., 72 Cal.App. 331, 237 P. 554. But the fact that the owner permitted such use does not give the utility a title or a right of way or estop her from maintaining an action for damages.

[7] As this court recently said in the case of Peckwith v. Lavezzola, 50 Cal. App.2d 211, 122 P.2d 678, 682: When property "is appropriated and used for the benefit of the public for a considerable period of time, with full knowledge on the part of the owner, he may be estopped from interfering with such vested public use by means of injunction, ejectment or a suit to quiet title. Under such circumstances, his remedy will be confined to a mere right to recoup adequate damages to compensate him for the loss of his property on account of such appropriation. This remedy is based on the theory that although the intervening public rights prevent interference with the use and control of the property on the part of the owner, he is, nevertheless, entitled to compensation on the principle applicable to a proceeding in reverse condemnation. Private property may not be taken, even for the benefit of the public, without just compensation. That principle has been frequently announced by the decisions of our courts. Gurnsey v. Northern Cal. Power Co., 160 Cal. 699, 117 P. 906, 36 L.R.A.,N.S., 185; Collier v. Merced Irr. Dist., 213 Cal. 554, 563, 2 P.2d 790; Peabody v. City of Vallejo, 2 Cal.2d 351, 377, 40 P.2d 486; Hillside Water Co. v. City of Los Angeles, 10 Cal.2d 677, 688, 76 P.2d 681."

[8] At the conclusion of the trial, counsel for both parties agreed that the trial judge might view the premises. Knowledge of facts secured by a judge or jury in viewing premises may be presumed on appeal in support of findings or a judgment. However, because of the facts surrounding the present controversy it is difficult to comprehend how it would come within the general rule.

Other than as regards the question of public use to which the property had been put by the Southern Pacific, an inspection of the premises would assist the examiner little, if any. Such other impressions which the court might have gained are not a part of the record before us and we should not speculate in regard to the effect thereof.

[9] Because of a further lack of evidence to substantiate the court's finding that the Southern Pacific had not been in possession of the lot in controversy adversely to the plaintiff "for a period of five years, or for a period more than one year continuously before the commencement of this action, and it is not true that said defendants have paid all of the taxes which have been levied and/or assessed upon said parcel of land at any time prior to the commencement of this action," we are unable to agree with the judgment of the court.

[10] If the public interest prohibits the plaintiff from asserting her title to the lot in controversy because of a public service to which the property has been put under color of title by the defendant Southern Pacific, a court of equity should award her just compensation for the appropriation of her property on the theory of reversed condemnation (Peckwith v. Lavezzola, 50 Cal.App.2d 211, 218, 122 P.2d 678) unless her right thereto is barred by the statute of limitations (Robinson v. Southern California Ry. Co., 129 Cal. 8, 61 P. 947; Williams v. Southern Pac. R. Co., 150 Cal. 624, 626, 89 P. 599; Southern Pacific Co. v. Los Angeles Mill. Co., 177 Cal. 395, 403, 170 P. 829) or she has waived her right or may be deemed guilty of laches in asserting same. Collier v. Merced Irr. Dist., 213 Cal. 554, 563, 2 P.2d 790.

Upon a new trial of this cause, if the court should find upon substantial evidence that the claim of adverse possession of the property by the Southern Pacific under color of title is not well founded, but should find that the plaintiff is not entitled to a decree quieting title to the lot in controversy because it has been appropriated for a public use, then the court should determine whether or not the plaintiff has an existing and valid claim for damages (subject to the qualifications previously mentioned) as just compensation for the value of the property thus appropriated and used for the public benefit.

[11] This being a suit in equity it is inequitable to deprive the plaintiff of her property even though it be taken for public use without awarding her just compensation unless by inaction in asserting her rights, she has precluded herself from obtaining such relief. Such damages can be awarded in an equitable action to quite title under the general prayer contained in plaintiff's complaint "and that such other and general relief be granted as to the court may seem meet and agreeable to equity."

However, should the court find upon a new trial that defendants' use of the property has ripened into a valid claim to the property by adverse possession, findings and judgment should be entered accordingly.

The judgment is reversed, and a new trial is ordered in conformance with this order.

ADAMS, P. J., and THOMPSON, J., concurred.



CRANE et al. v. SMITH et al.

Civ. 13864.

District Court of Appeal, Second District, Division 1, California.

April 21, 1943.

Hearing Granted June 18, 1943.

1. Negligence ⇐32(2)

One may be an "invitee" upon certain portions of premises of another for proper purposes, and yet may become a mere "licensee" on or about other portions of the property, dependent upon particular circumstances.

See Words and Phrases, Permanent Edition, for all other definitions of "Invitee" and "Licensee".

2. Negligence ⇐82

In determining store owner's liability for injuries to three year old girl who in-

serted her finger in coffee grinder which was so constructed that no injury could result from accidental contact with it, but injury could result only from a deliberate act, although presence and location of grinder might be regarded as the remote cause of injury, the "proximate cause" was the act of child in inserting her finger.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

3. Negligence ⇐22

A coffee grinder was not a "dangerous instrumentality" so as to have required store owner to take extra precautions in connection with its location and use, but owner was bound to exercise reasonable care such as a prudent person under like circumstances would exercise in seeing that premises were safe, so as not to expose invitee to injury or danger.

See Words and Phrases, Permanent Edition, for all other definitions of "Dangerous Instrumentality".

4. Evidence ⇐20(1)

It is common knowledge that virtually every merchandising business has on display articles not inherently dangerous, that if tampered with by children are likely to cause injury.

5. Negligence ⇐32(4)

A three year old girl, who entered store with her mother, became a "licensee" when girl inserted her finger in coffee grinder, and to such licensee store owner owed no duty except to abstain from willful or wanton injury.

6. Negligence ⇐22

Where coffee grinder maintained in store was so constructed that no injury could result from accidental contact with it, the location of grinder at place accessible to children did not constitute negligence so as to render store owner liable for injuries to three year old girl who inserted her finger in the grinder.

WHITE, J., dissenting.

Appeal from Superior Court, Los Angeles County; Raymond McIntosh, Judge.

Action by Janice Crane, by her guardian ad litem; Bruce Crane, and by Bruce Crane, against C. S. Smith and others to recover for injuries sustained by the minor plaintiff and for consequential damages to the guardian ad litem when the infant plaintiff inserted her finger in a coffee grinding machine maintained by the defendant C. S. Smith Metropolitan Market Company. From a judgment for plaintiffs, C. S. Smith Metropolitan Market Company appeals.

Reversed.

Russell H. Pray, of Long Beach, and Samuel P. Block, of Compton (S. J. Nordorf and William C. Price, both of Long Beach, of counsel), for appellant.

Ben C. Cohen and George Cohn, both of Los Angeles, for respondents.

DORAN, Justice.

Defendant corporation appeals from a judgment in favor of plaintiff Janice Crane, a minor, for personal injuries, and her father, Bruce Crane, for consequential damages occasioned by injuries received by said minor when the child allegedly inserted her finger in a coffee grinding machine maintained and operated by defendant C. S. Smith Metropolitan Market Company. Briefly, the record reveals that appellant's store is what is known as a self-serve market wherein patrons serve themselves and pay for their purchases at a checking counter. However, when purchasing freshly ground coffee, patrons do not serve themselves but inform a clerk as to the amount desired and such clerk then and there grinds the coffee beans in appellant's coffee grinder. With reference to the location of the coffee grinder, it appears that it was placed upon an aisle or at least a passage way readily accessible to customers in the store, whether adults or children.

On August 6, 1939, about seven-thirty o'clock in the evening, the minor plaintiff then three years of age entered appellant's store accompanied by her mother. The mother requested one of the store clerks to grind one-half pound of coffee for her. As she approached the customer's side of the coffee counter she was holding her minor daughter's left hand with her right. At this time the mother placed the bread she had purchased on the counter and let go of her daughter's hand. The child was to the mother's right, close to the coffee grinder. Suddenly the child rushed back to the mother and showed her its finger which had been injured. The mother immediately took the child out to the automobile where Mr. Crane was, and in looking at the child's finger noticed "some

brown stuff" on the finger, which she testified looked like coffee. The mother returned to the store with the child and at that time saw blood on the floor under the spout on the south side of the coffee grinder. The motor had not been shut off for any time between the period when the child left her mother and returned exhibiting her injured finger. The mother testified she could hear the motor running. The spout of the machine was exposed by the moving of the cannister and the lip of the cannister had been broken before the time the accident occurred.

Trial was had before the court, sitting without a jury, resulting in a judgment against appellant in favor of the minor plaintiff for $4,800 and in favor of plaintiff Bruce Crane, father of the minor, in the sum of $45.

The complaint herein contains four separate counts. The first three sought recovery of damages on behalf of the minor plaintiff for personal injuries and the fourth was on behalf of the plaintiff father for medical expenses incurred. By their complaint plaintiffs charged that defendants were negligent in three specific respects: (1) Negligent placement of said machine in an aisle in a store without any appropriate safeguard to infants or children of tender years who might lawfully be upon the premises and who might be attracted to such machines; (2) negligence in failing to place proper safeguards around the said coffee grinding machine to prevent injury to children of tender years; and (3) negligence in the operation of said coffee mill.

[1] The court found that the coffee grinder "was easily accessible and dangerous to children of tender years". That as a direct and proximate result of the negligence of defendant, plaintiff, being too young to comprehend the attendant danger, inserted her finger in the coffee grinder. That said injuries were sustained as a direct and proximate result of the negligence of defendant. It is most earnestly contended by appellant that the evidence does not establish negligence on its part. While conceding that when the minor plaintiff entered the store accompanied by her mother she was an invitee, it is argued that she exceeded the scope of the invitation when she inserted her finger in the discharge spout of the coffee grinder. That thereupon her status became that of a mere licensee or trespasser to whom appellant owed no further duty or obligation other than to refrain from wilfully or wantonly injuring her. It must be conceded that one may be an invitee upon certain portions of the premises of another for proper purposes, and yet may become a mere licensee on or about other portions of the property, dependent upon the particular circumstances of the case. Medcraft v. Merchants' Exchange, 211 Cal. 404, 407, 295 P. 822; State Compensation Insurance Fund v. Allen, 104 Cal.App. 400, 413, 285 P. 1053.

[2] It should be noted at the outset that the coffee grinder was so constructed that no injury could result from accidental contact with any part of it exposed to such contact. Injury could result only from a deliberate act such as it is assumed respondent was guilty of, viz., inserting her finger into the mechanism. It follows therefore that although the presence and location of the coffee grinder may be regarded as the remote cause of the injury nevertheless the direct or proximate cause was the act of respondent hereinbefore described.

Camp v. Peel, 33 Cal.App.2d 612, 92 P.2d 428, 430, was concerned with the question of liability for injuries to a minor. There the court affirmed that: "'"A prior and remote cause cannot be made the basis of an action if such remote cause did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible, if there intervened between such prior or remote cause and the injury a distinct, successive, unrelated, and efficient cause of the injury, even though such injury would not have happened but for such condition or occasion. If no danger existed in the condition except because of the independent cause, such condition was not the proximate cause. And if an independent negligent act or defective condition sets into operation the circumstances which result in injury because of the prior effective condition, such subsequent act or condition is the proximate cause."'" (quoting from Hauser v. Pacific Gas & Elec. Co., 133 Cal. App. 222, at page 226, 23 P.2d 1068, at page 1070, which quoted from 45 C.J., p. 931.)

[3] Moreover, there is nothing to indicate that the coffee grinder was a dangerous instrumentality. It was not of and in itself likely to cause injury to property or person. It was not inherently such an agency as to have required defendant to take extra precautions in connection with

its location and use. That defendant was bound to exercise reasonable care and caution such as a prudent person under like circumstances would exercise in seeing that the premises are in a safe condition so as not to expose one lawfully entering upon them to injury or danger, there can be no question. See Means v. Southern California R. Co., 144 Cal. 473, 77 P. 1001, 1002, 1 Ann.Cas. 206. There the court declared: "In order to constitute actionable negligence, there must exist three essential elements, namely, a duty or obligation which the defendant is under to protect the plaintiff from injury, a failure to discharge that duty, and injury resulting from the failure. Not only must the complaint disclose these essentials, but the evidence must support them, and the absence of proof of any of them is fatal to a recovery. The facts stated in the complaint met all these essential requirements, but the evidence adduced upon the trial did not accord with the allegations of the complaint, nor square with the principle of law referred to."

[4, 5] It is a matter of common knowledge that virtually every merchandising business has on display articles that if tampered with by children are likely to cause injury, articles that are not inherently dangerous. Although some states have gone so far as to impose liability on merchants in such circumstances based on the contention that children of tender years cannot be bound by the doctrine of contributory negligence, nevertheless, the courts of this state have not gone to that extreme. As declared in Powers v. Raymond, 197 Cal. 126, 239 P. 1069, 1071: "But when it was made to appear that the occupancy and use of the portion of the premises on which the plaintiff was injured could not under any rational view of the evidence be within the scope of the invitation, she became a mere licensee, to whom the defendant owed no duty except to abstain from willful or wanton injury. Means v. Southern California R. Co., 144 Cal. 473, 77 P. 1001, 1 Ann.Cas. 206; Giannini v. Campodonico, [infra]; 16 Cal.Jur. 282, and cases cited."

[6] As a matter of law, the presence and location of the coffee grinder in the circumstances here presented was not negligence on the part of the defendant. Nor does the fact that plaintiff was a minor provide the negligence on the part of defendant if per se none existed. "The fact that respondent is a minor does not give him any greater rights under the circumstances. 'That might excuse him from concurring negligence, but cannot supply the place of negligence on the part of the company, or confer an authority on one who has none. It may excite our sympathy, but cannot create rights or duties which have no other foundation.'" Giannini v. Campodonico, 176 Cal. 548, at page 551, 169 P. 80, at page 821.

For the foregoing reasons the judgment is reversed.

YORK, P. J., concurred.

WHITE, Justice (dissenting).

I dissent. It is my opinion that under the facts of the present case the minor plaintiff at no time occupied a status other than that of invitee. The cases are in harmony with the declaration that the visitor to a store serving the public need not himself be upon the premises for the purposes of the owner's business. For instance, those who go to a hotel to pay a social call upon guests or to a railway station to meet passengers or bid them farewell, are regarded as business visitors, and by the same token a child taken by its mother, as in the instant case, to a shop or store is a business visitor regardless of whether it is necessary for the customer to take the child with her in order to visit the shop. 2 Restatement of the Law of Torts, paragraph 332(d). In the case at bar it is obvious that appellant knew that in the operation of its store there would be children, as well as men and women passing at or near the location of the coffee grinder, and a duty rested upon appellant to see to it that the machine was so placed, kept and operated that men, women and children, rightfully in the store, would not be unduly exposed to danger. Where children who have not arrived at the age of discretion are invited to go upon premises, those in possession are required to exercise a relatively higher degree of care for their safety than to adults. The minor plaintiff herein, three years of age, being an invitee, appellant owed to her the duty of taking reasonable precautions to prevent injury that would likely ensue from childish curiosity with respect to objects or machines which common knowledge dictates would arouse the interest or attention of such a child. Bergman v. Feitelowitz, 253 App. Div. 323, 1 N.Y.S.2d 983. Whatever may

be the rule with reference to the alteration of the status of an invitee to that of licensee or trespasser in the case of adults, it is my opinion that under the circumstances here present it can not be held that when the child went to the machine and inserted her finger therein she altered her status as an invitee, because she was too young to be guilty of negligence in so doing (Gonzales v. Davis, 197 Cal. 256, 240 P. 16; Hillerbrand v. May Mercantile Company, 141 Mo.App. 122, 121 S.W. 326; Scandalis v. Jenny, 132 Cal.App. 307, 22 P.2d 545); and as heretofore pointed out, the obligation rested upon appellant to realize that normal children of tender years might come in contact with the coffee grinder, and not to unduly expose such children to danger.

The majority opinion holds that the condition and placement of the machine, as well as the manner in which it was maintained and operated, were not the proximate cause of the child's injury. The trial court found upon substantial evidence that the minor plaintiff was too young to comprehend the danger of contact with the machine and that the grinder "was easily accessible and dangerous to children of tender years". Whether the result that ensued from the manner in which the coffee grinder was maintained should reasonably have been foreseen by appellant, it seems to me is a question addressed to the trier of facts. Even though it be conceded that different conclusions may be drawn from the evidence as to whether the actions and conduct of appellant were the proximate cause of the injury or damage, that question is primarily one that must be left to the jury, or in the instant case, to the court. Wells v. Lloyd, 35 Cal.App. 2d 6, 10, 94 P.2d 373. And where as here there is evidence to support the court's finding in that regard an appellate tribunal is not authorized to disturb such finding. While it is true, as contended by appellant, that it produced certain testimony given by experts to the effect that the type of coffee grinder here involved as well as its placement in the store was in conformity with established practice and usage employed by storekeepers generally in the locality where the accident occurred, there was also evidence proffered on behalf of the minor plaintiff in direct and sharp conflict therewith. Needless to say, the decision of the trial court upon the credibility of such witnesses and the intrinsic value of their testimony can not be disturbed on appeal.

The majority opinion holds that when the minor plaintiff placed her finger in the coffee grinder, her act in so doing was her own independent intervening act and precludes a recovery. With this I can not agree. It seems to me that it is immaterial whether the child intentionally thrust her finger into the machine or got it in accidentally, for she was too young to be guilty of any negligence (Gonzales v. Davis, supra; Hillerbrand v. May Mercantile Co., supra; Muller v. Standard Oil Co., 180 Cal. 260, 180 P. 605); and having invited people, including children, to come into its store, appellant was bound to see that its coffee grinder, which might cause injury, was so kept and operated as not to unduly expose children to danger. Granting that the test is whether it was within the reasonable contemplation of appellant to have foreseen that as a result of the manner in which it maintained the coffee grinder upon its premises, an accident and injury might occur to a child lawfully upon the premises, we are not authorized to disturb the conclusion thereon arrived at by the trial court adverse to appellant, when such finding is predicated upon conflicting evidence.

There being in the record sufficient evidence to justify the court in finding that appellant was guilty of negligence and that such negligence was fastened to the child's injury, I am of the opinion that the judgment should be affirmed.

58 Cal.App.2d 434

GILLETTE v. CITY AND COUNTY OF SAN FRANCISCO et al.

No. 12249.

District Court of Appeal, First District, Division 1, California.

April 30, 1943.

Hearing Denied June 28, 1943.

1. Appeal and error ⇐930(1)

Where evidence was in sharp conflict, and jury decided in plaintiff's favor, testimony supporting plaintiff's case was required to be taken as true for purposes of defendants' appeal.

2. Street railroads ⇐117(35)

In action by motorman of private street car company against city which operated street cars, for injuries sustained when motorman was struck by city's street car while he was allegedly standing in street with back to approaching street car of city, evidence justified submission of "last clear chance" doctrine to jury.

See Words and Phrases, Permanent Edition, for all other definitions of "Last Clear Chance".

3. Negligence ⇐83

In determining whether the "last clear chance" doctrine applies, question is not whose negligence came first or last, but whose negligence was the proximate cause of injury.

4. Negligence ⇐136(25)

Whether plaintiff's negligence is a proximate or remote cause of injury is a fact question.

5. Negligence ⇐83

The doctrine of continuing negligence has no application, unless plaintiff's negligence is proximate cause of injury.

6. Negligence ⇐83

The continuing negligence rule does not apply where the last clear chance doctrine by presence of its own elements, is brought into operation.

7. Negligence ⇐82

If defendant is not able to avoid injuring plaintiff in exercise of ordinary care, plaintiff's original negligence continues to be the "proximate cause" of his own injury and recovery is barred.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

8. Negligence ⇐83

If defendant is able to avoid injuring negligent plaintiff, but negligently fails to do so, plaintiff's original though continuing negligence is only the "remote cause" and not the "proximate cause" of the injury, and plaintiff is entitled to recover under the "last clear chance" doctrine.

See Words and Phrases, Permanent Edition, for all other definitions of "Remote Cause".

9. Negligence ⇐83

A plaintiff is not required to show that his inability to escape from threatened danger was a physical impossibility in order to render the "last clear chance" doctrine applicable, since doctrine applies equally if plaintiff is wholly unaware of his danger and for that reason is unable to escape.

10. Negligence ⇐83

Where a defendant has it within his power to prevent injury, he is not relieved from liability under "last clear chance" doctrine because plaintiff is unaware of his peril by reason of his own negligence.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by James T. Gillette against the City and County of San Francisco, a municipal corporation, and Lyle V. Godfrey to recover for injuries sustained by plaintiff when struck by a street car. From a judgment in favor of the plaintiff, the defendants appeal.

Judgment affirmed.

John J. O'Toole, City Atty., and Henry Heidelberg, Deputy City Atty., both of San Francisco, for appellants.

Timothy Healy, Linforth, Cannon & Miller, and Jesse H. Miller, all of San Francisco, for respondent.

KNIGHT, Justice.

The defendants appeal from a judgment for plaintiff entered pursuant to the verdict of a jury in an action to recover damages for personal injuries of a permanent character sustained by plaintiff as the result of being struck by a street car of the Municipal Railway, operated by the defendant city. The motorman was joined as party defendant, and one of the defenses urged was contributory negligence. At a previous trial

a jury returned a verdict for the defendants; plaintiff appealed, and the judgment was reversed for the giving of erroneous instructions. The court held that while it could be claimed that plaintiff was guilty of contributory negligence, it was equally clear that he contended at all times that his acts were not a proximate cause of the accident and that the doctrine of the last clear chance was applicable; that the evidence was sharply conflicting, and that the instructions as given "took from the jury the consideration of those contentions" and were therefore prejudicially erroneous. Gillette v. San Francisco, 41 Cal.App.2d 758, 107 P.2d 627. As in the previous trial the jury here was instructed on the last clear chance doctrine, and no complaint is made by defendants that singly or as a whole said instructions do not correctly state the law, but it is contended that the evidence was such as to preclude a right of recovery under the last clear chance doctrine, and that therefore the giving of any instructions pertaining to that doctrine calls for a reversal of the judgment.

Plaintiff at the time of the accident was a motorman employed by the Market Street Railway Company on one of its street cars which had become temporarily stalled on lower Market Street, and he was struck by a passing Municipal Railway car travelling in the same direction, easterly, toward the ferry, on a parallel track; but there is a conflict in the evidence as to plaintiff's position at the time he was struck. Plaintiff's witnesses testified that he was standing in the street in plain view between the tracks; whereas defendants' case was tried on the theory that he was not standing in the street at all; that he swung out from the platform of the Market Street Railway car while the Municipal car was passing and was struck by some part of the Municipal car back of the front corner thereof.

[1] The evidence being in sharp conflict, and the jury having decided in plaintiff's favor, the testimony supporting plaintiff's case must be taken as true for the purposes of this appeal. The essential facts may therefore be stated as follows: The accident occurred about 7:15 p. m. on August 10, 1935 (while it was still daylight), on Market Street within the block east of Second Street. There are four sets of parallel car tracks on Market Street, the inner two being used by the Market Street Railway, and the outer two by the Municipal Railway. The distance between the northerly rail of the Municipal eastbound track and the southerly rail of the Market Street Railway eastbound track is six feet. The overhang of the cars involved herein totalled 3 feet 9 inches, leaving a clearance between the cars of 27 inches. There is a switchback between the east and westbound Market Street Railway tracks, the east end of which was 228 feet east of Second Street. At the time the accident herein occurred, an eastbound No. 7 car of the Market Street Railway had stopped east of the switchback in order to turn back and proceed in the opposite direction. A No. 5 eastbound car (headed toward the ferry) stopped just west of the switchback, a No. 21 stopped behind the No. 5, and a No. 31 stopped back of the No. 21, all waiting for the No. 7 to take the westbound track. The three stalled cars were all 50 feet long, and stopped with a space of 5 feet between each other, so that the rear platform of the last car was about even with the east property line of Second Street. Plaintiff was the motorman on the No. 21 (which was as stated between the No. 5 and the No. 31), and after the Market Street Railway cars had come to a stop he leaned out of his car and said something to the conductor of the No. 5, named Kitto. He then got out of his car and went forward to talk to Kitto. Upon reaching the rear platform of the No. 5 car he stood on the street about a foot away from the car, with his right hand on the middle stanchion of the rear platform of the No. 5. It was stipulated that his body was about a foot in thickness; and according to Kitto, plaintiff stood "kind of sideways" with his back toward the west, up Market Street, looking up at Kitto. He conversed with Kitto some 10 or 15 seconds about being delayed, and while standing in that position, a "C" car of the Municipal Railway, operated by the defendant Godfrey, came along on the outer track, struck plaintiff, and he was thrown beneath the rear truck of the "C", his leg being pinned under the front wheel of the rear truck. As a result of the accident plaintiff suffered severe head injuries, including complete loss of hearing in one ear and a defect in vision, and the loss of his left leg below the knee. Because of his injuries he was unable to recollect anything connected with the accident.

Kitto testified that the "C" car was travelling 25 to 30 miles an hour when it struck plaintiff; that it gave no warning of its approach, nor did he hear it approach-

ing; that plaintiff was struck by the front left hand corner of the car, and that it did not stop until the rear end was 5 or 10 feet beyond the front fender of the No. 5. He also testified that plaintiff did not move while he stood on the street talking to him, and that he had been standing there 10 or 15 seconds when he was struck.

Bernstein, the conductor of the No. 31, was looking out the right side of his car, toward the ferry, and saw plaintiff standing on the street facing the rear platform of the No. 5, and he saw the "C" come alongside and strike plaintiff. He, like Kitto, testified that plaintiff did not move; that the "C" gave no warning of its approach; that plaintiff was struck by the left corner of the "C", and that the "C" did not stop until the rear end was about 10 feet ahead of the front of the No. 5.

Dr. Wilson, a dentist residing in Niles, was riding as a passenger on the rear end of the No. 5, and he testified substantially the same as the two above-mentioned employees. He saw the conductor of his car lean out and talk to the motorman of the car behind (plaintiff). He then saw plaintiff standing on the street directly below the conductor of the No. 5, conversing with the conductor, for several seconds; he saw the "C" car momentarily before the impact, coming down the outside track, but testified that it gave no warning of its approach; that plaintiff was struck by the left front stanchion of the car; that the "C" stopped with its rear end some 5 or 6 feet ahead of the front of the No. 5; that the accident happened so suddenly and without warning that he did not realize plaintiff was going to be struck and could give no warning of the car's approach.

The motormen of the No. 5, the No. 31, and the conductor of the No. 21 did not see plaintiff struck, but all of them estimated the speed of the "C" at between 20 and 30 miles an hour, and testified that it gave no warning of its approach, and that it stopped some 5 or 10 feet ahead of the front of the No. 5.

The motorman of the "C" car testified among other things that it was daylight and his vision was good; that he could see ahead down the track all the way from Second Street to the Ferry Building; that he was looking straight ahead, "along the side of the cars that were standing still"; that as he approached Second Street he rang the bell and made a "check stop" by slowing down and then going ahead, because he saw "carmen standing out alongside of their cars like carmen always do," and that he saw people getting off the No. 7 car. But he denied having seen plaintiff at any time. In this regard he stated that the first thing that happened that indicated to him that there might have been an accident was that he "heard a crack" and "saw a dark object like a hat flying in the air," and that he then applied the brakes and stopped the car. In this connection it should be noted that no one else testified that any carmen other than plaintiff were standing alongside their cars. Quite to the contrary, all the other motormen and conductors of the stalled cars testified positively that they were on the respective platforms of their cars when the accident occurred.

The evidence relied upon by defendants as showing that plaintiff swung out from the front platform of the No. 21 car of the Market Street Railway as the Municipal car was passing consisted of the testimony given by a taxi-cab driver who was travelling down Market Street about 75 feet to the rear of the Municipal car, and a broken grab handle on the car. But at the most, such evidence raised only a conflict with that produced by plaintiff. There was also a conflict in the evidence relating to the speed of the Municipal car and as to the distance it travelled before it was finally brought to a stop. But in view of the well settled rule that all conflicts must be resolved in favor of the prevailing party, it becomes unnecessary to narrate the opposing testimony in greater detail.

[2] Counsel for plaintiff concede that plaintiff was negligent in standing on the street between the tracks in a position where he might be struck by a passing car; but it is contended that since the evidence shows that plaintiff was standing in a position of danger, with his back toward and unaware of the peril of the approaching car and in plain view of the motorman of that car, the inference may be fairly drawn that the motorman must have seen plaintiff and could have avoided the accident by simply sounding his bell as a warning of his approach or applying the brakes and stopping his car, and that therefore his negligence in failing to do either was the proximate cause of the accident, which brought into operation the doctrine of the last clear chance. We are of the opinion that the law as laid down by such cases as Girdner v. Union Oil Co., 216 Cal. 197, 13

P.2d 915; Center v. Yellow Cab Co., 216 Cal. 205, 13 P.2d 918; Darling v. Pacific Electric Ry. Co., 197 Cal. 702, 242 P. 703; Wahlgren v. Market Street Ry. Co., 132 Cal. 656, 62 P. 308, 64 P. 993; and Hoy v. Tornich, 199 Cal. 545, 250 P. 565, fully supports plaintiff's contention and that therefore the trial court was justified in submitting that issue to the jury under the instructions given.

[3-8] Defendants contend that plaintiff's negligence constituted contributory negligence as a matter of law, which was concurrent with the asserted negligence of the defendants in the operation of their car, and continued up to the very time of the accident, and that therefore there is no room for the application of the doctrine of last clear chance. In other words, defendants contend that plaintiff by moving a step forward could have avoided being struck; hence that he not only had a better chance of avoiding the accident, but that his negligence continued up to the moment he was struck and was the proximate cause of the accident; and that therefore the doctrine of last clear chance should not have been submitted to the jury. There is no merit in the contention. The case of Girdner v. Union Oil Co., supra, is recognized generally as the leading late authority on the doctrine of last clear chance, and in discussing the question of continuing negligence the court there said in part [216 Cal. 197 13 P.2d 917]: "It is claimed on behalf of appellants that the doctrine of last clear chance has no application to a situation as here, where by mutual carelessness an injury ensues to one of two parties. In other words, the doctrine of last clear chance excludes from the operation of its underlying principle every case wherein it may be said that the negligence of the injured party was contemporaneous, concurrent, continuing, and contributory with the negligence of the party inflicting the injury, up to the very moment of the impact. * * * The real issue in cases of the character here involved is not whose negligence came first or last, but whose negligence, however it came, was the proximate cause of the injury. Esrey v. Southern Pac. Co., 103 Cal. 541, 37 P. 500; Beach on Contributory Negligence, § 50. Whether or not, therefore, negligence is the proximate or remote cause is, as above stated, a question of fact in each particular case. The doctrine of continuing negligence has no application unless the negligence is the proximate cause of the injury. On the other hand, if all the elements of the last clear chance doctrine are present and plaintiff's negligence becomes remote in causation, then this doctrine applies. If any one of the elements of the last clear chance doctrine is absent, then plaintiff's negligence remains the proximate cause and bars recovery. But the continuous negligence rule does not apply to a situation in which the last clear chance rule, by the presence of its own elements, is brought into operation. * * * The element of continual negligence is present in all last-chance cases. If defendant is not able to avoid injuring plaintiff in the exercise of ordinary care, the plaintiff's original negligence continues to be the proximate cause of his own injury, which bars recovery. If, on the other hand, defendant is able to avoid injuring the negligent plaintiff, and negligently fails to do so, plaintiff's original though continuing negligence only remotely contributes to the injury and is not the proximate cause thereof, and hence the applied doctrine, by its own principles, establishes the right of plaintiff to recover notwithstanding the fact that his original negligence would, by its continuing nature, bar a recovery if the doctrine were not applicable. To hold otherwise would be to dispute its existence. The real question to be determined in considering cases of the character of the one here involved is whether or not the so-called continuing negligence is the proximate or remote cause of the injury, which question is determined by the application of the principles of the doctrine of the last clear chance itself. Stated in another way, contributory negligence of the party injured is not the proximate cause of the injury, as the negligence of the defendant being later it constitutes the sole proximate cause. Cady v. Sanford, 57 Cal.App. 218, 207 Pac. 45. When the doctrine applies, plaintiff's negligence becomes remote rather than proximate in causation. If it does not apply, his negligence remains proximate in its causation and will bar his recovery."

[9, 10] From the foregoing it will be seen that the continuous negligence rule does not operate to the exclusion of the last clear chance doctrine when all of the elements of that doctrine are present; and this is such a case. As set forth in the Girdner case, supra, those elements are as follows: "That plaintiff has been negligent and, as a result thereof, is in a position of danger from which he cannot es-

cape by the exercise of ordinary care; and this includes not only where it is physically impossible for him to escape, but also in cases where he is totally unaware of his danger and for that reason unable to escape; that defendant has knowledge that the plaintiff is in such a situation, and knows, or in the exercise of ordinary care should know, that plaintiff cannot escape from such situation, and has the last clear chance to avoid the accident by exercising ordinary care, and fails to exercise the same, and the accident results thereby, and plaintiff is injured as the proximate result of such failure." As stated, plaintiff's negligence is conceded. As to the second element, it will be noted that the term "danger from which he cannot escape by the exercise of ordinary care" includes "cases where he is totally unaware of his danger and for that reason unable to escape"; and here the actual danger of which plaintiff was unaware was the approach of the Municipal car at an excessive rate of speed without giving any warning of its approach; and being totally unaware of such danger he was, for that reason, unable to escape therefrom. Defendants argue that plaintiff being a motorman must have been aware of the possibility of a car coming along on the outer track and striking him, and that if he was standing in the pathway of the car he could have taken a step forward and avoided being struck. There would be much force in the argument if any warning had been given of the approach of the Municipal car; but the fact that plaintiff did not take a step forward and thus avoid being struck was sufficient to warrant the conclusion that he was totally oblivious to the danger, because, obviously, it cannot be said that any reasonable person, being aware of an oncoming street car, would stand motionless in its pathway and be struck thereby. As said in the Girdner case, supra, a plaintiff is not required to show that his inability to escape from the threatened danger was a physical impossibility. The doctrine applies equally if he is wholly unaware of his danger, and for that reason is unable to escape. See, also, Darling v. Pacific Electric Ry. Co., supra; Palmer v. Tschudy, 191 Cal. 696, 218 P. 36. Nor where a defendant has it within his power to prevent the injury is he relieved from liability because the injured person is unaware of his peril by reason of his own negligence. In this connection the court in the Girdner case goes on to say: "A defendant is never relieved of liability if he has it in his power to prevent the injury. This doctrine applies whether one is unaware of his peril by reason of his negligence, or when exercising ordinary care is so ignorant. In either situation the rule is the same. A defendant is not privileged to injure another simply because he is negligently or otherwise in a position of danger. If he has the opportunity of avoiding the injury, he must at his peril exercise it."

With respect to the third element, the courts have held repeatedly that it is a question of fact for the jury to determine from all the circumstances presented by the evidence whether the defendant actually knew of the plaintiff's peril; and that notwithstanding there may be a total absence of any positive testimony that the defendant actually knew of plaintiff's danger, and even though the defendant definitely denies seeing the plaintiff at all, the doctrine of the last clear chance may be invoked and applied where the facts and circumstances are such as would justify the jury in finding that despite the defendant's denial of knowledge or the absence of direct testimony on the subject, he was actually aware of plaintiff's danger in time to avert the accident; in other words, that he "must have known" of plaintiff's danger. For example, in the case of Hoy v. Tornich, supra, it was contended that since the uncontradicted evidence showed that the defendant did not see the plaintiff until the very moment of the accident, the doctrine of the last clear chance was inapplicable. The court held otherwise, saying [199 Cal. 545, 250 P. 569]: "If the defendant in this case was looking straight ahead, as he testified that he was, he must have seen the plaintiff." In another case "The motorman testified that he did not see plaintiff on the tracks until the car was within some 30 feet of the wagon, and that the horses were then upon the track"; and it was contended that there was "no other evidence in the record which would justify a contrary finding." But after reviewing the evidence the court held: "Under all the circumstances and conditions as disclosed by the record the jury might have found that the motorman saw plaintiff in time to have avoided the injury, and while plaintiff was actually in peril." Smith v. Los Angeles Ry., 105 Cal.App. 657, 288 P. 690, 691, citing Hoy v. Tornich, supra; Darling v. Pacific Electric Ry. Co., supra. Again, in the case of Wahlgren v. Market Street Ry. Co., supra, the court said [132 Cal.

656, 62 P. 310]: "As to the assumption of evidence in the instruction, we think counsel had a right to argue to the jury that the employés were interested witnesses, and, though they both testified that they did not see plaintiff before her injury, yet, there being no obstruction to the view, the conductor must have seen her from where he was at the switch before the car passed him, if he was looking for approaching pedestrians, as his testimony would seem to imply." And in the case of Paulos v. Market Street Ry. Co., 136 Cal. App. 163, 28 P.2d 94, 96, the court used this language: "Even if the motorman had denied actual knowledge, the jury could have disbelieved him and found, from the evidence, that he had such knowledge", citing Hoy v. Tornich, supra; Darling v. Pacific Electric Ry. Co., supra; Chappell v. San Diego & Ariz. Ry. Co., 201 Cal. 560, 258 P. 73. (For additional cases holding to the same effect, see 2 Cal. Jur. 10 Yr. Supp. pp. 189, 190.) In the present case the evidence shows, as above set forth, that plaintiff was standing motionless alongside the No. 5 car, directly in the pathway of and with his back toward the approaching Municipal car; and Godfrey, the motorman of the Municipal car, admitted he had a clear view of the tracks ahead, all the way from Second Street to the ferry, and that he was looking straight ahead "along the side of the cars that were standing still" and saw carmen "standing out alongside their cars like carmen always do." In that state of the evidence, it was a pure question of fact for the jury to determine whether Godfrey, despite his denial, was actually aware of plaintiff's danger in time to avert the accident; and the jury having decided that question in favor of plaintiff, there was ample evidence to support the conclusion that Godfrey had the last clear chance to avert the accident by the exercise of ordinary care, to-wit, by sounding his bell to give warning of the approach of his car, or by stopping the car before it reached the point where plaintiff was standing. In this latter respect Godfrey admitted that he saw the stalled cars when his car reached Second Street, which was more than 100 feet distant from the point of the accident, and that at all times thereafter he could have brought his car to a stop within 20 feet. And even though he may have believed that in the limited space between the two cars his car would clear plaintiff's body in safety, the defendants are not relieved from responsibility for the accident, for "As held in a number of cases, where a person sees another in a position which is in fact dangerous, he may not rely upon dullness to excuse him from not realizing the danger of the position (Basham v. Southern Pac. Co., 176 Cal. 320, 168 P. 359); and if he sees the dangerous situation he must use reasonable diligence in analyzing the same (Starck v. Pacific Electric R. Co., 172 Cal. 277, 156 P. 51, L.R.A.1916E, 58), knowledge of danger being imputed where the circumstances are such as to convey to the mind of a reasonable man that the plaintiff is in a position of peril (Harrington v. Los Angeles Ry. Co., 140 Cal. 514, 74 P. 15, 63 L.R.A. 238, 98 Am.St.Rep. 85)." Nicolai v. Pacific Electric Ry. Co., 92 Cal.App. 100, 267 P. 758, 761; Paulos v. Market Street R. Co., supra.

An examination of the cases cited and relied on by defendants in support of their position shows that they are not here controlling, for the reason that as pointed out in each of them there was an absence of some element essential to the proper application of the last clear chance doctrine. For instance, in those particularly relied on (Palmer v. Tschudy, supra; Bagwill v. Pacific Electric R. Co., 90 Cal.App. 114, 265 P. 517; Young v. Southern Pac. Co., 189 Cal. 746, 210 P. 259; Rasmussen v. Fresno Traction Co., 15 Cal.App.2d 356, 59 P.2d 617), it appears that the plaintiffs while occupying positions of safety either saw or had warning of the approach of the instrumentality which struck them, and that nevertheless by reason of their continuous negligence they placed themselves directly in the pathway thereof, and in Poncino v. Reid-Murdock & Co., 136 Cal.App. 223, 28 P.2d 932, it was held that instructions on the last clear chance doctrine were properly refused for the reason that the evidence established as a matter of law that the defendant could not have averted the collision by the exercise of ordinary care and that therefore the conceded contributory negligence of the driver of the other automobile, who was killed in the accident, was the proximate cause of the collision.

In the present case, as shown, the evidence was legally sufficient to establish all of the elements necessary to justify the application of the doctrine of last clear chance; therefore it was proper for the court to submit the case to the jury under instructions on that doctrine. No other

points being raised by the appeal, the judgment is affirmed.

PETERS, P. J., and WARD, J., concur.



58 Cal.App.2d 473

BROWN v. BOARD OF POLICE COM'RS OF CITY OF LOS ANGELES et al.

Civ. 12041.

District Court of Appeal, First District, Division 1, California.

May 1, 1943.

1. Gaming ⇐7

Prohibited "gaming" is ordinarily synonymous with "gambling" and usually takes the form of a "wager" involving gain and loss between known participants of money or property staked upon the future happening of an uncertain event, but in a "premium" which is a "reward" for an act done, it is known before the event who is to give; there being until the outcome but one party to the transaction. Pen.Code, § 330 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Gambling", "Gaming", "Premium", "Reward" and "Wager".

2. Gaming ⇐8

That a definite charge is exacted for the privilege of demonstrating skill in competitive shooting at a target does not bring the sport within statute prohibiting "gaming". Pen.Code, § 330.

3. Appeal and error ⇐1008(1)

In action to require issuance of permit for conduct of a game under city ordinance authorizing issuance of permits for conduct of games of skill and science, whether skill was a negligible factor in the game and chance predominated was for trial court.

4. Gaming ⇐6

In determining whether a game was a "game of skill and science" within city ordinance providing for issuance of permits for conducting such games, the test was whether skill or chance determined the result of the game.

See Words and Phrases, Permanent Edition, for all other definitions of "Game of Skill and Chance".

5. Gaming ⇐6

A game called "Defiance", which was played by tossing by hand free and pay rubber balls into a four-sided box approximately 22x24 inches with no top, with a flat bottom consisting of 36 holes forming a solid square, and with transparent sides some 12 inches high, was not as a matter of law one of "chance" and not of "skill and science", within city ordinance authorizing issuance of permits for conduct of games of skill and science, where object of game was to complete a straight line of six balls with the total number of free balls the same as the last number called by the operator, for merchandise prizes announced before each game.

See Words and Phrases, Permanent Edition, for all other definitions of "Defiance Game" and "Game of Chance".

6. Gaming ⇐4

Mere granting of a permit under city ordinance authorizing issuance of permits for conduct of games of skill and science would not authorize conduct of an illegal game.

7. Action ⇐6

An attempt to use the remedy of declaratory relief to obtain in advance a judicial approval of a scheme the operation of which plaintiff believes to be legal should be frowned upon.

8. Gaming ⇐4

Under city ordinance providing for granting of licenses for operation of games of skill to one of good moral character providing maintenance of such game will comport with public welfare, it is mandatory that an application for license be denied, though the game be one of skill, if the dominating factor is chance, but, if sufficient facts are presented on the application, a finding must be made as to the character of the game. Pen.Code, § 330 et seq.

9. Action ⇐6

Where city ordinance authorized board of police commissioners to grant licenses for operation of games of skill to one of good moral character provided that maintenance of such game would comport with

public welfare, and board found that applicant was of good repute and that maintenance of game would comport with public welfare, but made no finding as to character of game and denied the application, there was a "controversy", and applicant was entitled to petition for declaration of rights, where complaint alleged that board had duty to issue, and applicant was entitled to a permit.

See Words and Phrases, Permanent Edition, for all other definitions of "Controversy".

10. Action ⇐6

Declaratory relief has for its purpose a liquidation of doubts with respect to controversies which might otherwise result in subsequent litigation.

11. Mandamus ⇐154(4)

A requisite allegation in a petition for writ of mandate is that there has been action of an arbitrary, capricious, or fraudulent character, or an action in abuse of discretion, or a breach of duty, or one without due regard to the rights of the applicant.

12. Mandamus ⇐178

Where substance of allegations of cause of action in mandamus was that board of police commissioners had breached its duty in refusing to issue a permit to conduct a game and no demurrer was interposed, and amended complaint containing such cause of action was filed by stipulation that a separate cause of action for mandatory relief would be added, and prior thereto trial court had determined that board had duty to issue the permit, judgment directing issuance of a writ of mandate was proper notwithstanding that complaint failed to allege that board had acted in an arbitrary, capricious, or fraudulent manner.

Appeal from Superior Court, Los Angeles County; Harold B. Pool, Judge.

Action by Charles J. Brown against the Board of Police Commissioners of the City of Los Angeles, State of California, and others, as the Board of Police Commissioners of the City of Los Angeles, State of California, for declaratory relief and for issuance of a writ of mandate to compel the board to issue a permit to petitioner for the conduct of a game called "Defiance". From an adverse judgment, respondents appeal.

Affirmed.

Ray L. Chesebro, City Atty., and W. Jos. McFarland, Asst. City Atty., both of Los Angeles, for appellants.

Harold B. Pool, of Los Angeles, for respondent.

WARD, Justice.

This is an appeal by the Board of Police Commissioners of the City of Los Angeles and the members of such board, respondents in the court below, from a judgment in favor of petitioner, Chas. J. Brown, decreeing that such respondents issue him a permit for the conduct of a game called "Defiance." In order to avoid confusion by reason of respondents in the court below being appellants on this appeal, we will refer to them as the Board, and to the respondent on this appeal as petitioner.

Pursuant to chapter XIX of the charter of Los Angeles, and in the manner prescribed by the provisions of section 23.01 of the Municipal Code-Ordinance number 77,000, of said city, the board of police commissioners has the sole and exclusive power and authority to issue permits for the conduct in the City of Los Angeles of certain games referred to in the ordinance as "games of skill and science."

On October 9, 1940, petitioner filed with the board an application in proper form for a permit to conduct such an enterprise at the "Venice Amusement Zone" in the City of Los Angeles, which was denied, the board finding that, while petitioner was of good moral character, and that the game, if in fact one of skill and science and not one of chance, would comport with public welfare, it was in doubt as to which classification the game came under.

Following the board's refusal to grant a permit, this action was initiated by a complaint praying for declaratory relief. The board interposed a demurrer, which was sustained, as was a demurrer interposed to petitioner's first amended complaint. A second amended complaint, which also set out a cause of action for declaratory relief only and asked no other relief, was filed, and a demurrer to that overruled, after which the board answered. At the conclusion of a trial, the case as then made out was submitted and the court ordered judgment in favor of petitioner on the second amended complaint. Before the

judgment was signed, petitioner filed a new application for a permit with the board, which it denied upon the ground that the court had not, in the judgment ordered, directed that a permit be issued. Counsel for the board thereupon agreed with counsel for petitioner that a third amended complaint praying for the issuance of a writ of mandate should be filed, so that the board could then issue the permit if so ordered. Accordingly, and pursuant to this stipulation, a third amended complaint was filed, in which was added a cause of action and prayer for such relief. By the stipulation mentioned it was agreed that the board's answer to the second amended complaint should be deemed an answer to count I of the new complaint, and that certain portions of the new and second cause of action should be denied and other portions admitted, so that the issues as joined appear in: (1) Petitioner's third amended complaint; (2) the board's answer to the second amended complaint, and (3) the admissions and denials stipulated to as above mentioned. The issues thus finally presented were (a) whether or not the game which it was proposed to invite the public to play was a game of chance or one of skill and science—the petitioner affirming it is the former, and the board taking no stand on the question; (b) whether or not a controversy on this point thus existed between them—which the board denied; (c) whether or not the playing of the game would constitute a nuisance and would not comport with the public welfare, and (d) whether or not the petitioner is entitled to have issued to him the permit demanded so that it is the duty of the board to issue it.

No demurrer was interposed to the third amended complaint, and the action was again submitted upon the evidence previously taken, following which the court included in the judgment a direction for the issuance of a writ of mandate.

The court found that "Defiance" is a game of skill and science; that the petitioner having met the requirements of the governing ordinance in every respect, it is the duty of the board to grant his application; that a controversy exists between the parties, such controversy being as to the construction and interpretation of said game. As a conclusion of law it accordingly finds that petitioner is entitled to have issued to him such permit.

[1, 2] Appellant board contends that the mechanical device and its operation constitute a gambling game. Gaming, which is ordinarily synonymous with gambling (24 Am.Jur. 398), is specifically prohibited by law in this state. Penal Code, Pt. 1, Tit. 9, Ch. 10. Gaming usually takes the form of a bet or wager involving gain and loss, between known participants, of money or property staked upon the happening in the future of an event at the time uncertain. There is a clear difference between a bet or wager and a premium or reward offered for the performance of an act of skill. In the case of a premium it is known before the event who is to give, there being until the outcome but one party to the transaction; in a wager, there must be two parties, whose identity is established before the outcome of the uncertain event, and these are the parties who must either win or lose. 12 Cal.Jur. 1088. "A premium is a reward or recompense for some act done; a wager is a stake upon an uncertain event." Hankins v. Ottinger, 115 Cal. 454, 457, 47 P. 254, 255, 40 L.R.A. 76. It may be admitted that competitive shooting at a target is a game of skill. The fact that a definite charge is exacted for the privilege of demonstrating such skill does not bring the sport within the classification of a misdemeanor as enumerated or referred to in Penal Code, sec. 330. 27 Corpus Juris, p. 1051, sec. 267.

Much evidence was presented on the subject of the game and the manner of playing it, and it is described quite at length in the trial court's findings. We quote therefrom:

"The players are each provided with a chair at a counter, the top of the counter being approximately 22" wide and 36" above the floor. In front of each player and across the counter is provided a four sided box approximately 22" x 24" with no top, and with a flat bottom of wood which consists of 36 holes forming a solid square being six holes each way, each 2¼" square, 2" deep and with ⅜" partitions between them and with a smooth wooden border around the holes, sloping about ¼" up toward and extending to the four sides of the box, being 3¾" to the lateral sides, and 5" to the front and back sides. The front of the box toward the player is constructed of clear glass. The top of which is 11½" above the holes, and which slopes from the bottom to the top 2" away from the holes and from vertical and toward the

player, the other three sides are over 12" high vertical and transparent. The center of the square of 36 holes is approximately 3'6" from the inside edge of the counter, and the top of the holes is approximately 6" below the top of the counter. A separate box is provided for each player. * * *

"Each player will be given from one to five round sponge rubber balls of a diameter of not less than 1⅞" and not over 1 15/16". All players in any given game will use balls of the same diameter. These first balls will be of the same definite color for each player and will be known as Pay Balls. Each player will toss by hand the Pay Balls into that player's box, one ball at a time in an effort to place as many of them as possible in holes in a straight line. Thereafter each player will be given similar balls of a different color designated Free Balls which the player will be permitted to throw by hand one at a time into that player's box. Any player throwing more than one ball at a time will be disqualified. The operator of the game will announce 'Throw Free Ball No. 1, throw Free Ball No. 2 etc.,' and as the announcements are made, a corresponding number will be flashed on the wall of the room and remain until some player has completed in that player's box a straight line of six balls in six holes of which part are Pay Balls and the other Free Balls with the total number of free balls in the box the same as the last number called. Such player will then be announced as the winner and will be given the prize which will be designated before the game begins. Any player completing a line with a total of only six balls thrown will share in the prize. The balls used will be of such density that when tossed into a hole they will remain and not bounce out. All players must remain seated while playing the game. The winner of the game must by that player's own hand and skill toss each and every ball of the six that comprise the winning row as well as all other balls in that box. In this game the play will be entirely individual, and no toss, throw or any act of any player in the game will be permitted to either help or hinder any other player.

"All prizes awarded will be announced before the beginning of each game and will be confined to cigars, cigarettes and other merchandise."

[3-6] The trial court had before it the witnesses and a demonstration of the game. It was able to observe any propensities toward a misstatement of the facts, and to determine from the demonstration the characteristics of the game. There is nothing in the testimony of the witnesses to warrant a conclusion that it was palpably false, and it was for the trial court to determine whether skill is a negligible factor in the game and that chance predominates. The test is which element—skill or chance—determines the result. Under the circumstances we are unable to say as a matter of law that the game is one of chance and not of skill. If the mode of operation or rules of the game should be changed, the findings of the trial court in this proceeding would not necessarily be applicable. The mere granting of the permit would not authorize an illegal game.

The main contention presented on this appeal is that courts may not entertain suits for declaratory relief in the absence of a bona fide controversy between the parties, and that here the complaint, as amended, affirmatively shows there is no dispute concerning a question of law or of fact. In addition it is contended, and which must be admitted, that there is no direct allegation in the cause of action for mandate that defendants acted in an arbitrary, capricious or fraudulent manner.

[7] The board reviews the controversy as one in which the petitioner has devised a scheme, the operation of which he believes to be legal, and is attempting in advance to obtain judicial approval thereof. An attempt to use the remedy of declaratory relief for such a purpose should be frowned upon. Hayden Plan Co. v. Friedlander, 97 Cal.App. 12, 275 P. 253. In the Hayden case it was contended that petitioner did not intend to issue securities within the meaning of the Corporate Securities Act, St.1917, p. 673. In the present case petitioner proposes to operate a game which under the ordinance requires a permit. If in other respects he has met the requirements of the ordinance he is entitled to an order from the board either granting his application, or denying it upon the ground that in its opinion the game proposed to be played is not one for which the board is authorized to issue a permit.

[8] The City of Los Angeles has provided for the granting of a license for the operation of certain games of skill, not prohibited by the provisions of Penal Code, Pt. 1, Tit. 9, Ch. 10, or any municipal ordinance, to one of good moral character pro-

viding the maintenance of such game will comport with public welfare. It is mandatory that the board deny an application for a license though the game be one of skill if the dominating factor is chance. It is conceded that if sufficient facts are presented thereon, it is the duty of the board to make a finding as to the character of the game. The board does not claim that all the facts entering into the operation of the game herein were not presented. It found that the applicant was of good repute and that the maintenance of the game at the desired location would comport with public welfare. However, it made no finding as to the character of the game and denied the application for a permit.

[9, 10] The complaint in the present proceeding alleges that it is the duty of the board to issue, and that the petitioner is entitled to, the permit. The court found that an actual controversy existed and concluded that it is the duty of the board to issue the permit. It seems that under such circumstances there was a controversy in law and in fact and the applicant was entitled to petition the court for a declaration of his legal rights. In Jackson v. Lacy, 37 Cal.App.2d 551, 561, 100 P.2d 313, 318, the court said: "Declaratory relief has for its purpose an eclaircissement or a liquidation of doubts with respect to uncertainties or controversies which might otherwise result in subsequent litigation."

The board strenuously objects to the judgment in the mandate proceedings upon the ground that the complaint, as stated, failed to allege that the defendants acted in an arbitrary, capricious or fraudulent manner.

[11, 12] A requisite allegation in a petition for writ of mandate is that there has been action of an arbitrary, capricious or fraudulent character, or an action in abuse of discretion (Dierssen v. Civil Service Commission, 43 Cal.App.2d 53, 110 P.2d 513), or a breach of duty (16 Cal.Jur. 862), or one without due regard to the rights of the applicant. Hogan v. Retirement Board, etc., 13 Cal.App.2d 676, 57 P.2d 520. The substance of the allegations in the cause of action in mandamus is that the board breached its duty in refusing to issue the permit. No demurrer was interposed—on the contrary the third amended and supplemental complaint was filed by stipulation that a separate cause of action for mandatory relief would be added. Prior thereto the trial court had determined that it was the duty of the board to issue the permit. Under the circumstances this contention of the board is without merit.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concurred.



58 Cal.App.2d 287

HESLOP v. KINYOUN et al.

KINYOUN et al. v. GERHART.

Civ. 13726, 13727.

District Court of Appeal, Second District, Division 3, California.

April 20, 1943.

Hearing Denied June 17, 1943.

1. Appeal and error ⇐1047(3)
Trial ⇐39

In actions for injuries resulting from automobile collision, any error in overruling motion to strike out testimony of witness based on his deductions rather than memory was not error where case was tried by court without a jury and testimony was given by witness in order to explain inconsistency between testimony and testimony given at previous trial, but if error, it was harmless.

2. Automobiles ⇐245(13, 79)

The fact that automobile was momentarily on wrong side of the street and that it was being turned back to right side of street just as the collision occurred would not make motorist negligent as a matter of law. Vehicle Code, § 525, St.1935, p. 181.

3. Appeal and error ⇐1010(1)
Automobiles ⇐244(10, 42)

In actions for personal injuries resulting from head-on collision of automobiles, finding of trial judge that one of the automobiles was not driven negligently was supported by the evidence, which was conclusive on appeal.

4. Automobiles ⇐247

In actions for personal injuries resulting from head-on collision of auto-

mobiles, findings that collision was caused solely and proximately by the negligence of one of the motorists should be broadly construed in support of the judgment.

5. Automobiles ⇐244(36)

In actions for personal injuries resulting from head-on automobile collision, findings that collision was solely and proximately caused by the negligence of one of the motorists were supported by the evidence.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Separate actions by Emilie Heslop against F. H. Kinyoun and Mrs. F. H. Kinyoun and by Floyd H. Kinyoun and Marie Kinyoun against Robert Gerhart for personal injuries resulting from automobile collision, which were consolidated for trial. From separate judgments in favor of F. H. Kinyoun and Mrs. F. H. Kinyoun, Emilie Heslop appeals and from judgment for Floyd H. Kinyoun and Marie Kinyoun, Robert Gerhart appeals.

Judgments affirmed.

J. R. Girling, of Los Angeles, for appellant Emilie Heslop.

James V. Brewer and George L. Greer, both of Los Angeles, for appellant Robert Gerhart.

Nourse & Jones, of Los Angeles, for respondents.

SHINN, Acting Presiding Justice.

At about 2 o'clock in the morning two automobiles were driven into a head-on collision in the middle of Beverly Boulevard in the City of Los Angeles. One of them, a Cadillac convertible coupe, traveling east, was driven by Robert Gerhart, who had as a passenger Emilie Heslop. The other, a Packard sedan, was being driven west by Dr. Kinyoun, who was accompanied by his wife. The four occupants of the cars were injured, Miss Heslop and Dr. Kinyoun seriously. Miss Heslop sued Dr. and Mrs. Kinyoun and they, in turn, sued Gerhart for damages. In a consolidated trial of the two actions by the court, the Kinyouns recovered judgment against Gerhart upon a finding that he was solely responsible for the accident, and Miss Heslop was denied a recovery from the Kinyouns as a result of the same finding. From separate judgments Miss Heslop and Gerhart prosecute separate appeals, which are presented upon a single record and will be considered together. The principal contention on both appeals is that the evidence failed to support the finding that Dr. Kinyoun was free from negligence.

The position of the cars with relation to each other and to the street as they came together pretty well demonstrates the manner in which they were being driven immediately before the collision. Beverly Boulevard, at the scene of the accident, is 56 feet wide between curbs. It is divided into four marked traffic lanes. Those adjoining the double middle stripes are 10 feet 6 inches wide, the outer ones 17 feet 6 inches wide. Assuming that the boulevard extends directly east and west, Dr. Kinyoun's car came to rest with its left front wheel on the middle stripes and its left rear wheel some 21 inches to the left or south of the middle stripes. The right rear wheel had made a skid mark 36 feet long and on a line parallel with the middle lines. It necessarily follows from these facts that if the car was in the same position at the time it was struck (and the skid marks show this to have been the case) it was being turned rather sharply to the right at the time of the impact but traveled no appreciable distance in the process of turning, since the right rear wheel was still in direct line with the skid mark, which showed no deviation from a straight course. The Cadillac driven by Gerhart was entirely on its left or the north side of the middle stripes and was headed southeasterly at an angle of approximately 45 degrees. The right front corners of the two cars came together in this position. The left front halves of the two cars were undamaged, although both cars were badly smashed, at the point of impact. The right front of the Cadillac was some 3 or 4 feet north of the middle lines, the right rear some 7 or 8 feet farther to the north. These facts appear from photographs in evidence, from which it would further appear that the two cars did not move after they came together.

The obvious explanation of the cause of the accident is that Gerhart immediately before the collision was driving on the wrong side of the street and that he turned suddenly into the Kinyoun car. This is borne out by the physical facts as to the location of the cars and by the testimony of the witnesses, from which the conclusion is inescapable that Gerhart failed to observe or follow a long, gradual turn which

Beverly Boulevard takes in that locality. This curve in the highway is best illustrated by the maps and numerous photographs which were in evidence, but we shall endeavor to describe it. The collision occurred some 160 feet east of the intersection of June Street with Beverly Boulevard. The middle of the highway at the point of the collision is 13½ feet south of the middle of the highway at the easterly line of June Street. At a point 62 feet east of the point of collision the middle of the highway, and consequently the markings of the several traffic lanes, are 1½ feet more or 15 feet south of their locations at the east side of June Street. This offset is taken up by a long, easy curve in the street, which commences at the east side of June Street and extends over said distance of 222 feet. It would appear from the maps that the curve is somewhat more pronounced in the westerly half than in the easterly half of this area but at no point does it appear other than a very easy and gradual curve. We may here state the obvious and simple fact that two cars driving, respectively, east and west adjacent to the middle stripes before they reached the curve and each on its own side of the street would be traveling directly east and west and so that each would pass on the left side of the other if both continued in a straight course and did not follow the curve of the street. If they did follow the curve there would be a time when they would be headed directly toward each other, although of course if they continued to follow the curve of the street each would pass to its right of the other. We mention these facts only because they appear to account for the confusion of Gerhart and his actions, as illustrated by his own testimony and the physical facts which we have described. Although the headlights of both cars were burning, Gerhart and his passenger failed to see the Kinyoun car until, as they testified, they were very close to it; according to Gerhart, only some 30 feet apart. He testified that at about the easterly boundary of June Street he was traveling on the south side of the street some 3 feet from the middle stripes; that after that he did not watch the markings of the middle of the street, and that when he observed the other car directly in front of him he turned suddenly to avoid it. He did not recall in which direction he turned. The logical explanation of his conduct, and the one which the court no doubt accepted, is that he failed to notice the curve in the street and continued straight ahead or turned quickly onto the wrong side of the highway and that when he realized his peril and his position with relation to the other car he suddenly turned sharply to the right to get back onto the right side of the road and turned directly into the Kinyoun car at an angle of approximately 45 degrees. Whether he got onto the wrong side of the street by reason of turning sharply to the left or by following a straight course instead of following the curve cannot be definitely determined from the record, as his own testimony is vague. But the most natural inference would be that he failed to observe the curve of the street, for had he seen it, he no doubt would have followed it. That he was negligent cannot be doubted; indeed, counsel for appellants quite properly do not contend that he was free from negligence.

The question then is whether Dr. Kinyoun was guilty of negligence as a matter of law so as to bar his recovery in his action against Gerhart and to render him liable to appellant Heslop in her action against him. Neither car was traveling at any excessive speed, not over 35 miles miles an hour, and the element of speed is not relied upon in support of the claims of negligence on the part of the respective drivers. Dr. Kinyoun testified that he was traveling on the north or right-hand side of the street some 3 feet from the middle lines; that he observed the Gerhart car when it was a block or a block and a half away; that as the cars came closer together the Gerhart car turned into his lane; that he immediately turned to the left, put on his brakes, probably swerved back toward the right, and was slowed down to 12 or 15 miles an hour at the time of the collision. Incidentally, Gerhart testified that he did not put on his brakes before the collision.

It would be difficult to conceive of an automobile accident more inexcusable than this one. Two men of mature years, having a 56-foot highway all to themselves, drive their respective automobiles down the center line of a street with which they are both familiar from having driven it many times, each relying upon the other to stay on his own side of the street and neither thoughtful or cautious enough to provide a margin of safety for himself by giving the other a wider berth. The case was tried upon the theory that this was the conduct of reasonable men and upon evidence that neither during the evening had indulged to

an unreasonable extent in the use of intoxicants. The undisputed evidence was that the doctor had partaken of two ounces of wine with coffee, sandwiches, and cake, and that Gerhart over a period of several hours had consumed two highballs, described as consisting of Bourbon whiskey diluted with ginger ale. It is not contended that the respective drivers were negligent in choosing their courses along this crooked street so that they would pass in close proximity at a combined speed of between 60 and 70 miles an hour. There is therefore no occasion for us to compare their conduct with that of a man who hunts for a gas leak with a lighted match or pulls the trigger of a gun to see whether it is loaded. We shall therefore assume, as counsel do, that if each driver had remained on his own half of the highway, no matter how close to the middle, he would not have been guilty of a want of ordinary care.

[1] We return to the arguments of appellants which accuse Dr. Kinyoun of negligence because for some distance before reaching the point of collision his car was partly on the wrong side of the street, in violation of the requirement of section 525 of the Vehicle Code, St.1935, p. 181, that a car under such circumstances must be driven on the right-hand side of the street. It undoubtedly was a fact that the car for at least 36 feet before it reached the point of the collision was on the wrong side of the street to the extent already noted. It does not necessarily follow from that fact that the trial court was obliged to find that Dr. Kinyoun was negligent. Both he and his wife testified that shortly before the Gerhart car was observed on the wrong side of the street Dr. Kinyoun was driving several feet north of the middle. There had been a previous trial of the case and before that Dr. Kinyoun had given his deposition. In his deposition he testified that he was driving at all times before the collision upon the right side of the street. At the time of the trial of the present action he testified that when he apprehended danger from the Gerhart car he made a turn to the left in order to avoid it. He was examined and cross-examined at length concerning this change in his testimony and he made it clear that his statement that he had turned to the left was not based upon his recollection of having done so, but upon his recollection of his position in the street before he apprehended danger and the position his car was shown to have been in at the time of the collision, as was clearly illustrated by the photographs. He testified that he had not seen these until the first trial. Counsel for defendant Gerhart moved to strike out Dr. Kinyoun's testimony that he had turned to the left to avoid the accident, upon the ground that it was based upon evidence as to physical facts and not upon his memory; the motion was denied. We may as well consider here the contention that the court erred in this ruling. In one view of the matter the conclusion of the witness, based upon his deductions, could properly have been stricken out, but if in this view it was error to deny the motion, it was harmless error. It would be unreasonable to believe that the trial judge could have been led astray in reaching his own conclusions as to the manner in which Dr. Kinyoun's car was driven by the argumentative testimony of the witness. The principal fact for the court to determine was whether Dr. Kinyoun and Mrs. Kinyoun were telling the truth when they testified that they had been driving on the right side of the street before they got into a position of danger. If the trial judge believed them it would necessarily have followed that Dr. Kinyoun did turn to the left when he realized his danger. If he had not believed their testimony he surely would not have been influenced by the doctor's expression of opinion or conclusion. Witnesses frequently volunteer opinions as to matters which are for the court to decide. With some witnesses, especially with professional men, it is often difficult to prevent this, but a trial judge who could not reach his own conclusions uninfluenced by such trivial digressions from the strict rules of evidence would have to be peculiarly inexperienced or susceptible. But we do not believe it was error to deny the motion to strike; the conflicting statements made by the witness bore upon the question of his credibility—a most important question. It was entirely proper for the court to consider his entire testimony, with his explanations, if any, of the conflicts therein, in order to determine what weight should be given to it. If upon a consideration of his entire testimony the court had believed him to be an untruthful witness, the result would have been favorable to appellants. From an examination of the record it appears to us that the court could not very well have stricken out the mere conclusion stated by the witness without striking out all of the testimony which led up to it and

which was in conflict with statements made in the deposition. The witness was entitled to explain or correct his testimony as first given and we can see no prejudice to the case of appellants in the manner in which the court allowed him to do so.

[2, 3] It must be obvious from what we have said that the court would have been fully justified in believing that Dr. Kinyoun's car was momentarily on the wrong side of the street and that it was being turned back onto the right side just as the collision occurred. If this was true, the violation of the letter of the law which required it to be driven on the right-hand side would not have been negligence as a matter of law. Finney v. Wierman, 1942, 52 Cal.App.2d 282, 286, 126 P.2d 143. As a matter of fact it might prove the exact opposite of negligence. The trial court's determination that the Kinyoun car was not driven negligently is not unsupported by the evidence and we must accept it as conclusive.

While we have discussed only the claim of negligence arising from the fact that the car was for a time on the wrong side of the road, we have noticed that there are some other theories of possible negligence suggested in the briefs, but are of the opinion that they do not merit particular attention.

There is another feature of the case which we deem important, although it has not received the attention of counsel. The court found in the Kinyoun case that the accident was caused solely and proximately by the negligence of Gerhart and that no negligent act or omission of Dr. Kinyoun caused or contributed thereto.

[4, 5] In the Heslop case it was found that the accident was not caused by any negligent act or omission of Dr. Kinyoun but that the negligence of Gerhart was the sole and proximate cause of the accident. These findings, in our opinion, are broad enough to cover the issue of proximate cause as well as the issue of Dr. Kinyoun's negligence. They mean that the manner in which Dr. Kinyoun's car was driven did not cause or contribute to the happening of the accident. We should construe the findings broadly in support of the judgment and if we do construe them as being favorable to Dr. Kinyoun on the issue of proximate cause, we find that they are clearly supported by the evidence. Let us suppose for the sake of argument that Dr. Kinyoun's car was being driven so that it extended 2 feet onto the south half of the road and that Dr. Kinyoun was thereby guilty of violation of section 525 of the Vehicle Code and of negligence. Still, upon the facts which were clearly established such negligence would not appear to have been a cause of the accident, proximate or otherwise. The collision did not occur because Dr. Kinyoun was on the wrong side of the street but because Gerhart was on the wrong side. It would have been very different if Gerhart's car had been struck on its own side of the street. Gerhart did not see the Kinyoun car until he was within about 30 feet of it, and obviously then he was on the wrong side of the street because he had failed to follow the curve. The collision would have occurred just the same if Dr. Kinyoun's car had been 2 or more feet to the north; in fact, Dr. Kinyoun's car would then have been somewhat more directly ahead of the Gerhart car. If the trial judge believed, as we think he surely did, that when the Gerhart car was turned directly toward Dr. Kinyoun's car the latter had no chance to escape a collision, Gerhart's negligence would have to be found to be the sole cause of the accident, and if the court had believed that the accident would have happened even though Dr. Kinyoun had been driving entirely on the north side of the street, his failure to so drive under the circumstances could not have been held to be a proximate cause of the accident. The court then very properly found that Gerhart's negligence was the sole proximate cause of the accident and that no act or omission of Dr. Kinyoun caused or contributed thereto. But the finding that Dr. Kinyoun was not negligent was well justified by the evidence. What we have said on the issue of proximate cause furnishes an additional reason why the judgment must be affirmed.

The judgments are affirmed.

PARKER WOOD, J., and SHAW, J. pro tem., concur.

58 Cal.App.2d 415

PEOPLE v. RODRIGUEZ.

Cr. 3646.

District Court of Appeal, Second District, Division 3, California.

April 28, 1943.

1. Criminal law ⇐684

Where a defendant has confessed, proof of the confession is a part of the case of the prosecution and it is duty of district attorney to offer it before resting his case, when the evidence is then available and there is no reason for not offering it in chief.

2. Criminal law ⇐683(1)

Where case of prosecution is closed and the defense is in, the remainder of the prosecution's case is limited to evidence in rebuttal of that produced by the defense and should be so limited by the court except where a proper showing is made for reopening the case in chief for the receipt of further evidence.

3. Criminal law ⇐684

The prosecution has no right to withhold a material part of its evidence which is admissible in chief for sole purpose of using it in rebuttal.

4. Criminal law ⇐412(1)

Evidence regarding statements of accused tending to show his guilt is admissible to establish the truth of facts stated.

5. Witnesses ⇐397

Evidence offered to show contradictory statements of a witness or to otherwise impeach him is received because it bears on the credibility of the witness, and not for purpose of proving truth of statements which are contradictory of the witness' sworn testimony.

6. Criminal law ⇐684

The practice of allowing district attorney to withhold a part of his case in chief and offer it after defense has closed is improper.

7. Criminal law ⇐517(1)

A confession of one charged with a crime cannot be used against him if it was not made voluntarily.

8. Criminal law ⇐520(1), 522(1)

The use of external means of pressure, whether by threats, intimidation, or the promise or holding out of the hope of immunity or reward or by any like means tending to induce the accused to admit guilt, is opposed to "public policy".

See Words and Phrases, Permanent Edition, for all other definitions of "Public Policy".

9. Criminal law ⇐633(1), 700

Both the district attorney and the court have an affirmative duty to use their respective authority to make certain that through no fault or omission on their part may a defendant be deprived of his guaranteed right to a legal, fair, and impartial trial.

10. Criminal law ⇐700

It is duty of district attorney not to make use of an alleged confession until he has satisfied himself through his own investigation that it was made voluntarily.

11. Criminal law ⇐517(3)

It is duty of court to require satisfactory proof of voluntary character of a confession before allowing it to be placed in evidence.

12. Criminal law ⇐1036(1)

The failure to make a timely and sufficient objection to confession on ground that there was no showing that it was voluntary did not preclude consideration of question of admissibility of confession in view of fact that a grave matter of public policy was involved.

13. Criminal law ⇐1030(2)

Where constitutional rights of an accused have been invaded and opportunity arises on appeal to undo the wrong, the failure to register an objection does not preclude court from granting proper relief.

14. Criminal law ⇐698(1)

A defendant can "waive" a constitutional right, but, where the alleged waiver is of right to exclude confession obtained by illegal means, a waiver arising from mistake and inadvertence cannot be accepted.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

15. Constitutional law ⇐266

One who has been convicted of a crime upon evidence which consists wholly or in substantial part of his confession which has been procured by officers by means of force

or violence, has been convicted without "due process of law".

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

16. Criminal law ⇐517(3), 1186(4)

Where defendant testified that he had been beaten by officers shortly after his arrest, that officer was questioning him in jail building at time of beating, and that he promised to confess to any crime if they would cease beating him, evidence of alleged confession to such officer was inadmissible without proof that it was made voluntarily notwithstanding evidence regarding the confession was offered in rebuttal by way of impeachment, and the fact that defendant denied having made the confession did not cure the error but use of confession under such circumstances resulted in a "miscarriage of justice" requiring reversal of conviction.

See Words and Phrases, Permanent Edition, for all other definitions of "Miscarriage of Justice".

17. Criminal law ⇐1186(4)

The phrase "miscarriage of justice" does not simply mean that a guilty man has escaped or that an innocent man has been convicted, but it is equally applicable to cases where the acquittal or the conviction has resulted from some form of trial in which the essential right of the people or of the defendant has been disregarded or denied.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Isidro E. Rodriguez was convicted of robbery which at time of sentence was reduced by court to grant theft from the person, and defendant appeals.

Reversed and remanded for retrial.

Ben Van Tress, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

SHINN, Acting Presiding Justice.

Defendant was tried by the court without a jury, convicted of robbery, which at the time of sentence was reduced by the court to grand theft from the person, was sentenced to the state prison, and appeals. He raises no question as to the sufficiency of the evidence to support the verdict. The conviction rests in part upon a confession of the defendant allegedly made to a police officer. Evidence of the confession was received without any effort to prove that it was made voluntarily, and in disregard of the defendant's testimony that he was beaten by police officers in an effort to make him confess. For this reason the judgment must be reversed.

Before discussing the use of the confession under these circumstances, we shall give attention to an irregularity in the presentation of the case of the People which should not be allowed to pass unnoticed, even though it may not of itself necessitate a reversal.

A brief statement of the case will suffice for an examination of the legal questions involved, if, indeed, they could be so denominated.

The prosecuting witness, Dellinger, frequently referred to in the evidence as "the old man," testified that after he and defendant, aged 21, had been drinking together at a "beer joint" on Valley Boulevard near the town of Puente, he undertook to drive the defendant to the latter's home; that as they were driving through the San Gabriel wash in brushy country, defendant asked that the car be stopped so he could alight, told him that he had a "bunch of glass" in his tires, asked him to get out and look at it, and attacked him with his fists, blacking his eyes, cutting his face and head, breaking his glasses and knocking him down and out; that defendant abstracted a wallet from his pocket, containing $200 and a "21-year life membership" card in the Elks Lodge, and disappeared in the brush; that the Elks card was never returned to him, but the following day a deputy sheriff returned to him $190.90, which had been found upon the person of the defendant when he was arrested.

Defendant's version of the occurrence was that he had been shooting dice with Dellinger during their drinking; that Dellinger started to drive him home; that they stopped in the wash in order to resume their dice game; that he won all of Dellinger's money; that the latter accused him of cheating and attacked him, and that he used upon Dellinger only the force necessary to defend himself against the attack. He testified that he won altogether from defendant about $90; that he had $120

when he left home that morning. Defendant, his mother and sister testified that he had received $100 from his mother in cash to deposit in bank, and defendant testified that this was the money that was taken from him by the officer. There was some evidence that while the parties were drinking, defendant had paid for drinks with a $20 bill. It appears that Dellinger was rather thoroughly intoxicated.

In the People's case in chief, one Bletcher, a deputy sheriff, testified that defendant had accompanied officers to the wash, identified the location as the one where the altercation had taken place, had directed a search for the wallet, had reached into a hole during the search but that the wallet had not been found. All of this took place after the officer had stated to defendant that it would do no one any harm if the Elks card were returned to Dellinger, that the card meant a lot to him and that Dellinger "wasn't going to harm nobody." The testimony was objected to upon the ground that defendant's statements under the circumstances would not have been voluntary, permission was requested to place defendant upon the stand to prove that any statements he made were involuntary; this permission was denied and the objection was overruled. Because of a more serious error, to be presently discussed, we find it unnecessary to consider whether defendant's statements upon the occasion of the visit to the wash amounted to a confession or, if they did, whether the previous statements of the officer to him were such as would have rendered involuntary any confession which they may have induced.

In the cross-examination of defendant he was asked whether he had not given to officer Story a complete account of having beaten and robbed Dellinger as the latter claimed, and he denied having made any such statements. After the defense had rested, officer Story was called and testified to a complete and detailed confession made by defendant shortly after he had been "booked" following his arrest.

Defendant had testified repeatedly that he had been beaten by the officers shortly after his arrest; that officer Story was questioning him in room 338 of the jail building at the time of the beating; that he promised to take the officers to the scene of the alleged robbery and to confess "to any crime in the United States" if they would cease beating him. He was asked by his counsel to name the other officers who were present at the beating, the District Attorney objected to the question and, although the court appears not to have ruled on the objection, the question was not answered. Defendant again denied having made any of the statements to which Story testified.

[1-6] The alleged confession to officer Story was not offered as a part of the People's case in chief. It was held back, to be offered in rebuttal and in the guise of impeachment of defendant after his denials upon cross-examination. Apparently both counsel and the court considered this to be a proper procedure. Not only that, but it appears to have been assumed that a confession elicited by way of impeachment was admissible without proof that it had been given voluntarily. The procedure was entirely wrong. If the defendant had confessed, proof of the confession was a part of the case of the People and it was the duty of the District Attorney to offer it before resting his case, when the testimony was then available and there was no reason for not offering it in chief. When the case of the People is closed and the defense is in, the remainder of the People's case is limited to evidence in rebuttal of that produced by the defense and should be so limited by the court, except where a proper showing is made for reopening the case in chief for the receipt of further evidence. The People have no right to withhold a material part of their evidence which could as well be used in their case in chief, for the sole purpose of using it in rebuttal. Evidence as to statements of the accused tending to show his guilt was admissible to establish the truth of the facts stated. Evidence offered to show contradictory statements of a witness or to otherwise impeach him is received because it bears upon the credibility of the witness and not for the purpose of proving the truth of the statements which are contradictory of the witness' sworn testimony. The alleged confession was offered to establish facts constituting guilt; the impeachment feature was incidental and comparatively unimportant. It was no more proper for the District Attorney to offer the evidence as rebuttal after defendant's denial of the alleged statements, under the pretense that it was offered to impeach the defendant, than it would have been to offer it in rebuttal if the defendant had not been questioned about it at all. It makes no difference here that the testi-

mony as to the confession, aside from being evidence of the fact of guilt, also tended to impeach the defendant. People v. Yeaton, 1888, 75 Cal. 415, 17 P. 544. The practice of allowing the District Attorney to withhold a part of his case in chief and to offer it after the defense has closed cannot be approved, but the obvious error in permitting that procedure does not appear to have been prejudicial in this instance and is not the vital one involved.

[7-11] The error which demands a reversal is that the defendant's conviction rests in part upon evidence of his confession which was received under circumstances which rendered it inadmissible. The principle that a confession of one charged with crime cannot be used against him if it was not made voluntarily is as firmly established and as jealously upheld by the courts as any rule or principle of criminal law or procedure. It is axiomatic that the use of external means of pressure, whether by threats, intimidation or the promise or holding out of the hope of immunity or reward or by any like means tending to induce the accused to admit guilt, is opposed to public policy. Such means of coercion or persuasion cast such doubt upon the voluntary nature of the confession as to condemn it altogether. Both the District Attorney and the court have an affirmative duty to so use their respective authority and power as to make certain that through no fault or omission on their part may a defendant be deprived of his guaranteed right to a legal, fair, and impartial trial. It is the duty of the District Attorney not to make use of an alleged confession until he has satisfied himself through his own investigation that it was made voluntarily. It is the duty of the court to require satisfactory proof of the voluntary character of a confession before allowing it to be placed in evidence. These principles are elementary. There is always an opportunity for an inquiry as to whether unlawful means have been employed to obtain a confession when it is sought to use it in court and whenever the voluntary nature of the alleged confession is subject to reasonable doubt, the matter should be made the subject of a fearless and thorough investigation by the District Attorney or, if he fails in his duty, by the court. It is within their power to do more toward suppressing the use of third-degree methods and all forms of brutality upon prisoners than all other agencies combined can do.

The testimony of the defendant, a young Mexican laborer, that he had been beaten by the officers during his interrogation and before he was taken to the scene of the alleged crime appears to have aroused no interest upon the part of the District Attorney or the court. In fact, the former by his objection disclosed that he thought it to be out of order to ascertain the names of the officers who administered the alleged beating. Neither officer Story nor any other witness was questioned as to the truth of defendant's testimony regarding the beatings, nor was any effort whatever made to prove that the alleged confession was voluntary.

Defendant's testimony as to mistreatment by the officers made so little impression upon the District Attorney that he was not even cross-examined upon the subject. Perhaps such complaints have become so frequent that it would be a great burden to investigate all of them; but if they are so frequent, may that not be because they are often true? This we cannot know, but we do know that the uncovering of a single case of the beating of a prisoner would compensate for many unsuccessful efforts in that direction.

[12-14] Counsel for defendant did not object to the testimony of officer Story as to the confession upon the ground that there was no showing that it was voluntary, but on the grounds that it was incompetent, irrelevant and immaterial and no foundation laid (for impeachment). The failure to make a timely and sufficient objection is of no moment where a grave matter of public policy is involved. Counsel for the defense do not bear the entire burden of protecting the constitutional rights of their client. Where those have been invaded, as they appear to have been here, and the opportunity arises on appeal to undo the wrong, the court cannot allow itself to be hampered by the failure of counsel to register an objection. Undoubtedly a defendant can waive a constitutional right, but where the alleged waiver is of the right to exclude a confession obtained by illegal means, we are not willing to accept less than an express waiver, at least not one arising from mistake and inadvertence.

In what we have to say as to the gravity of the failure to observe the rights of a defendant whose confession is used against him, it will be necessary to consider also whether the use of a confession which has been obtained by police officers through

illegal means is of itself a miscarriage of justice which requires a reversal of the conviction. In the early case of People v. Barric, 1874, 49 Cal. 342, in condemning the use of a confession induced by a statement made to the defendant by or in the presence of the sheriff, "It will be better for you to make a full disclosure," the court said (49 Cal. at page 345): "The rule is without exception that such a promise made by one in authority will exclude a confession. Public policy absolutely requires the rejection of confessions obtained by means of inducements held out by such persons."

In White v. Texas, 1940, 310 U.S. 530, 60 S.Ct. 1032, 1033, 84 L.Ed. 1342, it was held that the use of a confession obtained by force and fear, and "upon which the State's case substantially rests," was a deprivation of due process.

In Chambers v. Florida, 1940, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716, the court, in denouncing the use of a confession obtained by illegal means, said: (309 U.S. at page 241, 60 S.Ct. at page 479, 84 L.Ed. at page 724): "Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death. No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion."

In Brown v. Mississippi, 1936, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682, it was held that the use of a confession obtained by force and fear was a clear denial of due process. The court, speaking through Mr. Chief Justice Hughes, then said (297 U.S. at page 286, 56 S.Ct. at page 465, 80 L.Ed. at page 687): "It is in this view that the further contention of the State must be considered. That contention rests upon the failure of counsel for the accused, who had objected to the admissibility of the confessions, to move for their exclusion after they had been introduced and the fact of coercion had been proved. It is a contention which proceeds upon a misconception of the nature of petitioners' complaint. That complaint is not of the commission of mere error, but of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void. Moore v. Dempsey, [261 U.S. 86, 43 S.Ct. 265, 67 L.Ed. 543], supra. We are not concerned with a mere question of state practice, or whether counsel assigned to petitioners were competent or mistakenly assumed that their first objections were sufficient."

[15] The foregoing cases are authority for the statement that one who has been convicted of a crime upon evidence which consists wholly or in substantial part of his confession which has been procured by officers of the law by means of force or violence has been convicted without due process of law.

[16] Defendant was not questioned at all as to the circumstances or details of the alleged beatings and it cannot be determined to what extent, if at all, force was used upon the defendant by the officers or whether he was put in fear by their treatment to which he testified. The record is silent on the subject except for the testimony of the defendant and we do not see how the trial judge could have known more than is disclosed by the record. In summing up the case before finding defendant guilty, the judge said: "As far as the confessions are concerned, this man denies everything that he ever told these officers, anything which incriminated him or gave them any information as to the location of this purse or anything of the kind, so as far as the beatings, which he received, if he did receive them, they had no effect on him whatever to produce results." And yet if the officer was to be believed, defendant confessed to the crime at the time when, as he testified without contradiction, he was being subjected to beatings. Without any testimony from the defendant it would have been error to admit the confession. If his testimony was disbelieved, it was still error to admit it without affirmative proof that it was voluntary. If defendant was to be believed, then the confession testified to by officer Story was obtained illegally and was not admissible at all. The fact that defendant denied having made the confession does not cure or mitigate the error in allowing it to be used and has no bearing upon the questions of legality and public policy that are involved. White v. Texas, supra, 310 U.S. 530, 60 S.Ct. 1032, 84 L.Ed. 1342.

The uncertainty as to the facts surrounding the interrogation of defendant by the officers results from the failure of the District Attorney and of the court to in-

quire into the truth of defendant's charges. Had such inquiry been made, and had the confession then been received, we would have the benefit of the court's implied finding that defendant's testimony was untrue and there no doubt would be some evidence in the record tending to show that it was made voluntarily. But we have no such record.

[17] The question before us is not the one decided by the Supreme Court of the United States in the cases cited above, namely, whether defendant was denied due process. The confessions which had been used in those cases were clearly shown to have been extorted from the respective defendants. The evidence here does not go that far. But we are not in a position to say, and we think the trial court could not have said, from all that transpired at the trial, that defendant had not been so grievously mistreated by the officers as to render the use of a confession obtained thereby a denial of the constitutional right of due process. The case is one where the constitutional right of the defendant may have been violated and where it was the manifest duty of the trial court to determine whether there had been such violation. This brings us to the question whether the use of the confession under the circumstances resulted in a miscarriage of justice. We are definitely of the opinion that it did. The inquiry is not as to whether the guilt of the defendant was established but as to the methods by which the finding of guilt was reached. As was said by Mr. Presiding Justice Conrey in People v. Wilson, 1913, 23 Cal.App. 513, at 524, 138 P. 971, at 975: "The phrase 'miscarriage of justice' does not simply mean that a guilty man has escaped, or that an innocent man has been convicted. It is equally applicable to cases where the acquittal or the conviction has resulted from some form of trial in which the essential rights of the people or of the defendant were disregarded or denied. The right of the accused in a given case to a fair trial, conducted substantially according to law, is at the same time the right of all inhabitants of the country to protection against procedure which might at some time illegally deprive them of life or liberty. 'It is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure, in which the substantial rights belonging to defendants shall be respected.' Opinion written by Mr. Justice Sloss in People v. O'Bryan [165 Cal. 55,] 130 P. 1042."

The record before us illustrates how easily departure from established procedure may lead to the impairment of substantial rights.

We find particularly appropriate in this connection remarks of former Chief Justice Bleckley of the Supreme Court of Georgia, delivered to the Georgia Bar Association and printed in its annual report (1886) as follows: "Some meritorious cases, indeed many, are lost in passing through the justice of procedure; but they are all justly lost, provided the rules of procedure have been correctly applied to them. That a just debt is unrecognized, a just title defeated, or a guilty man acquitted, is no evidence that justice has not been done by the Court or the jury. It may be the highest evidence that justice has been done, for it is perfectly just not to enforce payment of a just debt, not to uphold a just title, not to convict a guilty man, if the debt, or the title, or the guilt be not verified. It is unjust to do justice by doing injustice. A just discovery cannot be made by an unjust search. An end not attainable by just means is not attainable at all; ethically, it is an impossible end. Courts cannot do justice of substance except by and through justice of procedure. They must not reach justice of substance by violating justice of procedure. They must realize both, if they can, but if either has to fail, it must be justice of substance, for without justice of procedure Courts cannot know, nor be made to know, what justice of substance is, or which party ought to prevail. As well might a man put out his eyes in order to see better, as for a Court to stray from justice of procedure in order to administer justice of substance."

It cannot be doubted for a moment that a conviction which rests in substantial part upon the use of a confession obtained illegally by police officers is a miscarriage of justice. A conviction also results in a miscarriage of justice where a defendant's alleged confession is used against him without any evidence to prove that it was made voluntarily, where the defendant has testified without contradiction that he was beaten by police officers during his interrogation and where the District Attorney and the court have made no inquiry as to the truth of the defendant's charges or as to the circumstances under which or the

means by which the confession was obtained.

The judgment and order are reversed, and the cause is remanded for retrial.

PARKER WOOD, J., and SHAW, Justice pro tem., concur.



58 Cal.App.2d 315

BONFILIO v. GANGER et al.

Civ. 6926.

District Court of Appeal, Third District, California.

April 21, 1943.

1. Appeal and error ⇐529(2)

Affidavits presented at hearing to set aside default judgment were not part of "judgment roll". Code Civ.Proc. § 670.

See Words and Phrases, Permanent Edition, for all other definitions of "Judgment Roll".

2. Appeal and error ⇐616(1)

Trial judge is only one authorized to authenticate the pleadings, proceedings and documents used on hearing before him.

3. Appeal and error ⇐653(1)

Appellant's motion to withdraw transcript, which had been certified by clerk rather than by trial court, in order to procure trial court's certificate, was granted in interest of justice, where made before respondents' motion to affirm order from which appeal was taken, was made. Code Civ.Proc. § 953a.

4. Appeal and error ⇐653(1)

An appellate court having jurisdiction of a record may properly authorize temporary withdrawal thereof at any time during pendency of appeal for purpose of correction or amendment in conformity with appellate court's direction.

5. Appeal and error ⇐653(1)

An appellate court will disregard technical objections to temporary withdrawal of record for purposes of correction or amendment, and will look with favor on the making of such amendments as will enable it to dispose of appeal on the merits.

Suit by Anthony Bonfilio against Sam J. Ganger and others to enjoin defendants from dumping sewage on plaintiff's property, wherein a default judgment was rendered in favor of the plaintiff. From an order setting aside judgment and default, the plaintiff appeals, and the plaintiff moves to withdraw the transcript and the defendants move that order from which appeal is taken be affirmed.

Plaintiff's motion granted, and defendants' motion denied.

Joseph H. Huberty, of San Andreas, for appellant.

Virgil M. Airola, of San Andreas, for respondents.

THOMPSON, Justice.

A motion to withdraw the transcript on appeal, for the purpose of procuring the certificate of the trial judge, was made to this court. The respondents subsequently filed notice of motion that the order from which the appeal is taken be affirmed for lack of record showing error. This court reserved its rulings on the motions which were submitted for consideration.

October 31, 1939, the plaintiff filed a suit for injunctive relief against the defendants to prevent the dumping of sewage on his property in Calaveras County. The defendants were served with summons. Pending an effort on the part of the citizens of the town of Valley Springs, adjacent to which the plaintiff's property is located, to create a sanitary district pursuant to law, from the organization of which it was anticipated the alleged nuisance would be abated, the time for the appearance of the defendants was repeatedly extended. Finally the defendants were urged to and did file a demurrer to the complaint on April 25, 1941. The demurrer was overruled and the defendants were granted ten days in which to answer. They failed to answer within that time. After notice and upon demand, the default of the defendants was duly entered. Judgment by default was rendered October 23, 1941. On motion of the defendants, the judgment and default were vacated and set aside pursuant to section 473 of the Code of Civil Procedure, on the ground of mis-

take and excusable neglect. That motion was presented on affidavits of the respective parties. From the order setting aside the judgment and default, the plaintiff has appealed. It is contended the granting of that motion constituted an abuse of discretion on the part of the trial judge.

The transcript on appeal was prepared under section 953a of the Code of Civil Procedure. It contains some of the pleadings and proceedings on motion to set aside the judgment, together with the affidavits presented at that hearing. The documents and proceedings contained in the transcript are certified by the clerk to be "full, true and correct" copies of the originals. The transcript contains no certificate of the trial judge. For that reason the respondents have moved to affirm the order.

[1, 2] The transcript is defective. The affidavits are no part of the judgment roll. § 670, Code Civ.Proc.; Drummond v. Drummond, 39 Cal.App.2d 418, 422, 103 P.2d 217. It has frequently been held the judge of the trial court is the only one authorized to authenticate "the pleadings, proceedings and documents used upon a hearing before him." Sutliff v. Dempsey, 5 Cal.App.2d 246, 42 P.2d 677.

[3-5] The appellant's motion to withdraw the transcript to have it properly certified was filed in this court prior to respondents' motion to affirm the order from which the appeal is taken. We are of the opinion the appellant's motion to withdraw the transcript to procure the judge's certificate should be granted, in the interest of justice. In the case of Union Oil Co. of Cal. v. Basalt Rock Co., Inc., 28 Cal.App.2d 87, 81 P.2d 977, it was held that a motion to withdraw the transcript on appeal to procure the certificate of the trial judge, under circumstances similar to those which are involved in this case, should be granted. The court said:

"As held in several recent cases, an appellate court having jurisdiction of a record may properly authorize the temporary withdrawal thereof at any time during the pendency of the appeal for the purpose of correction or amendment in conformity with the direction of the appellate court; and to that end that it will disregard technical objections and look with favor upon the making of such amendments as will enable it to dispose of the appeal on the merits."

Several cases are cited in support of the preceding statement of law.

On the authority last cited the motion to withdraw the transcript on appeal for the purpose of procuring the certificate of the trial judge is granted. The motion to affirm the order is therefore denied.

ADAMS, P. J., and PEEK, J., concurred.

58 Cal.App.2d 262

PACIFIC EMPLOYERS INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 6893.

District Court of Appeal, Third District, California.

April 19, 1943.

Hearing Denied June 17, 1943.

1. Workmen's compensation ⇐1794

The Industrial Accident Commission is authorized by statute to grant a rehearing and to rescind, alter or amend its original order, decision or award. St.1937, pp. 302, 304, §§ 5900, 5908.

2. Workmen's compensation ⇐1794

Where Industrial Accident Commission entered an order discharging insurance carrier from liability for compensation to claimant on ground that carrier's assured was not an employer of claimant, but denied carrier's application for a lien against any award that might be made to secure refunding of amount paid by carrier for expenses incurred by claimant, and thereafter carrier filed a petition for rehearing based on general grounds, Commission had jurisdiction to grant the rehearing and to alter its former findings by holding carrier liable for compensation to claimant. St.1937, pp. 302, 304, §§ 5900, 5908.

3. Workmen's compensation ⇐1461

Evidence supported finding that compensation claimant seeking to recover for injuries sustained when loading timber was an "employee" of insurance carrier's assured at time of accident, so as to render carrier liable for compensation, as against contention that claimant was an employee of an independent contractor engaged in

logging timber on assured's land pursuant to a contract with assured.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee".

4. Workmen's compensation ⇐201

Where facts support finding of a joint hiring of a workman by two or more employers, each employer becomes liable for compensation incurred as result of injuries sustained by workman in course of his employment.

5. Evidence ⇐450(6)

When a contract is uncertain in its terms, oral evidence may be received of facts surrounding performance of work to determine whether workman is an employee of an independent contractor only, or whether workman is subject to control and is an employee of the other contracting party.

6. Evidence ⇐450(6)

Even if logging contract entered into between assured company and another for logging timber on company's land had been entered into prior to injury of compensation claimant while loading timber, where contract contained provision that logging should be carried on in accordance with company's instructions, oral evidence was admissible for purpose of determining whether claimant was employed by the company, so as to render company's insurance carrier liable for compensation, or whether claimant was employed by an independent contractor.

Proceeding on a writ of certiorari by Pacific Employers Insurance Company to review an award of the Industrial Accident Commission awarding compensation in favor of Harry E. Sowell for personal injuries.

Award affirmed.

W. N. Mullen, of San Francisco, for petitioner.

Everett A. Corten, Dan Murphy, Jr., and George C. Faulkner, all of San Francisco, for respondents.

THOMPSON, Justice.

By means of certiorari the Pacific Employers Insurance Company seeks to cancel an award of compensation in favor of Harry E. Sowell for injuries received, on the theory that he was not an employee of Walker-Hovey Company, Inc., the petitioner's assured. The determination of this petition depends almost entirely upon the question as to whether there is substantial evidence to support the commission's finding that the workman was an employee of the assured company at the time of the accident.

Walker-Hovey Company, Inc., owned 460 acres of timber land in Modoc County, California. It contracted in writing with Kesterson Lumber Corporation of Klamath Falls, Oregon, to sell a large quantity of lumber at $12 per thousand feet, to be cut and delivered at the rate of 200,000 feet per working day. The contract provided that:

"Either party may terminate further deliveries under the terms of this contract by giving the other party one week's notice in writing."

The petitioner, Pacific Employers Insurance Company was the insurer of the Walker-Hovey Company, which had a large number of workmen employed. In September, 1939, the last mentioned company contracted with Martin Stoehsler to log and cut the timber. The Walker-Hovey Company did not have the necessary equipment with which to carry on the enterprise. Stoehsler told Charles Hovey, who represented the owner of the timber, that he did not have experienced loggers or the required men to do the work. He also told Mr. Hovey that he carried no workman's compensation insurance, and did not then have the money with which to purchase a policy. He testified that the Walker-Hovey Company agreed to carry on its insurance list all men employed by Stoehsler for the month of September, 1939. Mr. Hovey told Stoehsler that William J. Sowell owned some logging equipment and advised him to rent it. It consisted of a log-loading machine, called a jammer, a bulldozer and a "cat." The loading machine was held in a machine shop in Klamath Falls for payment of repairs in a sum amounting to $2,250. It was agreed that Stoehsler would rent the bulldozer and the "cat" for $20 per day, and that Sowell would rent the log loading machine and personally operate it for forty cents per thousand feet of lumber handled. The machinery was moved to the lumber camp. The Walker-Hovey Company then had a number of its employees working in that camp in preparation for the logging enterprise. Richard H. Browne was acting as its representative

and manager in that camp. Kenneth Ross, who was the company's local boss of workmen, was engaged in constructing a log dock for several days following September 21st.

Martin Stoehsler did not commence operations under his logging contract until September 18, 1939. After William Sowell rented his equipment and agreed to work for Stoehsler he communicated with his brother, Harry E. Sowell, the claimant, telling him he could get a job in that lumber camp. Harry and his son Reuben immediately went to the camp, but did not at once go to work. September 21st he was contacted by Walker-Hovey Company's local boss, Kenneth Ross, for whom he worked three days helping to build the dock. The company paid him for that service. Regarding his general employment he said, "I was supposed to have the job loading. Q. Did you know for whom? A. I understood Hovey and Walker. * * * That is what he told me when he called me, Stoehsler was the boss." Following the completion of the dock upon which he worked for three days, he was employed for only two additional days as loader, when he was struck by a log and seriously injured. He said that on September 26th, "A log hit me in the back, knocked me up agin the bunk of the truck. [It struck me] in the back, back of the shoulders, put my chest here up agin the bunk of the truck." As a result of those injuries Harry Sowell was disabled for two and a half years.

A claim for compensation was filed with the Industrial Accident Commission against the Walker-Hovey Company, Martin Stoehsler and the Pacific Employers Insurance Company. After hearing findings were adopted January 29, 1941, relieving from liability the Walker-Hovey Company and Martin Stoehsler on the ground that they were not employers of the workman. An award was however made against William Sowell as the employer of his brother Harry E. Sowell. The Pacific Employers Insurance Company was discharged from liability.

At the first hearing it appeared that the insurance company had paid the sum of $1,145 for expenses incurred by the claimant on account of his injuries sustained in the accident, for the refunding of which sum that company asked for a lien against any award which might be made. This demand for a lien was denied. Because the application for a lien was denied, the Pacific Employers Insurance Company petitioned for a rehearing upon several grounds, including insufficiency of the evidence. William Sowell also asked for a rehearing. Both petitions were granted.

Upon rehearing the commission adopted findings determining that Harry E. Sowell was injured on September 26, 1939, in the course of his joint employment, by Walker-Hovey Company, Inc., Martin Stoehsler and William Sowell, and each of them; that the Pacific Employers Insurance Company was then the insurance carrier of Walker-Hovey Company, and that the other employers were not insured. It was found that the injuries sustained by the claimant caused temporary total disability entitling him to compensation in the sum of $25 per week, and that the employers were entitled to credit for all sums previously paid on that account. An award of $25 per week was thereupon granted to the claimant from October 4, 1939, "until the termination of disability or the further order of this Commission," against Pacific Employers Insurance Company, Martin Stoehsler and William Sowell, together with $400 attorney's fees. The insurance company's demand for a lien for the refunding of said sum of $1,145 was denied. This petition for a writ of certiorari was then filed in this court.

The petitioner contends that the Pacific Employers Insurance Company was discharged from liability by the commission in its findings which were originally adopted, and that jurisdiction was therefore lost to modify those findings upon rehearing since the insurance company merely asked for a rehearing to grant its petition for a lien to reimburse its payment to the claimant of $1,145, alleged to have been made under a mistake of the law and the facts of this case.

February 14, 1941, the Pacific Employers Insurance Company filed a petition for rehearing based on general grounds, and not for the mere purpose of obtaining a lien. It states in part:

"This petition for rehearing is based on the following grounds, to wit:

"I. That the evidence does not justify the findings of fact;

"II. That the findings of fact do not support the award;

"III. That the award is unreasonable;

"IV. That the commission acted without and in excess of its powers."

On February 20, 1941, William Sowell also filed a separate petition for rehearing on similar grounds.

Both petitions were granted, and a formal rehearing was granted.

[1] The commission is authorized to grant a rehearing and to rescind, alter or amend its original order, decision or award. §§ 5900, 5908, Labor Code, St.1937, pp. 302, 304; Great Western Power Co. v. Industrial Acc. Comm., 191 Cal. 724, 218 P. 1009, 1011. In the case last cited it is said: "The petitioner made a general application for a rehearing, on the grounds already enumerated, and without in any way limiting the issues raised by such request. Under such an application the whole subject-matter was reopened for further consideration and determination, and the issues thus raised were as broad as those raised on the original application for compensation. Under subdivision (e) of section 64 of the Workmen's Compensation Act [now section 906 of the Labor Code] the Commission has broad powers in the matter of rehearings. Pruitt v. Industrial Acc. Comm., [189 Cal. 459] 209 P. 31. If it were of the opinion, as it apparently was, that the original award was unjust as first made, it had plenary power to modify it. Section 64(f) of the act [now section 5908 of the Labor Code] so provides."

[2] We are of the opinion the commission had jurisdiction under the petitions which were filed in this case to grant the rehearing and to alter its former findings by holding the insurance company liable as the insurer of the Walker-Hovey Company.

The important issue to be determined on this petition for certiorari is whether there is substantial evidence to support the last findings of the commission determining that the claimant, Harry E. Sowell, was injured in the course of his employment by Walker-Hovey Company, Inc., Martin Stoehsler and William Sowell, and each of them. Since the last mentioned individuals were not insured at the time of the accident, to hold this petitioner liable it becomes necessary to find there is substantial evidence to support the finding that the relationship of employer and employee existed between the Walker-Hovey Company and the claimant at the time of the accident.

[3] After a careful examination of the record we are persuaded there is adequate evidence to support the last findings of the commission in that regard.

There is evidence that the contract for cutting timber, between the Walker-Hovey Company and Stoehsler, was not executed until September 28, 1939, two days after the accident occurred; that the Walker-Hovey Company kept a crew of its own employees at the camp until after the accident occurred; that the work to that time, at least, was conducted under the supervision, management and control of its representative Richard H. Browne; and Kenneth Ross as local boss; that the preparation for the logging enterprise was conducted under the supervision and control of the company which retained and exercised the right to direct the work in all essential particulars including the hiring, direction and dismissal of the workmen; that a policy of compensation insurance was not issued to Martin Stoehsler until October 25, 1939, about one month after the accident occurred; that the Walker-Hovey Company agreed to and did carry insurance on all workmen for a period of one month after the work began; that the company paid the wages of the claimant to the time of his accident, and paid the wages of numerous other workmen upon statements rendered by Martin Stoehsler of services performed; that the company's representatives, Browne and Ross, employed the claimant, Harry E. Sowell, to work for a period of several days before the accident occurred on a log dock which it was constructing in that camp; that after the accident occurred Mr. Browne directed a report to be filed in which the claimant was listed as an employee of the company, and that the insurance company paid the claimant on account of his expenses incident to his employment and injuries the sum of $1,145. It is true that the insurance company asserts that money was paid by reason of a mistake as to the facts.

In spite of the fact that Walker-Hovey Company executed, after the accident occurred, a contract with Martin Stoehsler to cut the timber, the record contains evidence to indicate that the lumber company retained and exercised authority to superintend and control the manner in which the work was to be performed and to employ or discharge the men engaged in that enterprise. Mr. Stoehsler testified to that fact. He said Mr. Browne was on the job every day and that he was the manager and the boss and that he had the authority to direct the manner of performance of the work and to hire or fire the workmen. The following evidence supports that statement.

Mr. Stoehsler testified in that regard: "Who could tell you to stop? A. Mr. Browne. Q. Could he tell you to stop at any time? A. Yes. * * * He was there a number of times. * * * Practically every day." One day when Stoehsler was leaving the camp to go to Klamath Falls on business, Browne met him and ordered him to "get back up there" on the job. Stoehsler promptly returned, admitting that he was required to obey the orders of Mr. Browne. He said in that regard: "Q. In other words you obeyed his orders? A. Yes, he was the manager there."

On another occasion when a wreck occurred, Browne ordered Stoehsler to clear the wreck, and he did so without protest.

The evidence also shows that Mr. Browne assumed the authority to employ, direct and discharge the workmen. On one occasion Browne criticised the fact that Stoehsler's men were cutting the logs too close to the ground so as to retain deteriorated or rotted butts. Browne discharged four men for doing so, without consulting Stoehsler, who, when asked if he approved of those dismissals, replied, "I didn't have no say of it." At another time when Stoehsler secured some men to work in the felling of trees, Mr. Browne refused to let them go to work. Stoehsler testified regarding that incident, Browne "did not even let them come up" to go to work. Again when a timekeeper by the name of Stuart W. Patty was employed for Stoehsler's job, he was instructed by Browne regarding the manner of performing his work and the form and contents of reports he was required to make. Stoehsler did not pretend to direct or instruct him. Mr. Patty testified in that regard:

"I talked it over with Mr. Browne. Q. Then the only one that told you about this * * * was Mr. Browne. * * * A. I believe I followed his instructions. Q. Did you ask Mr. Stoehsler about it before at any time? A. No, sir. I did it on my own. Q. Just as Mr. Browne told you? A. Yes, sir."

The record discloses many other incidents of a similar nature, which, in our judgment, sufficiently support the findings and judgment of the commission, holding that the relationship of employer and employee existed between the Walker-Hovey Company and Harry Sowell at the time of his accident.

[4] The commission held that the Walker-Hovey Company, Stoehsler and William Sowell were joint employers of the claimant, Harry Sowell. Where the facts support the finding of a joint hiring of a workman by two or more employers, each employer becomes liable for compensation incurred as a result of injuries sustained by the workman in the course of his employment. New York Indemnity Co. v. Industrial Acc. Comm., 126 Cal.App. 37, 14 P.2d 160; Standard Acc. Ins. Co. v. Industrial Acc. Comm., 123 Cal.App. 443, 11 P.2d 401; Ragos v. Industrial Acc. Comm., 83 Cal.App. 313, 256 P. 487.

[5] In the present proceeding we are of the opinion the evidence sustains the finding that the claimant, Harry Sowell, was an employee of the Walker-Hovey Company at the time of his accident, in spite of the fact that the timber contract between the lumber company and Stoehsler was actually executed a few days later. When a contract is indefinite or uncertain in its terms, oral evidence may be received of the facts and circumstances surrounding the performance of the work to determine whether the injured workman is an employee of an independent contractor only, or whether he is subject to the control and is an employee of the other contracting party. Carlson v. Industrial Acc. Comm., 213 Cal. 287, 2 P.2d 151; S. A. Gerrard Co. v. Industrial Acc. Comm., 17 Cal.2d 411, 110 P.2d 377.

[6] In the present proceeding the contract which was signed two days after the accident occurred, provides that:

"Logging shall be carried on * * * in accordance with the company's instructions."

Assuming that the contract had been agreed upon previous to its actual execution, we are of the opinion it contained sufficient uncertainty to justify the admission of oral evidence of facts and circumstances for the purpose of determining whether the claimant was employed by an independent contractor or by the Walker-Hovey Company.

For the foregoing reasons the award is affirmed.

PEEK, J., and ADAMS, P. J., concurred.

58 Cal.App.2d 232

HAWLEY v. JOHNSON, State Treasurer.

Civ. 12433.

District Court of Appeal, First District, Division 2, California.

April 19, 1943.

1. Licenses ⇐34

In action by automobile dealer to recover sales taxes paid under protest, evidence sustained finding that dealer and purchasers of new automobiles when each sale was made fixed the valuation of used automobiles turned in upon the purchase, authorizing assessments based on such valuations notwithstanding that they generally exceeded the appraised values of the used automobiles. Gen.Laws 1937, Act 8493, § 2(f).

2. Licenses ⇐29

Where automobile dealer and his customers fixed values of used automobiles turned in as part of the purchase price of new automobiles, and such agreed value was made up of an appraised value and an amount added thereto as the result of negotiation between the parties, the full turn-in value of the used automobiles was subject to sales tax as "gross receipts" and the difference between the appraised values of the used automobiles and their turn-in values was not a "cash discount" excluded from the statutory definition of "gross receipts". Gen.Laws 1937, Act 8493, § 2(f).

See Words and Phrases, Permanent Edition, for all other definitions of "Cash Discount" and "Gross Receipts".

3. Licenses ⇐15(1)

The purpose of the Use Tax Act is to supplement the Sales Tax Act. Gen.Laws 1937, Act 8493, § 2(f); Act 8495a, §§ 2(b), 4(a).

4. Licenses ⇐15(1)

The tax levied by the Use Tax Act is not imposed on the ownership of property as such and does not apply to use of property to be resold. Gen.Laws 1937, Act 8495a, §§ 2(b), 4(a).

5. Licenses ⇐15(1)

Where automobile dealer selected about 3 per cent. of its new automobiles for use as demonstrators to stimulate sale of all automobiles on hand by affording prospective customers an opportunity to test their performance and such demonstrators were ultimately resold at lower figures than similar unused automobiles and sales tax was paid upon their sale, use of such automobiles was for the purpose of "sale in the regular course of business" and was not subject to use taxation. Gen.Laws 1937, Act 8493, § 2(f); Act 8495a, §§ 2(b), 4(a).

See Words and Phrases, Permanent Edition, for all other definitions of "Sale in the Regular Course of Business".

6. Licenses ⇐15(1)

Where goods displayed in a show window become faded or soiled decreasing the resale price, and phonographs and radios become shopworn by being played for customers, and goods sent upon approval are returned somewhat depreciated and their full sale price is refunded, such use of such goods is not subject to use taxation so long as the depreciation in sale value is a reasonable incident of the effort to market the goods. Gen.Laws 1937, Act 8495a, §§ 2(b), 4(a).

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Stuart M. Hawley, as trustee, etc., against Charles G. Johnson, as State Treasurer, etc., to recover sales and use taxes paid under protest. Judgment for plaintiff for the use tax and for defendant on the sales tax, and each party appeals as to the unfavorable portion of the judgment.

Affirmed.

Bronson, Bronson & McKinnon, of San Francisco, for plaintiff and appellant.

Earl Warren, Robert W. Kenny, Attys. Gen., and Adrian A. Kragen, Deputy Atty. Gen., for defendant and appellant.

DOOLING, Justice pro tem.

Plaintiff sued to recover sales taxes and use taxes paid under protest. The court gave judgment for plaintiff for the use tax and for defendant on the sales tax, and an appeal is here presented by each party as to the portion of the judgment unfavorable to that party. The two appeals present distinct questions and will be separately dealt with.

Plaintiff's Appeal.

Plaintiff was engaged in the retail sale of automobiles. When a used car was

turned in to plaintiff as part payment on a new automobile the sales invoice or contract showed the sale price of the new automobiles, the amount of cash paid or to be paid and the agreed value at which the used car was taken in. This agreed turn-in value was generally in excess of the appraised value of the used car. The difference between the appraised value and the turn-in value was entered in the books of the plaintiff as an "overallowance," but on the sales slip or contract received or signed by the customer no such notation appeared and the full turn-in price agreed upon was set out in a single item. The State Board of Equalization ruled that the full turn-in value was taxable as a part of the selling price and the plaintiff because of this ruling and to protect itself collected such tax from its customers but paid the amount attributable to overallowances under protest.

The trial court found "that the plaintiff and the individual purchaser of new automobiles fixed by agreement the valuation of the considerations received by plaintiff at the time that each sale was made." As a conclusion of law the court found "that the assessment of the Board of Equalization based on said valuation was legal and proper."

Plaintiff contends 1. That the finding above quoted is not supported by the evidence and 2. That in any event the sales tax should be based on the appraised or market value of the used automobiles turned in, and that the tax on the so-called overallowance was illegal.

[1] The record contains evidence from plaintiff's own case supporting the finding attacked. The witness Hawley testified:

"Well, I will start in with a new car and you assume a theoretical selling price of $1000 on which a customer turns in a used car. * * * We will assume that that used car which is appraised at $400. At that point the sales department comes in and, as a matter of negotiation or horse trading, if you want to put it that way, which the automobile business has developed into, a deal is made where the customer pays his car and $500. And that is the normal deal. That is a car is sold for your car and so much money. * * *

"Q. Well why don't you sell at an actual cash discount? Why go through all this process of alleged overallowance on used cars? A. Because we are forced to an account of horse trading. So, what you would do—

"Q. In other words you are trying to fool the public on what they are actually getting, is that right? A. Absolutely, and every other dealer is, too. * * *

"Q. In other words, you take it on the other side. You say you allow more on the used car rather than giving a discount on the selling price, is that it? A. It is the element of least resistance. * * * In practically every case the conclusion of the sale comes down to one question only, 'My car and how much money?'"

This evidence clearly supports the finding that the seller and purchaser fixed the value of the car turned in by agreement.

The question remains whether, where the parties by agreement fix the value of property exchanged as a part of the purchase price of other property, it is proper under our Retail Sales Tax Act to collect a tax based on such agreed value, where such value is made up of an appraised value and an amount added to the appraised value as a result of negotiation or "horse trading" between the parties.

The Sales Tax Act, Stats.1933, p. 2599; Deering's Gen.Laws, 1937 Act 8493, imposes a tax on "gross receipts." Gross receipts are defined in section 2(f) of the act:

" 'Gross receipts' means the total amount of the sale * * * price, * * * of the retail sales of retailers, * * * valued in money, whether received in money or otherwise, including all receipts, cash, credits and property of any kind or nature, * * * provided, however, that cash discounts allowed and taken on sales shall not be included * * *.

"For the purpose of this act the total amount of the sale price above mentioned shall be deemed to be the amount received exclusive of the tax hereby imposed * * *."

The precise question was passed upon by the Supreme Court of Michigan under a statute very similar in language in Montgomery Ward & Co. v. Fry, 277 Mich. 260, 269 N.W. 166, at page 170, where that court said:

"Count 5 seeks computation of the sales tax in case of sales at retail, partly in cash and partly in used merchandise, upon the sum of money paid and the actual market value, and not the credit arbitrarily allowed for secondhand articles.

"Plaintiff appeals from a holding that the gross proceeds of such a sale is the sum of money received, plus the amount allowed the purchaser for such used article.

"The gross proceeds of such a sale constitutes the price fixed at the sale, paid in money in part and secondhand articles accepted at an arbitrary figure by the seller. The loss, if any, in such transactions, as well as the profit, if any, is that of the plaintiff without any share therein by the state."

Similarly in State v. Hallenberg-Wagner Motor Co., 341 Mo. 771, 108 S.W.2d 398, at page 401, the Supreme Court of Missouri construing a similar statute said: "The phrase 'whether received in money or otherwise' applies to the preceding portions of the definition of 'gross receipts.' The 'trade-in' automobile is a valuable consideration, capable of being valued in money, its value standing agreed between the parties, and is within the meaning of the term 'otherwise' in said definition."

In City of Philadelphia v. Heinel Motors, 142 Pa.Super. 493, 16 A.2d 761, at pages 763, 764, the Pennsylvania Superior Court construing a sales tax ordinance of plaintiff city said: "The tax being a tax on the purchaser measured by the amount of the purchase, it is clear that the medium of payment agreed upon is immaterial. In other words, when the dealer in automobiles sells two new automobiles, each for the same price, accepting (a) cash from one customer for the automobile, and (b) personal property at an agreed valuation from another customer, either in complete or partial payment of the purchase price, both purchasers ought to pay the same amount of tax since they are buying identical merchandise and have agreed to pay the same price."

Plaintiff has cited no cases in point opposed to the conclusion expressed in the three opinions quoted from, that under a sales tax act similar in terms to our own the value in money of secondhand merchandise traded in as part of the purchase price is the "value standing agreed between the parties." Plaintiff argues that Montgomery Ward & Co. v. Fry, supra, was substantially overruled by the Michigan court in Standard Oil Co. v. State, 283 Mich. 85, 276 N.W. 908. There is no inconsistency between these cases. In the Standard Oil Co. case the court was dealing with cash discounts and quantity discounts and held no more than that in sales for money the amount of money actually paid pursuant to an agreement for a discount constituted the gross receipts for the purpose of measuring the tax. Novicki v. Department of Finance, 373 Ill. 342, 26 N.E.2d 130, and Stanolind Crude Oil Purchasing Co. v. Cornish, D.C., 16 F.Supp. 464, also relied on by plaintiff are even less in point. In the Novicki case the court held that a tavern keeper was liable for sales tax only on beer actually sold by him and that an assessment could not be levied arbitrarily on the basis of the amount of beer bought by him from the wholesaler, the tavern keeper having testified that some beer was lost over the glass, some in cleaning the coils daily and some given to customers as a free "beer wash" with other drinks. In the Stanolind case it was the uniform and well established custom to deduct 3 per cent from all oil sold on account of dirt and sediment. The court properly held in accordance with the settled practice that the tax should be based on the 97 per cent actually paid for.

[2] Plaintiff argues that the so-called overallowance is no different than a cash discount. It is to be observed that our statute expressly excludes cash discounts from the tax, but imposes the tax on payments in property "valued in money." The parties by bona fide agreement having valued the property in money, under the express terms of the statute have fixed the measure of the tax. To make market value rather than agreed value the measure would create almost insuperable administrative difficulties, since the taxing power would be compelled in every transaction to look behind the agreed value and ascertain the actual market value of the property traded in. In the give and take of the market place the value arrived at by the free negotiation of the parties may safely be relied upon to furnish a reasonable measure of the value in money of property traded in.

Defendant's Appeal.

About 3 per cent of the new automobiles received by plaintiff from the factory, after they arrived at its sales rooms, were selected for use as demonstrators. The purpose of such demonstrators is to stimulate and facilitate the sale of the cars on hand, including the demonstrators, by affording prospective customers an opportunity by driving, and riding in them, to practically test their performance. The demonstrators

are at all times held for resale and are ultimately resold, though at a lower figure than similar cars which have not been so used and, of course, upon their sale a sales tax is paid to the state. A use tax was collected from plaintiff on demonstrators and paid under protest. The trial court gave judgment to plaintiff for the recovery of the use tax so paid.

The Use Tax Act of 1935, Stats.1935, p. 1297; Deering's Gen. Laws, 1937, Act 8495a, under which the tax was collected provides in section 2(b): "'Use' means and includes the exercise of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include the sale of that property in the regular course of business."

Section 4(a) provides:

"The storage, use or other consumption in this State of the following tangible personal property is hereby specifically exempted from the tax imposed by this act:

"(a) Property, the gross receipts from the sale of which are required to be included in the measure of the tax imposed by Chapter 1020, Statutes of 1933, and any amendments made or which may be made thereto." I.e. The Retail Sales Tax Act.

[3, 4] The purpose of the Use Tax Act is to supplement the Sales Tax Act. Douglas Aircraft Co., Inc., v. Johnson, 13 Cal.2d 545, 549, 90 P.2d 572; Chicago Bridge & Iron Co. v. Johnson, 19 Cal.2d 162, 165, 119 P.2d 945. In the Douglas Aircraft Co. case our Supreme Court said at page 549, of 13 Cal.2d, at page 575 of 90 P.2d:

"It will be noted that when the use tax is considered in connection with the other two taxes mentioned, the legislature has provided a comprehensive taxing system applicable to the sale, use, storage or consumption of personal property. The three taxes are mutually exclusive, each taxing privileges not taxed by the other two."

Again at page 551, of 13 Cal.2d, at page 576 of 90 P.2d: "In the second place it is obvious, from a reading of the act, that the tax here levied is not imposed on the ownership of property as such. It does not apply to the use of property to be resold."

The Supreme Court of the United States in Southern Pacific Co. v. Gallagher, 306 U.S. 167, 171, 59 S.Ct. 389, 391, 83 L.Ed. 586, said: "As property covered by the sales tax is exempt under the use tax, all tangible personalty sold or utilized in California is taxed once for the support of the state government."

[5] We think that the learned trial judge correctly concluded that the use tax was improperly collected on so-called demonstrator automobiles, and that the use of such automobiles was for the purpose of sale in the regular course of business within the meaning of section 2(b) above quoted and also within the exemption of section 4(a).

[6] Plaintiff might have used all new automobiles in stock for demonstration purposes, in which event the sale price of all would have been somewhat decreased by such use. That it selected only 3 per cent of the cars on hand for that purpose can make no difference in principle. Goods displayed in a show window may become faded or soiled thus decreasing their resale price, phonographs and radios may become shopworn by being played for customers, goods sent upon approval may be returned somewhat depreciated and their full sale price refunded. Those are hazards of the trade incident to the effort to make sales and are not the character of use sought to be reached by the use tax. So long as the depreciation in sales value of the property held for sale is a reasonable incident of the effort to market the goods we are satisfied that the goods so used are not subject to the use tax provided by the Use Tax Act.

The judgment is affirmed, neither party to recover costs on appeal.

NOURSE, P. J., and SPENCE, J., concurred.

PENAAT v. TERWILLIGER et al.
Civ. 12362.

District Court of Appeal, First District, Division 2, California.

May 3, 1943.

Rehearing Denied June 2, 1943.

Hearing Granted July 1, 1943.

1. Taxation ⇐630

Under statute requiring publication of delinquent tax lists in newspaper of general circulation, amending statute requiring publication in newspaper or "supplement", tax sale made under publications of list in separately folded sections of newspapers, carrying name and trade-mark of newspapers at tops of pages but containing no news nor any other reading matter except that dealing exclusively with the list, was illegal as having been published in "supplements" to newspapers, though newspaper section containing notice of sale also contained map of world as filler. Pol.Code, § 3766.

See Words and Phrases, Permanent Edition, for all other definitions of "Supplement".

2. Taxation ⇐630

The word "supplement", as used in the statute prior to amendment in 1921 requiring publication of delinquent tax lists in newspaper of general circulation or supplement thereto means a separately folded or bound page or pages added to and distributed with newspaper and containing no printed matter which would otherwise appear in the newspaper except the list of delinquent taxes. Pol.Code, § 3766.

The word "supplement" means something added that supplies a deficiency, especially an addition to a publication, in a newspaper often a separate sheet; a part added to, or issued as a continuation of, a book or paper, to make good its deficiencies, correct its errors or provide special features not ordinarily included.

3. Appeal and error ⇐221

Where judgment in action by purchaser of tax title to realty against fee owner thereof to quiet title to the realty was for defendant but ordered defendant to pay a specified sum as taxes, penalties and interest to plaintiff, and ordered plaintiff to pay defendant a greater amount as costs, and plaintiff, on appeal, did not question the amount of the costs so allowed to defendant, judgment was not erroneous as quieting defendant's title without securing repayment of taxes, penalties and costs paid by plaintiff. Pol.Code, § 3766.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by Naomi J. Penaat against Clara Terwilliger and others to quiet title to realty. From a judgment for defendant Terwilliger, plaintiff appeals.

Affirmed.

Wm. H. Penaat, of San Francisco, for appellant.

Edmund J. Holl, of San Francisco, for respondent.

DOOLING, Justice pro tem.

Defendant was the owner of a city lot in San Mateo County upon which she failed to pay the 1934 county taxes. Plaintiff purchased the property at a tax sale in 1940. In an action brought by plaintiff to quiet her title the trial court found that the tax sale was illegal and entered judgment quieting defendant's title to the lot.

The delinquent tax list of San Mateo County was published in 1935 in a separately folded section of the Burlingame Advance Star. This section carried the name and trade-mark of the newspaper at the top of the page, but there was printed therein no news nor any other reading matter except that dealing exclusively with the delinquent tax list. The notice of sale of the lot in question was published in 1940 in a similar separately folded section of the San Mateo Times also devoted exclusively to the delinquent tax list, with no news or other reading matter except a map of the world which was put in as a "filler" on the last page.

The trial court found that these publications did not comply with section 3766 of the Political Code (now section 3356, Rev. and Tax Code, St. 1939, p. 1321). To point the question involved we quote the following from Clayton v. Schultz, 22 Cal.App.2d 72, 74, 70 P.2d 512, 513:

"Prior to 1921, section 3766 of the Political Code * * * of this state provided as follows: 'Manner of making publication. The publication must be made once a week for three successive weeks in some newspaper, or a supplement thereto, published in the county.'

"The foregoing section was amended in 1921 * * * to read as follows: 'Pub-

lication of delinquent tax lists. The publication must be made once a week for three successive weeks in some newspaper of general circulation published in the county.'

"Obviously it was the intention of the Legislature to eliminate publications of delinquent tax lists in supplements to a newspaper, and to confine the publications thereof to a regular or main issue of a newspaper of general circulation."

Appellant calls attention to the very general practice of newspapers of printing their regular issues in two or more separately folded sections, and argues that in view of such practice the separately folded delinquent tax lists in question were not supplements to the newspapers, but parts of the "regular or main issue" of such papers.

"Supplement" is defined in Funk & Wagnalls New Standard Dictionary of the English Language (1933) as: "Something added that supplies a deficiency; especially, an addition to a publication. In a newspaper it is often a separate sheet * * *."

In Webster's New International Dictionary, 2d Ed. 1935, we find the following: "Specif., a part added to, or issued as a continuation of, a book or paper, to make good its deficiencies, correct its errors, or provide special features not ordinarily included."

[1, 2] In seeking to determine the purpose of the legislature in eliminating the provision from § 3766, Pol.Code which had theretofore authorized the publication of the tax list in a supplement to a newspaper we are entitled to look to these definitions of the term in standard and recognized works on the subject. Tested by these definitions we are satisfied that the delinquent tax lists were published in supplements to the newspapers. The only reason for the publication and distribution of the entirely distinct sections in question was, in the language of Webster's to "provide special features not ordinarily included," i.e. the delinquent tax list, and to "make good its deficiencies" i.e. the omission of the delinquent tax list from the main section of the newspaper. It was "a part added to" the paper in each instance for those purposes and those alone by way, to quote Funk & Wagnalls, of "a separate sheet" or sheets. The newspaper in each instance was a complete newspaper without the section containing the delinquent tax list. The section containing this list added to the newspaper such list and nothing more. We can conceive of no meaning to be given to the word "supplement", eliminated from this code section in 1921, unless it means a separately folded or bound page or pages added to and distributed with the newspaper and containing no printed matter which would otherwise appear in the newspaper except the list of delinquent taxes. The use of the map of the world as a filler in the 1940 publication does not in our opinion change this result, but conceding that it might, the 1935 publication contained nothing at all but the tax list.

The cases and quotations from Corpus Juris cited by appellant are not in point. It may be conceded that normally provision for publication in a newspaper is satisfied by publication in a supplement thereto which is fully circulated as a part of the newspaper. But in view of the statutory history of § 3766, Pol.Code, it must be construed, as pointed out in Clayton v. Schultz, supra, as if it read "in a newspaper, and not in a supplement thereto."

The distinction is clearly recognized in Morton v. Horton, 189 N.Y. 398, 82 N.E. 429 and Whitney v. Bailey, 88 Minn. 247, 92 N.W. 974. In the Morton case the statute of New York provided that certain publications should be "in the body of the newspapers and not in a supplement" and others should be published in "two newspapers". Tax Law, Laws 1896, c. 908, §§ 120, 151. The court of appeals of New York held that the latter type of publication might be in supplements to the newspapers although the former clearly could not. In the Whitney case the law required the delinquent tax list to be published "in a designated newspaper, or partly in such paper and partly in a supplement issued therewith." [88 Minn. 247, 92 N. W. 975.] It further provided that the "forfeited list" should be appended to the delinquent list. The delinquent list "commenced in the newspaper, but it was concluded in the supplement, and then followed the forfeited list; all thereof being in the supplement." The Minnesota court held, under the peculiar language of their statute, that a portion of the delinquent list having been published in the main body of the newspaper the publication complied with the statutory requirement.

It may be said of these cases, and of all the cases on the subject which we have ex-

amined, that uniformly they proceed on the theory that the publication of tax lists on separately folded sheets constitutes publication in a supplement, the question involved in the cases generally being whether the publication in a supplement constitutes a publication in a newspaper within the meaning of the particular statute.

[3] Appellant complains that the judgment appealed from quiets defendant's title without securing the repayment of taxes, penalties and costs paid out by appellant. Holland v. Hotchkiss, 162 Cal. 366, 123 P. 258. There is nothing in the point. The judgment orders payment by respondent of $39.09 "taxes, costs, penalties and interest" to appellant. It gives judgment to respondent for $43.50 costs against appellant. The amount of costs is not questioned on this appeal. Since the costs exceed the amount which the judgment finds appellant entitled to be repaid she is fully protected by offsetting one against the other.

The judgment is affirmed.

NOURSE, P. J., and SPENCE, J., concur.



58 Cal.App.2d 390

In re PESSAGNO'S ESTATE.

PESSAGNO v. PLEITNER et al.

Civ. 12220.

District Court of Appeal, First District, Division 1, California.

April 28, 1943.

Rehearing Denied May 28, 1943.

Hearing Denied June 24, 1943.

1. Wills ⇐386

In reviewing the sufficiency of the evidence in a will contest, the test to be applied is whether there is any substantial evidence to support the trial court's determination of testator's incapacity.

2. Wills ⇐386

In will contest, questions of the weight of the evidence and the credibility of witnesses are for the jury and the trial court, and if there be any substantial evidence to support the finding or verdict it cannot be set aside although the reviewing court might believe the great preponderance of the evidence was the other way.

3. Wills ⇐386

In determining sufficiency of evidence to sustain a finding or verdict in a will contest, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence which will support the conclusion of the trier of the facts.

4. Wills ⇐38(1)

The will of one who by insanity is incapable of making a valid testamentary disposition is invalid, but mere insanity on some particular subject will not necessarily invalidate the will.

5. Wills ⇐38(1)

To make a will invalid because of delusions held by testator, the will itself must be the product of such hallucination and be caused directly thereby.

6. Wills ⇐52(1)

The burden of proof to show lack of testamentary capacity is on the contestant.

7. Wills ⇐50

A testator has sufficient mental capacity to execute a will if he has sufficient capacity to understand the nature of his act, the extent and character of his property, and the persons who are the natural objects of his bounty.

8. Evidence ⇐568(2), 571(2)

The opinion of a witness or of an expert that testator was of unsound mind is of no greater value than the reasons given in support of the opinion.

9. Wills ⇐55(1)

Evidence justified finding that testator did not possess testamentary capacity.

10. Wills ⇐53(2)

In will contest, testimony of physician who examined testator some six months after execution of will and evidence that testator had been declared incompetent some eight months after execution of will was admissible on issue of testamentary capacity.

11. Wills ⇐55(1)

In will contest, evidence of physician who had examined testator some six months after execution of will, and that testator had been declared judicially in-

competent some eight months after execution of will, supported finding of incompetency when will was executed, where such evidence was connected up with testimony that testator's condition was the same on the earlier date as it was on the later dates.

12. Wills ⇐55(1)

Testimony of testator's banking transactions consisting mainly of routine deposits and transactions handled mainly by bank employees, while entitled to careful consideration by the trier of facts was not conclusive on issue of testamentary capacity.

13. Evidence ⇐590

In will contest, trial court was not required either to believe testimony of attorney who drafted and witnessed will that testator was of sound mind or to question his integrity.

14. Wills ⇐324(2)

Testimony of an attorney who draws a will and who also becomes a witness to the instrument to the effect that testator appeared to be of sound mind and memory is entitled to serious consideration, but is not conclusive when other witnesses have testified to the contrary, and creates only a conflict for jury.

15. Wills ⇐386

Where there is substantial evidence to support the findings of a jury on any material issue, its determination will be upheld.

Appeal from Superior Court, Alameda County; Andrew A. Schottky, Judge.

Proceeding in the matter of the estate of Antonio Pessagno by Joseph Pessagno against Henry A. Pleitner, as executor and legatee, and others, legatees. From a judgment denying probate to decedent's alleged will, the legatees appeal.

Affirmed.

Arthur Joel, of San Francisco, and Pierce & Sherwin, of Oakland, for appellant.

J. Paul St. Sure, Edward H. Moore, and James R. Agee, all of Oakland, for respondent.

PETERS, Presiding Justice.

Henry A. Pleitner, Andre Ghiotti and the Imperial Council of the Ancient Arabic Order of the Nobles of the Mystic Shrine for North America, legatees under the will of Antonio Pessagno, appeal from a judgment denying probate to the latter's will based on a finding that "at the time of the signing of said purported will said Antonio Pessagno was not of sound and disposing mind and was not competent to dispose of his estate by will." On this appeal the proponents contend that there is not sufficient evidence to sustain the finding of lack of testamentary capacity.

[1, 2] In reviewing the sufficiency of the evidence in an action involving a will contest the test to be applied by the appellate court is the same that applies on other appeals, namely, whether or not there is any substantial evidence to support the trial court's determination of incapacity. In Estate of Downey, 51 Cal.App.2d 275, 285, 124 P.2d 637, 643, the court quoted from Estate of Ramey, 62 Cal.App. 413, 425, 217 P. 135, as follows: "However, in will contests the rule is the same as in other proceedings, that all questions of the weight of the evidence and the credibility of the witnesses are for the jury and the trial court, and if there be any substantial evidence to support the finding or verdict it cannot be set aside by the reviewing court, although said court might believe the great preponderance of the evidence was the other way." See, also, Estate of Hansen, 38 Cal.App.2d 99, 100 P.2d 776; Estate of Gill, 14 Cal.App.2d 526, 58 P.2d 734; Estate of Miller, 16 Cal.App.2d 141, 60 P.2d 492.

[3] As in other cases involving the sufficiency of the evidence to sustain a finding or verdict, "the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion" of the trier of the facts. Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183; see, also, Treadwell v. Nickel, 194 Cal. 243, 228 P. 25; Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 134 P. 1157; Wing v. Kishi, 92 Cal.App. 495, 268 P. 483.

[4, 5] The rule that must be applied by trial courts in determining, in the first instance, whether the testator has sufficient testamentary capacity to execute a valid will, and by the appellate courts in determining whether a finding of lack of testamentary capacity is supported by substantial evidence, is stated as follows in the

frequently cited case of Estate of Chevallier, 159 Cal. 161, 168, 113 P. 130, 133: "In considering the evidence it is important, preliminarily, to observe that it is not every form of insanity, not every mental departure from the normal, which destroys an otherwise valid testamentary act. The rule of law is not that no person who is insane may make a valid will, but that the will of no person who, by reason of insanity, is incapable of making valid testamentary disposition shall be upheld. Thus the wills of aged and infirm people, of people sick in mind as well as in body, are always upheld, if, notwithstanding their enfeeblement, testamentary capacity is shown. So, again, it may be well and perhaps soundly reasoned that all persons who commit crime and that all persons who commit suicide are aberrant, abnormal, and therefore insane. But such is not the insanity which the law has in mind. It must be an insanity of one of two forms, either insanity of such broad character as to establish mental incompetency generally, or some specific and narrower form of insanity, under which the testator is the victim of some hallucination or delusion. And even in the latter class of cases it would not be sufficient merely to establish that a testator was the victim of some hallucination or delusion to avoid the will. The evidence must go further and establish that the will itself was the creature or product of such hallucination or delusion, or, in other words, that the hallucination or delusion bore directly upon and influenced the creation and terms of the testamentary instrument." See, also, Estate of Finkler, 3 Cal.2d 584, 46 P.2d 149; Estate of Bemmerly, 110 Cal.App. 550, 294 P. 33; Estate of Casarotti, 184 Cal. 73, 192 P. 1085; Estate of Purcell, 164 Cal. 300, 128 Cal. 932; Estate of Sexton, 199 Cal. 759, 251 P. 778; Estate of Arnold, 16 Cal.2d 573, 107 P.2d 25.

[6-8] There are certain other rules that must be kept in mind in passing on the sufficiency of the evidence. The burden of proof to show lack of testamentary capacity is, of course, on the contestant. It is well settled that a testator has sufficient mental capacity to execute a will if he has sufficient capacity to understand the nature of his act, the extent and character of his property, and the persons who are the natural objects of his bounty. Estate of Purcell, 164 Cal. 300, 128 P. 932; Estate of Arnold, 16 Cal.2d 573, 107 P.2d 25; Estate of Sexton, 199 Cal. 759, 251 P. 778; Estate of Grant, 8 Cal.App.2d 232, 47 P.2d 508; Estate of Garvey, 38 Cal.App.2d 449, 101 P.2d 551. It is also well settled that the opinion of a witness or of an expert that the testator was of unsound mind is of no greater value than the reasons given in support of the opinion. If the reasons given by such witnesses do not support the conclusion of lack of testamentary capacity, the opinion is entitled to no weight in either the trial or appellate courts. Estate of Nolan, 25 Cal.App.2d 738, 78 P.2d 456; Estate of Flint, 179 Cal. 552, 177 P. 451; In re Redfield's Estate, 116 Cal. 637, 48 P. 794; Estate of Finkler, 3 Cal.2d 584, 46 P.2d 149; Estate of Bemmerly, 110 Cal.App. 550, 294 P. 33; Estate of Dolbeer, 149 Cal. 227, 86 P. 695, 9 Ann.Cas. 795.

Tested by the standards laid down in these cases, there can be no reasonable doubt that the evidence produced by the respondent amply supports the finding of the trial court that the testator lacked the requisite testamentary capacity to make a valid will.

Antonio Pessagno died on October 10, 1941, at the age of 72 years. The challenged will was executed by him on December 29, 1939. He left a substantial estate consisting of money in the bank, outstanding loans, shares of stock, and a piece of real property. By the will he bequeathed the real property to the Shriners, some stock valued at about $500 to Andre Ghiotti, and the residue to Henry A. Pleitner. Neither of these last two legatees was related to the testator. His closest relative was Joseph Pessagno, the contestant, his half brother.

Tony was born in Italy, and came to this country in the early part of this century. He could speak and understand English, and could read, write and speak Italian, but could not write or read English except to a very limited extent. In his early years in this country, and until the advent of prohibition, he operated a saloon in West Oakland. Thereafter, he sought employment for several years out of Oakland, apparently spending most of this period in Richmond. In 1918, while at Richmond, he suffered a stroke which partially paralyzed one side and caused him to limp. From 1919 to 1922 Tony lived with his half brother, the contestant, and in 1921 made a will leaving his entire and substantial estate to Joe. After leaving the residence of Joe, Tony went to live in a house at

Eighth and Filbert Streets, Oakland, and about 1931 moved to quarters at 725 Third Street, Oakland, which he rented from Frank Migalo for $6 per month. During a considerable portion of this period he sold newspapers on a street corner in downtown Oakland. In 1935, and again in 1936, he was a patient in the Alameda County Hospital where he was treated and operated upon for an eye condition.

In 1937, Louis Pessagno, another brother, died intestate, leaving Joe and Tony as his heirs at law. Louis' estate consisted of a house and a lot at 1511 Union Street, Oakland, appraised at $2,750, cash in the sum of $344.35, and stock valued at about $9,000. Although Tony at that time was, to use the words of the attorney who drafted the will and who was a witness for appellants, "a perfect example of a miser," he insisted that all that he wanted from Louis' estate was the house, and that Joe should take the balance, and he executed an agreement to that effect. Thereafter, he lived in indescribable squalor in the basement of the Union Street house, renting out the upper rooms. Joe testified that one of the things that first caused him to believe that Tony was of unsound mind was his agreement to accept such a small portion of Louis' estate.

It was during the 1930's, and particularly about 1936 or 1937, that a marked change occurred in Tony's mental condition and in his way of life. Previously, Tony dressed properly, wore good clothes, and kept his person and clothes clean. He apparently had many friends and acquaintances. After he went to live at Union Street, his clothing became dirty and ragged, his appearance very disagreeable, and he acquired a noticeable body odor. At times he did not recognize, and sometimes would insult, his intimate friends and relatives. During 1938 and 1939 he frequently walked the streets of Oakland with one trouser leg down and the other above his knee. He told one witness in 1939 that "Oh, this morning I saw Virgin Mary. My mother [who had been dead many years], she is Virgin Mary. She pray for me." He was in the habit of frightening little children and would walk about the street striking them with his cane. He would try to cut the lawn in front of his residence with a pair of scissors. He used to roam the streets in the early hours of the morning, rain or shine, dressed like a rag man, mumbling to himself, and picking up refuse and newspapers out of garbage cans and cigar and cigarette butts from the gutters, and picking up fruit and vegetable scraps from the sidewalks and gutters. All these articles he would put in a sack and carry home. He would pick up and carry home women's used sanitary napkins. When Tony moved from Migalo's house in 1937 the owner found many of such napkins in the house. His mattress at the Union Street house was filthy and full of bed bugs. The appellant Pleitner described the living conditions as "very dirty" and "filthy."

In September of 1938 Tony became quite ill. He was taken to the county hospital. His hospital record shows that he then informed the attendants that he had worked most of his life as a farmer, and he signed statements that he had no money. These statements were false. At that time it was discovered that, among other things, he was suffering from tabes dorsalis, which is a form of the last stage of syphilis.

For many years Tony belonged to the Druids, and apparently, in his early years, took an active interest in the lodge. In 1938 he began to draw sick benefits, first at the rate of $5 per week, and later, under lodge rules, this was reduced to $1 per week. Dues were $1 per month. Had Tony paid this $1 per month he would have received the $1 weekly benefit for life, but in 1939 or 1940 he allowed his dues to lapse.

In the early part of 1939 Tony's illness continued. Joe took him to the doctor two or three times a week. It was about this time that Tony complained that he had a "noise like an automobile" in his head, and that "I got high pressure in my head like a balloon."

In about April, 1939, Tony told Joe that he wanted to give him the Union Street property, and that he wanted to have his stock and bank accounts put in their joint names. Tony signed the requisite stock endorsements and bank slips to accomplish this purpose, and executed, and delivered, in the presence of the notary, a deed to the Union Street property naming Joe as grantee. Joe testified that he believed that Tony did not know what he was doing when he executed these documents, but took them to keep Tony from getting excited and angry. Joe did not record the deed, nor did he ever try to use any of the other property thus transferred to his name.

During this period while Tony was sick he had Joe go to the office of Mr. Pleitner, uncle of the appellant of the same name, a money lender and real estate broker, to collect interest due Tony on certain real estate loans he had made through Pleitner. He told Joe the amount of interest due him.

Also during this period Joe found that Tony was keeping about $600 in a drawer in the basement of the Union Street house. The money was in small change and some paper. Joe warned Tony about the possibility of theft and inquired why Tony kept the money at home. Tony said he was going to build a three-room apartment on top of the garage. Joe induced him to put the money in the bank.

Several months after transferring the bank accounts to their joint names, and late in 1939, Tony told Joe he wanted everything returned to him. He told Joe he wanted to sell the stock so he could go to an unidentified place to make a speech. Joe immediately delivered the bank books and stock to Tony. During the interval while Joe had possession of this stock the Transamerica stock had been re-issued cutting down the number of shares, so that what had been eighty-four shares became forty-two shares. When Joe explained this to Tony the latter got mad at Joe. Joe was unable to find the deed. He thought he had placed it in his safe deposit box but was unable to find it. He had recently moved his residence and thought he must have lost it, and so informed Tony. The latter was not satisfied with this explanation and insisted that the deed be returned. Tony consulted Mr. Cianciarulo, an attorney whom he had known for many years, to secure his assistance in recovering the deed. Tony told the attorney that Joe had secretly removed the deed and the stock from a box in Tony's house. The evidence shows that these statements were false. In January, and again in March, 1940, Cianciarulo wrote to Joe demanding the return of the deed. In March, 1940, Joe found the deed folded in some insurance papers and immediately returned it. During this period Tony frequently told Cianciarulo he wanted him to draw a will for him, but did not tell him that he had another attorney draw a will for him on December 29, 1939.

On or about December 4, 1939, Joe called on Tony and asked him if the taxes had been paid on the Union Street property. Tony said he was not going to pay any taxes because a policeman had told him that he did not have to pay taxes since he was not working. Joe paid the taxes, and later Tony acknowledged receiving the receipted bill.

As already indicated, for many years Tony had placed money for investment with Henry Pleitner, a money lender and real estate broker, who invested the funds of his clients in real estate loans. This man was the uncle of the appellant of the same name. Tony had placed $4,900 with Pleitner for such purposes. The elder Pleitner died in September, 1939, and it was then discovered that for some time he had been collecting interest and principal payments on his clients' loans, remitting to his clients only the interest payments, and commingling the principal payments with his own funds. The young Mr. Pleitner told Tony of his uncle's actions, and recommended that Tony see Mr. Sherwin, the young Mr. Pleitner's personal attorney, to see about filing a claim against the estate of the elder Pleitner. In October of 1939 Pleitner took Tony to Sherwin's office to see about filing the claim. Both Sherwin and Pleitner told Tony that the elder Pleitner had collected over a thousand dollars of the principal of Tony's loans and had commingled them with his own. Between October and December, 1939, Tony had four or five conferences with Sherwin concerning the claim. The will was drawn by Sherwin on December 29, 1939. As already indicated, the will makes Pleitner the residuary legatee, and makes two other bequests, one to the Shriners and one to Andre Ghiotti. Concerning the Pleitner bequest, the will recites that the residue of the estate "to my friend, Henry A. Pleitner in appreciation of his kindness and the kindness of his uncle to me for many years." Sherwin testified that Tony discussed his property with him, and named the proposed legatees, including the Shriners, because of his desire to help crippled children. He told Sherwin he wanted Joe cut out completely and would not consent to even a nominal bequest to Joe as suggested by Sherwin. He named Ghiotti as a legatee because he had known him as a child in Italy and had seen him a couple of times since coming to this country. Sherwin drafted the will and it was properly witnessed by him and his secretary. Both gave it as their opinion that Tony was sane on that day.

About the middle of 1940 Tony became so ill he was taken to the Jackson Home,

a sanitarium. In July of 1940 he was first examined there by Dr. Crockett. The doctor testified that when he examined Tony he found that he was irrational, noisy and incoherent. He thought he was in jail, and that the doctor, whom he had never seen before, was an old friend. The doctor found that Tony was suffering from syphilis of the third and last stage. His diagnosis was that Tony was suffering from senile dementia. He gave it as his opinion that Tony was of unsound mind in July of 1940 and that that condition had existed for some time. He treated and examined Tony some four or five times thereafter, and frequently saw him at the Home. On all of these occasions Tony was, in his opinion, of unsound mind. Tony was later transferred to a Catholic sanitarium. He usually called the doctor "Father," indicating that he had met the doctor in a religious capacity.

In August of 1940 Frank Meillette, an employee of one of the banks where Tony had his bank account, and who had handled the account for Tony for many years, signed a petition prepared by Sherwin for the appointment of a guardian of the person and estate of Tony. The petition recites that Tony "has by reason of old age and illness become mentally incompetent either to care for himself or manage his property." In September, 1940, upon the basis of this petition, the probate court appointed Meillette guardian of the person of Tony and the bank guardian of his estate, expressly finding that Tony was then "an incompetent person and incapable of taking care of himself and managing his property." Many witnesses testified that Tony's mental condition was about the same from 1939 until the time of his death. He died at the Jackson Home on October 10, 1941.

[9] This fairly summarizes the evidence produced by respondent. Appellants emphasize the evidence that Tony managed his financial affairs to some extent, and contend that the evidence falls short of the requirements laid down in the cases cited in the first part of this opinion. It is true that the evidence that Tony lived in squalor and filth, that he was unkempt, that he collected garbage and fruit from the gutters, that he failed to recognize intimate friends and acquaintances, and did other abnormal acts, standing alone, is not sufficient to sustain a finding that he lacked testamentary capacity. This is equally true of the evidence that he was a miser. Standing alone, the evidence of the judicial declaration of incompetency some eight months after the execution of the will would not support the challenged finding. It may be conceded that Dr. Crockett's testimony as to his mental condition in July of 1940 would not alone support the finding. But these various factors do not stand alone. Here they all occur together. We have here a man who for many years lived a normal and apparently sane life. Gradually his manner of life changed to that heretofore described. He was admittedly a miser. He had never drawn one cent from his account with the Central Bank. His mind was obviously beginning to disintegrate from the ravages of syphilis and old age as early as 1937. In that year this "typical miser" willingly insisted that Joe take the bulk of Louis' estate. This man, who was so miserly he would not buy proper food, clothing or shelter allowed his lodge dues to lapse when, by the expenditure of but $1 a month, he could have drawn at least $4 per month as sick benefits. Although Tony was told in October, 1939, that Pleitner had, in effect, embezzled over a thousand of the dollars so laboriously and carefully saved, in December of 1939 he executed a will leaving the largest portion of his estate to Pleitner's nephew because of Pleitner's "kindness" to him. When this testimony is coupled with the records of the county hospital produced by appellants showing that in 1938 he was in the third stage of syphilis, and that of Dr. Crockett that in July of 1940 he was in the last stages of that disease, was incoherent and irrational, was suffering from senile dementia and was of unsound mind, and that that condition was of long standing, and when this testimony is considered with the admitted fact that in September of 1940 Tony was judicially declared incompetent, it is quite clear that the trial court was justified in finding that Tony's mind had so disintegrated by December 29, 1939, that he no longer possessed testamentary capacity.

[10, 11] It is true that Dr. Crockett did not examine Tony until July of 1940, and that Tony was not declared incompetent until September of that year, and that, standing alone, this evidence would not establish mental incompetency as of December 29, 1939. But such evidence is admissible, and if connected up with testimony

that the condition was the same on the earlier date as it was on the later date, it supports the finding of incompetency on the earlier date. Estate of Johnson, 200 Cal. 299, 252 P. 1049; Estate of Loveland, 162 Cal. 595, 123 P. 801; Estate of Ehle, 115 Cal.App. 656, 2 P.2d 398. Doctor Crockett testified that the condition he found in July, 1940, had prior existence and was not the product of immediate illness. Joe testified that the mental condition of Tony remained unchanged from 1937 until his death in 1941. Ghiotti testified that Tony was in the same mental condition when he saw him in 1939 as he was when he saw him in October, 1940, after the adjudication of incompetency. Pleitner testified to substantially the same effect, as did the witness Meillette. This evidence clearly connected up the testimony of Dr. Crockett and the evidence of the judicial declaration of incompetency within the meaning of the rule announced in the above cases.

Appellants place particular reliance on the case of Estate of Finkler, 3 Cal.2d 584, 46 P.2d 149, in support of this appeal. A reading of the majority opinion discloses that the main theory relied upon by the contestants in that case was that the testator was affected with insane delusions. They proved that fact. But for delusions and hallucinations to deprive a person of the power to make a will such delusions and hallucinations must bear directly upon and influence the terms of the will. Estate of Perkins, 195 Cal. 699, 235 P. 45. In the Finkler case, according to the majority opinion, the contestants failed to prove that connection. In referring to the evidence the majority opinion, 3 Cal.2d at page 589, 46 P.2d at page 150, states: "The evidence respecting the alleged insanity relates almost exclusively to certain delusions possessed by the testator, but no one of said delusions was shown to be such as would or could affect the testamentary disposition of his property."

That is not the type of insanity here relied upon. In the instant case the theory of the contestants is that the testator suffered from general mental incompetency. It is well settled, of course, that general mental incompetency is sufficient to deprive a testator of the power to make a will. As already pointed out, the evidence here is susceptible of the reasonable conclusion that, by reason of the ravages of disease and old age, Tony was mentally incompetent in a general sense.

[12] Appellants place some reliance on the evidence that Tony was capable of carrying on certain banking transactions. These transactions consisted mainly of routine deposits and transactions handled mainly by the bank employees. This testimony, while entitled to careful consideration by the trier of the facts, is not conclusive on the issue. In Estate of Hansen, 38 Cal.App.2d 99, 111, 100 P.2d 776, 783, the court disposed of a similar contention with the following statement: "The record of the testator's banking transactions about the time of the execution of the will furnishes only a conflict of evidence regarding his mental capacity which we assume the jury fully and fairly considered. The jurors were the sole judges of the weight of that evidence."

[13] Appellants place considerable reliance on the testimony of Mr. Sherwin, the attorney who drafted the will. It seems to be the thought of appellants that the trial court was required to either believe the attorney or to question his integrity. That is not the law. Mr. Sherwin believed that Tony was of sound mind, and, from what he knew and observed, had reason for believing that Tony appeared to know what he was doing. But Mr. Sherwin did not know of the mass of testimony above referred to that supports the conclusion that Tony did not know what he was doing. In his order denying the motion for a new trial the trial judge stated: "After further consideration, the Court is convinced even more strongly than before that from 1937 to the date of his death, Antonio Pessagno was not competent to make a will. This view of the Court is not in any sense, as counsel intimated, a reflection upon the attorney who drew the will and who testified that in his opinion Pessagno was of sound mind. The Court does not doubt the integrity or good faith of said attorney, but under the evidence, as the Court has weighed it, the Court must and does disagree with his opinion as to the soundness of mind of deceased."

[14, 15] A similar thought was expressed in Estate of Hansen, 38 Cal.App. 2d 99, 115, 100 P.2d 776, 785, as follows: "The testimony of an attorney who draws a will, and who also becomes a witness to the instrument, to the effect that the testator appeared to be of sound mind and memory, is entitled to serious consideration. It has been said his evidence may be entitled to more consideration than that

of a mere relative, friend or acquaintance. But it is not conclusive when other witnesses have testified to the contrary. Such evidence creates only a conflict. The jury must finally determine the weight and sufficiency of the evidence. Estate of Nelson, 134 Cal.App. 561, 25 P.2d 871; Estate of McDonald, 191 Cal. 161, 215 P. 545. Where there is substantial evidence to support the finding of a jury on any material issue, its determination of that issue will be upheld." See, also, Estate of Miller, 16 Cal.App.2d 154, 60 P.2d 498. For these reasons the trial court did not abuse its discretion in denying the motion for a new trial.

The judgment appealed from is affirmed.

KNIGHT and WARD, JJ., concur.



58 Cal.App.2d 354

ELSBACH v. MULLIGAN.

HERMAN ELSBACH & SONS, Inc., v. SAME.

MULLIGAN v. HERMAN ELSBACH & SONS, Inc.

Civ. 12136.

District Court of Appeal, First District, Division 1, California.

April 26, 1943.

As Modified on Denial of Rehearing May 26, 1943.

Hearing Denied June 24, 1943.

1. Joint adventures ⇐5(1)

Where defendant had brought about the loss of revocable exclusive agencies formerly held by plaintiff and defendant in the name of a corporation for importation, distribution, and sale of wine and liquors, plaintiff had devoted his time to the business in return for his salary, the principals were unlikely to disturb the agencies but for defendant's acts, and the parties had refused reciprocal offers of $25,000 for the other's interest, damages were properly computed at $30,000 based upon a 20 per cent. capitalization of plaintiff's net earnings from the business, taking into consideration defendant's conduct.

2. Damages ⇐6

A party at fault may not escape the payment of damages merely because it is difficult to ascertain the amount thereof.

3. Damages ⇐208(1)

Special circumstances of a case give the court the right to assess the amount of damages where the element of bad faith is involved.

4. Torts ⇐12

Where defendant, to plaintiff's personal detriment, had fraudulently induced the principals to terminate their contracts of exclusive agency formerly held by plaintiff and defendant in the name of a corporation for importation, distribution, and sale of wine and liquors, defendant's conduct was a "tort" for which defendant was liable to plaintiff in damages.

See Words and Phrases, Permanent Edition, for all other definitions of "Tort".

5. Damages ⇐103
Torts ⇐12

One who purposely and wrongfully induces another not to perform a contract is liable for the harm caused, and the consideration of profits and losses is one method of computing damages arising from the commission of the wrongful act.

6. Joint adventures ⇐4(1)

For defaults of duty, a coadventurer may be taxed with the loss caused by him, the element of bad faith resulting in the detriment shown being the basis for fixing damages.

7. Damages ⇐103

The measure of damages for the diminution of value of a business due to a wrongful act is reflected by loss of profits, expenses incurred, or similar concrete evidences of injury, and capitalization of past profits is a concrete form of determining one factor of the damages sustained.

8. Joint adventures ⇐4(1)

A party is not confined to the actual loss sustained during the period of a coadventure by sacrifice of a business interest because of the wrongful conduct of a coadventurer, but capitalization of prospective profits may be included, particularly if there appears a fraudulent breach of duty.

9. Joint adventures ⇐4(1)

Where one party to an established business association fails to carry out the agreement, the former becomes liable in damages suffered as the natural result of the default, and the recovery may include the amounts which the latter was reasonably induced to spend in preparing to perform the agreement and such prospective profits, the loss of which is the natural and direct consequence of the breach, and, for the latter purpose, evidence of profits, past and present, is admissible as a basis for determining the compensation to which the party is entitled.

10. Joint adventures ⇐5(1)

Where action concerned loss of exclusive agencies formerly held by plaintiff and defendant in the name of a corporation for importation, distribution, and sale of wine and liquors, and acquisition of agencies by defendant by a series of acts inextricably woven as to the two and designed to promote defendant's interest to plaintiff's detriment, the damages resulting from the loss of the agencies were not required to have been separately assessed.

11. Joint adventures ⇐1, 4(1)

Where defendant had brought about the loss of exclusive agencies formerly held by plaintiff and defendant in the name of a corporation for importation, distribution, and sale of wine and liquors, evidence established that plaintiff and defendant as coadventurers occupied a "fiduciary relation" to each other which forbade the taking by either of an unfair advantage over the other, entitling plaintiff to damages, notwithstanding that the agencies were revocable.

12. Damages ⇐103

In determining the value of exclusive agencies for importation, distribution, and sale of wine and liquors, trial court properly included the amount of future returns reasonably to be expected from exercise of the agencies.

13. Corporations ⇐30(6)

Generally, when a corporation supersedes a partnership or joint adventure, rights subsequently accruing to the partners or joint adventurers are not based on that relationship.

14. Corporations ⇐1, 30(6)

If a corporation or a formal partnership is a mere agency for convenience in carrying out a joint venture agreement, and independent and innocent third parties, such as creditors or stockholders, are not injured thereby, in determining the rights of the parties, they will be placed in the position each occupied under the original agreement.

15. Corporations ⇐1

Where a corporation is but the instrumentality through which an individual, for convenience, transacts his business, such corporation is bound as the owner of a corporation might be bound, and the owner is bound by acts which would bind his corporation.

16. Joint adventures ⇐5(1)
Partnership ⇐108

Ordinarily, if one partner has wronged another with respect to a partnership matter, the remedy is by general accounting, but the rule does not apply with equal force to the right of an adventurer to sue his coadventurer, and he may sue at law for damages.

17. Joint adventures ⇐5(1)

One party in a joint adventure may sue the other at law for a breach of the contract or a share of the profits or losses or a contribution for advances made in excess of his share, as where the adventure has been closed and a party thereto is entitled to a sum certain as his share of the adventure, but the right thus to sue at law does not preclude a suit in equity for an accounting.

18. Corporations ⇐1
Joint adventures ⇐5(1)

Where defendant had brought about the loss of exclusive agencies formerly held by plaintiff and defendant in the name of a corporation of which they were stockholders for importation, distribution, and sale of wine and liquors and the corporate entity and defendant's acts were used for purpose of obtaining plaintiff's interest, suit in plaintiff's own name was proper and suit in the name of the corporation or for an accounting was not required, where independent and innocent third parties would not be injured.

19. Corporations ⇐1
Joint adventures ⇐5(1)

An action will lie by an adventurer against his coadventurer for a wrong in-

flicted by the latter in carrying out their joint undertaking, notwithstanding that for convenience the enterprise has been clothed with a corporate form.

Appeal from Superior Court, City and County of San Francisco; Maurice T. Dooling, Judge.

Action in the Superior Court by R. H. Elsbach against Walter J. Mulligan, individually and doing business under the firm name and style of W. J. Mulligan & Co., for a declaration that exclusive agencies formerly held by the parties in the name of Herman Elsbach & Sons, Inc., for the importation, distribution, and sale of wine and liquors, are held in trust by defendant for both parties and for damages for breach of a contract of joint adventure, wherein plaintiff as vice president of Herman Elsbach & Sons, Inc., filed a cross-complaint praying damages for the corporation. Action in the municipal court by Walter J. Mulligan against Herman Elsbach & Sons, Inc., upon an open book account, wherein a counterclaim was filed. The latter action was transferred to the superior court and the two actions were consolidated for trial. From the judgment awarding damages to plaintiff, individual defendant appeals, and from that part of the judgment that it take nothing by its cross-complaint, cross-complainant cross-appeals.

Affirmed.

Brobeck, Phleger & Harrison, of San Francisco, for appellant Mulligan.

Milton Marks and Heller, Ehrman, White & McAuliffe, all of San Francisco (Morris Lowenthal, of San Francisco, of counsel), for respondent R. H. Elsbach.

WARD, Justice.

R. H. Elsbach individually filed an action (superior court No. 272,578) against Walter J. Mulligan, individually and doing business under the firm name and style of W. J. Mulligan & Co., praying that the exclusive agencies formerly held by the parties in the name of Herman Elsbach & Sons, Inc., for the importation, distribution and the sale of wine and liquors be adjudged to be held in trust by the defendant for the use and benefit of plaintiff and defendant, and that plaintiff recover from defendant Mulligan damages for breach of their contract of joint adventure. Defendant answered in each capacity, admitting or denying various paragraphs of the complaint, and alleging that plaintiff's activities described in the complaint arose in connection with his duties as an official of Herman Elsbach & Sons, Inc., a corporation. Thereupon, plaintiff, as vice-president of such corporation, filed a cross-complaint, in terms practically the same as his original and amended complaints on behalf of himself individually, except that in lieu of demanding damages for himself it was prayed that they be awarded to the corporation. Mulligan answered this cross-complaint individually and on behalf of the Mulligan company. In the meantime he filed an action in the municipal court upon an open book account against the Elsbach corporation, which was answered and to which a counterclaim was filed. This action was transferred to the superior court under No. 280,212 and the two actions were consolidated for trial.

In action No. 272,578 judgment was entered in favor of R. H. Elsbach and against Mulligan individually and doing business under the name and style of W. J. Mulligan & Co. in the sum of $30,000, the corporation to take nothing by its cross-complaint. No trust was imposed. In action No. 280,212, Mulligan recovered a judgment against the corporation in the amount as prayed with interest, and that the corporation take nothing by its counterclaim.

There is an appeal by defendant from that part of the judgment (action No. 272,578) whereby Elsbach individually was awarded damages, and an appeal by the corporation cross-complainant from that part in favor of the Mulligan defendants. The latter appeal appears to be merely precautionary as will appear later. There is no appeal from the judgment rendered in action No. 280,212.

The primary difference in the two appeals is the question whether damages should be awarded to Elsbach individually or in favor of the corporation. This narrows the appeal to two major issues: Is the evidence sufficient to uphold the findings of actionable wrongdoing on the part of Mulligan? If so, is Elsbach entitled to a personal recovery or should recovery be confined to the corporation?

The findings contain much historical background, issues raised by the pleadings and evidentiary matter, both oral and documentary. For clarity we quote rather ex-

tensively from them at this time as follows: "Prior to the month of February, 1933, plaintiff, anticipating the repeal of the Eighteenth Amendment to the Constitution of the United States and of national and state prohibition acts, conceived the idea or plan of acquiring exclusive agencies from foreign manufacturers of wines and liquors and building up in the Western States and elsewhere a valuable business in the importation, distribution, and sale of such wines and liquors. In furtherance of said idea or plan plaintiff [Elsbach] initiated and carried on correspondence with various and numerous foreign manufacturers of wines and liquors, including G. H. Mumm & Co., and continued such correspondence with said manufacturers for the purpose of obtaining from them exclusive agencies as aforesaid. Subsequently, during or about the month of February, 1933, defendant, Walter J. Mulligan, was introduced and recommended to plaintiff as a person then engaged in the importing and exporting business, other than the importation and exportation of wines and liquors, and shortly thereafter, defendant, Walter J. Mulligan, became interested in plaintiff's plan, with the result that plaintiff and defendant, Walter J. Mulligan, agreed to become and did become associated in plaintiff's proposed plan and entered into an agreement of joint enterprise, undertaking and adventure. At the time of entering into the agreement between plaintiff and defendant, Walter J. Mulligan, for the establishment of said joint enterprise, undertaking and adventure, defendant Mulligan stated that he did not wish to have his own name used in connection with the enterprise and it was agreed that the enterprise would be carried on in the plaintiff's family business name and plaintiff agreed that he would make available for their mutual benefit all correspondence and data relating to plaintiff's idea and plan for acquiring the said exclusive agencies, including correspondence and data relating to the said correspondence with G. H. Mumm & Co. and it was further agreed by plaintiff that he would supply funds and credit and devote his efforts, knowledge and business experience to the joint adventure and in the acquisition, development and retention of said exclusive agencies and it was agreed by plaintiff and said defendant that defendant Walter J. Mulligan would be 'boss' and defendant Walter J. Mulligan agreed and promised to cooperate fully with plaintiff and agreed and promised to exercise his best efforts, knowledge, experience and labors toward the acquisition, development and retention of said exclusive agencies, for the equal and mutual benefit and advantage of plaintiff and defendant Walter J. Mulligan. Defendant, Walter J. Mulligan, at said time further promised and agreed that he would cooperate fully with plaintiff at all times thereafter in the building up of good will and trade in the importation, sale and distribution of said wines and liquors under such exclusive agencies as might be acquired by the joint enterprise and adventure, all for the equal and mutual benefit and advantage of plaintiff and defendant Walter J. Mulligan. It was agreed between plaintiff and defendant Walter J. Mulligan that any profits or losses resulting from said joint enterprise, undertaking or adventure would be shared equally between plaintiff and defendant Walter J. Mulligan. * * * Thereafter and throughout the life of the joint enterprise and adventure, and at all times until the wrongful acquisition by defendant Walter J. Mulligan of the assets of said joint enterprise, plaintiff, in addition to the hereinafter mentioned funds and banking credit, contributed to the development and building up of the joint enterprise his industry, ability and activity and all of said contributions materially contributed to the success of said joint enterprise."

The findings further set forth the financial contributions of the two partners from the time of their association, including those made to a California corporation organized by them for the express purpose of continuing the joint enterprise and adventure. The capital stock of this corporation was issued one half to Elsbach and the other half to Mulligan. The trial court further found that the corporation "was in actuality a partnership or joint adventure business * * * operated for the equal and mutual benefit of plaintiff and defendant" as exclusive agents for the sale of certain wines and liquors in eleven western states, plaintiff for a short period and subsequently defendant, acting as its president. Its principal agencies—that of Mumm for champagne and McCallum for whisky—were terminable under the agreements creating them upon thirty and ninety days' notice respectively by the principals. It was further found that:

"From the time of the first association of plaintiff and defendant, Walter J. Mulli-

gan in said joint enterprise and adventure, and at all times subsequent thereto, plaintiff and defendant, Walter J. Mulligan owed to each other undivided and highest loyalty and utmost good faith, and occupied a fiduciary, confidential and trust relationship to each other.

"Commencing during the month of November, 1934, and thereafter continuing until the month of February, 1937, defendant Walter J. Mulligan, in violation of the aforesaid promises and undertakings of said defendant, and in violation of the trust, confidential and fiduciary relationship created by and arising out of the association of said defendant with plaintiff in the said joint enterprise and adventure, deliberately and in bad faith conceived, formulated and continuously engaged in a course of conduct, both secretive and otherwise, for the purpose of acquiring and appropriating to himself the said exclusive agencies and of depriving the said joint enterprise and adventure of said exclusive agencies and eliminating plaintiff from said business. In pursuance of said course of conduct and of said fixed purpose to eliminate plaintiff from the business, defendant, Mulligan, throughout said period of time continuously resorted to disparagements, pressure, conniving and misrepresentations for the purpose of forcing plaintiff to give up his interest in the business and for the purpose of persuading and inducing the said manufacturers of said wines and liquors and their controlling agents to terminate and cancel or cause the termination and cancellation of the said exclusive agencies, and to grant said agencies to defendant, Walter J. Mulligan, personally. Pursuant to the said course of conduct thus formulated and conceived by said defendant, and in furtherance of said fixed purpose herein alleged, the said defendant, Walter J. Mulligan, made numerous false representations to the manufacturers of said wines and liquors and to their controlling agents and to the trade, and in particular said defendant falsely represented to said manufacturers and their controlling agents that the plaintiff had failed to engage efficiently in the importation, distribution and sale of said wines and liquors, that the plaintiff had failed to promote the business of the said joint enterprise, that the plaintiff had failed to develop the sale of the products of said manufacturers in an efficient manner, that the plaintiff had failed to perform his duties and obligations in connection with the management and conduct of said joint enterprise, that the plaintiff was unfit by reason of inexperience, inefficiency and lack of financial responsibility and resources to hold and retain the said agencies as a co-adventurer with the said defendant, that the plaintiff had contributed little to the success of the business of the joint enterprise, that the plaintiff was a mere subordinate in its affairs, that the plaintiff had acted contrary to the interest of the said business and was a handicap to the company, that the Elsbach Company was a mere subsidiary or nom de plume for the Walter J. Mulligan Company, and was under defendant Mulligan's domination, that the said defendant possessed superior fitness by reason of knowledge, ability, experience and financial responsibility and resources to receive and thereafter to retain the said agencies to the exclusion of plaintiff, that said defendant and W. J. Mulligan Company were financially responsible for the Elsbach Company, that it was defendant's money, brains, energy and ability that was alone responsible for the building up, establishment, maintenance and success of the business of the joint enterprise, and plaintiff was of no consequence. Each and every one of the said representations was false and was known by said defendant, Walter J. Mulligan, to be false, and was made by said defendant in bad faith and as part of the said course of conduct pursued by him for the purpose of eliminating plaintiff from the business and persuading and inducing the said manufacturers and their controlling agents to terminate and cancel said exclusive agencies, and to grant said agencies to defendant, Walter J. Mulligan.

"In addition to the aforesaid false representations, defendant, Walter J. Mulligan, in furtherance of the aforesaid course of conduct carried on by him, deliberately and in bad faith continuously engaged in numerous acts of misconduct against plaintiff, including the following: Said defendant engaged in a course of conduct designed and intended to eliminate plaintiff from all activity in the business and ultimately said defendant did eliminate plaintiff from all activity in the business; said defendant frequently threatened the liquidation of the business and threatened to use his influence to obtain the agencies for himself unless plaintiff relinquished his interest therein to said defendant; said defendant disparaged, belittled, humiliated and abused plaintiff and made plaintiff's position in the Elsbach Company intoler-

able with the deliberate intention of eliminating plaintiff from the said business; said defendant secretly and surreptitiously conspired with the North American representative of the McCallum Company for the secret accomplishment of a transfer of the McCallum agency to said defendant and in addition to the false representations previously recited hereinabove in these findings defendant also falsely represented to said North American representative of the McCallum Company that the credit of the Elsbach Company was not worth very much under its name and that any commitments of the Elsbach Company had the credit of the W. J. Mulligan Company behind it; said defendant deliberately, knowingly and in bad faith and under a threat of vilifying and eliminating plaintiff, made and persisted in making frequent unjustified demands for plaintiff's interest and stock in said joint adventure business for the purpose of creating and generating and maintaining an apparent friction and dissension between the joint adventurers, which discord was a wholly one-sided affair on the part of defendant, with the knowledge and intention that such wrongful conduct on his part would result in the cancellation of the agencies and would result in the ultimate acquisition of the agencies by the defendant by reason of the said course of conduct engaged in by him; said defendant repeatedly threatened to take the business of the joint adventure for himself unless plaintiff voluntarily relinquished his interest therein; said defendant openly disparaged and vilified to the trade the credit standing, financial resources and valuable name of the Elsbach Company and said defendant openly disparaged plaintiff's ability and contribution to the business.

"* * * The said defendant by the aforesaid course of conduct and false representations caused the termination and cancellation on the 25th day of February, 1937, of the exclusive agency for D. & J. McCallum held by said joint enterprise and adventure, and caused the termination and cancellation on the 15th day of February, 1937, of the said exclusive agency of G. H. Mumm Champagne S.V.C.S. & Associates, Inc., and together therewith the remaining exclusive agencies included with the agency of G. H. Mumm Champagne S. V.C.S. & Associates, Inc., as hereinabove alleged, and said joint enterprise and adventure was thereby deprived and stripped of its principal assets, resulting in great and irreparable injury and loss to said joint enterprise and adventure, and to plaintiff as a co-adventurer with said defendant, Walter J. Mulligan."

The findings thereupon relate the acquisition of the Mumm and McCallum agencies by defendant under the name of W. J. Mulligan & Co. notwithstanding the performance of all of the conditions of the joint adventure by plaintiff throughout a "controversy" which was "wholly one-sided * * * and was deliberately and in bad faith generated and fomented and maintained by said defendant as a part of his scheme" to acquire such agencies, to the injury of plaintiff in the sum of $30,000. The court further found that plaintiff and defendant reached a settlement of their difficulties in the years 1935 and 1936 "under the urgings * * * of the Mumm agency," but that immediately thereafter "defendant completely reverted to type and renewed and continued his conniving to eliminate plaintiff," etc.

Specifically Mulligan contends that the court improperly disregarded the corporation and treated Elsbach and Mulligan as partners, and that one partner cannot sue another partner for damages; that the damages assessed are excessive and based upon speculation; that no actionable wrong was committed by Mulligan, and that the two agencies—Mumm and McCallum—should be considered separately. In reference to the McCallum agency it is claimed that the findings are against the weight of the evidence, but it is admitted that under the rules of appellate practice there may be sufficient evidence to support the findings as to that agency. In regard to the Mumm agency, it is contended that there is no evidence to support the finding that Mulligan communicated with that company in an endeavor to induce it to withdraw its agency with the Elsbach company. It is admitted that the McCallum principal desired its agency to follow that of the Mumm. In a word, it is contended that the whole difficulty arose from dissension between the partners or coadventurers.

As appears from the evidence, Mumm did not care to have its agency in the hands of a corporation, partnership or joint adventure where the real parties in interest persisted in quarreling and dissension to the possible detriment of the agency. McCallum was anxious that its western agency should be under the control and direction of the distributors acting for Mumm. The

evidence of false representations is particularly strong as regards Mulligan's dealings with McCallum, but his schemes and plans for obtaining both agencies for his own company are so interwoven that there is no escape from the conclusion that it was the Mulligan influence, unfairly and wrongfully used, that also brought about the loss by the Elsbach company of the Mumm agency. The record contains approximately twenty-nine hundred pages of testimony and correspondence. The intent of Mulligan is demonstrated by the testimony of a stenographer for the Mulligan company—but whose compensation was actually paid by the Elsbach company—who read certain stenographic notes, dictated by Mulligan of a rough draft to be used as the basis of a letter ostensibly from one of the agencies to Mulligan. The notes contained statements exaggerated or minimized to suit the purpose of Mulligan, together with downright falsehoods. The proposed draft was accompanied by a statement from Mulligan that "given sufficient time I will have this difficulty removed." The "difficulty" referred to is plainly Elsbach. The purpose of Mulligan in the preparation of the data designed for incorporation in a communication to be sent the Elsbach company or to Mulligan is expressed in the following manner: "I would much prefer to have it brought about in this fashion, that is, a request coming from you for definite information as to the E. Company's ability to pay rather than have it come from some other way that might suggest the thought that I initiated this angle with a deliberate intention of weakening his position." There is no doubt that Elsbach's position had been and was thereafter weakened through the activities of Mulligan. This matter is concluded by the trial court's finding of wrongdoing, malicious intent and the consequent loss to plaintiff.

The matter of damages is inseparably linked with the adequacy of the evidence to support the findings. It seems proper to consider that question at this point. Both parties submitted in evidence voluminous written data covering profits, expenses, sales, etc., an examination of which here would unduly lengthen this opinion. Defendant claims that no profits were earned by the Elsbach company after the first six months of operation; that the McCallum company went out of business in August, 1937, and therefore the agency for that concern could not have existed after that time, and that there is no segregation of profits or losses as between the Elsbach company and the Mulligan company from the date of the transfer of the agency from Elsbach to Mulligan. It is further contended that prospective profits are conjectural, and that an award based upon their capitalization for a five-year period is even more remote, speculative and conjectural.

It should be noted that there is evidence that for a period of time the Elsbach company was doing business in eleven western states approximating a half million dollars in sales annually, and that its sales of champagne aggregated 80% of all sales of that commodity on the Pacific coast.

The trial court disclosed the basis of its findings of damage as follows: "It is the value of Elsbach's interest in the business which Mulligan acquired. The only practical way to arrive at this value is to capitalize the earnings. To take round figures the business netted $18,000 in 3½ years, ½ of which belonged to Elsbach. In addition to the $9,000 so realized by Elsbach from net profits he received $12,000 in salary. This averaged per year to Elsbach from the business, the sum of $6,000. I have decided in view of all the factors involved that to capitalize this at 20%, or on the basis of a five year purchase, is reasonable. This would give a value to Elsbach's interest in the business of $30,000. In capitalizing the earnings at 20% I have taken into consideration on the one side the facts that Elsbach devoted his time to the business in return for his salary, that the agencies were revocable and that there was practically no capital investment; and on the other hand that the principals were satisfied with the representation and unlikely to disturb the agencies but for Mulligan's machinations * * * I believe that a prudent buyer stepping into Elsbach's shoes would want to feel that he could get his money back in 5 years. In making this calculation I have not attempted to weigh the claims of excessive or unusual expenditures, but I have, as noted, included Elsbach's salary as a part of the income capitalized. This figure of $30,000 is supported to a degree by the reciprocal offers of $25,000 made by Mulligan and Elsbach, and the fact that neither would accept the offer of the other." The "buy or sell" offers were not determinative of the amount of damages, but were noted for comparison with the damages assessed.

The method of ascertaining damages under the facts of this case was in accordance with well-established rules, and the amount is certainly not excessive. If anything, an examination of financial statements indicates that if any criticism may be offered, it would rather be that the amount assessed is inadequate, particularly in view of the findings relative to the malicious machinations of the defendant.

[1-3] Upon the evidence as presented the trial court had the right to compute plaintiff's damages, on the value of the Elsbach interest destroyed by Mulligan, based upon the previous profits for a reasonable period, and on the loss of prospective profits, taking into consideration the defendant's fraudulent conduct through which such losses were incurred. A party at fault may not escape the payment of damages merely because it is difficult to ascertain the amount. Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am.St.Rep. 154. Special circumstances of a case give the court the right to assess the amount of damages where the element of bad faith is involved. Kline v. Guaranty Oil Co., 167 Cal. 476, 140 P. 1.

[4-7] This is not an action for the breach of a contract between Elsbach and Mulligan, but for damages for the fraudulent inducement of Mumm and McCallum to terminate their contracts with the Elsbach company to the detriment of Elsbach personally. Such conduct is a tort. Restatement, Torts, sec. 766; 39 Corpus Juris, 1373; 84 A.L.R. 67. In Imperial Ice Co. v. Rossier, 18 Cal.2d 33, 35, 112 P.2d 631, 632, the court said: "The question thus presented to this court is under what circumstances may an action be maintained against a defendant who has induced a third party to violate a contract with the plaintiff. It is universally recognized that an action will lie for inducing breach of contract by a resort to means in themselves unlawful such as libel, slander, fraud, physical violence, or threats of such action." One who purposely and wrongfully induces another not to perform a contract is liable for the harm caused. Restatement, Torts, sec. 766; Remillard-Dandini Co. v. Dandini, 46 Cal.App. 2d 678, 116 P.2d 641; H. G. Fenton Mat. Co. v. Challet, 49 Cal.App.2d 410, 121 P. 2d 788. The consideration of profits and losses is merely one method of computing damages arising from the commission of the wrongful act. For a default of duty a coadventurer may be taxed with the loss caused by him. In San Francisco Iron, etc., Co. v. American Milling, etc., Co., 115 Cal. App. 238, 248, 1 P.2d 1008, 1012, the court said: "The existence of the joint adventure being established, it follows that a fiduciary relationship between the coadventurers arose therefrom, which demanded of them the utmost good faith in all their dealings with each other; and this requirement of good faith alone forbade the accrual of any profit, or the acquisition of any secret advantage by one of the coadventurers over the other." The element of bad faith resulting in the detriment shown is the basis for fixing damages. Kline v. Guaranty Oil Co., supra. The measure of damages for the diminution of the value of business due to a wrongful act is "reflected by loss of profits, expenses incurred or similar concrete evidences of injury." Steiner v. Long Beach Local No. 128, 19 Cal.2d 676, 123 P.2d 20, 28. The capitalization of past profits is a concrete form of ascertaining the value of a business, and determining one factor of the damages sustained. Their amount in the present case was fixed at 50% of the prospective profit of the entire business; this corresponded to plaintiff's one-half interest therein.

[8] In Overstreet v. Merritt, 186 Cal. 494, 200 P. 11, involving the sacrifice of a business interest, it was held that the party whose wrongful conduct caused the loss may not be absolved because the damages are not susceptible of exact measurement. Long Beach Drug Co. v. United Drug Co., 13 Cal.2d 158, 88 P.2d 698, 89 P.2d 386. It is also the rule that a party is not confined to the actual loss sustained during the period of coadventure, but a capitalization of prospective profits may be included, particularly if instead of a mere breach there appears a fraudulent breach. Sobelman v. Maier, 203 Cal. 1, 262 P. 1087.

[9] In Caspary v. Moore, 21 Cal.App. 2d 694, 699, 70 P.2d 224, 226, the court said: "On the issue of the damage suffered by respondent, it is the rule that, where one party to an established business association fails and refuses to carry out the terms of the agreement, and thereby deprives the other party of the opportunity to make good in the business, the former becomes liable in damages suffered as the natural result of the default (Overstreet v. Merritt, 186 Cal. 494, 200 P. 11; Shoemaker v. Acker, 116 Cal. 239, 48 P. 62); and the recovery

may include not only the amounts which the latter was reasonably induced to spend on the faith of the contract in preparing to perform it (Blair v. Brownstone Oil Co., 35 Cal.App. 394, 170 P. 160; Cederberg v. Robison, 100 Cal. 93, 34 P. 625), but also such prospective profits the loss of which is the natural and direct consequence of the breach (Shoemaker v. Acker, supra; Sobelman v. Maier, 203 Cal. 1, 262 P. 1087), and for the latter purpose evidence of profits, both past and present, is admissible as a basis for determining the compensation to which he is entitled. Western Union Tel. Co. v. Commercial Pac., etc., Co., 177 Cal. 577, 171 P. 317; Schumann v. Karrer, 184 Cal. 50, 192 P. 849; Grosse v. Petersen, 30 Cal.App. 482, 158 P. 511; Hacker Pipe & Supply Co. v. Chapman Valve, etc., Co. [17 Cal.App.2d 265], 61 P.2d 944." An exact measure of future damages is seldom ascertainable. If the amount assessed is reasonable and not excessive the duty of review is at an end.

[10] There is no merit in the suggestion that the court should have separately assessed the amount of damages resulting from the loss of the Mumm and McCallum agencies. The action concerns the loss of "agencies", and their acquisition by Mulligan by means of a series of acts inextricably woven as to the two—varying at times, but always designed to accomplish one purpose, namely, the promotion of his own interest to the detriment of plaintiff.

[11, 12] From the evidence plaintiff is entitled to recover against his coadventurer; each occupied a fiduciary relation to the other which forbade the taking by either of an unfair advantage over the other. San Francisco Iron, etc., Co. v. American Milling, etc., Co., supra; Menefee v. Oxnam, 42 Cal.App. 81, 183 P. 379; Young v. Young Holdings Corp., Ltd., 27 Cal.App.2d 129, 80 P.2d 723. The fact that the agencies were revocable does not affect the right of recovery. Donleavey v. Johnston, 24 Cal.App. 319, 141 P. 229. It was proper for the trial court to determine their value including the amount of future returns reasonably to be expected from their exercise. Donleavey v. Johnston, supra; Steinweg v. Epstein, 152 Misc. 24, 271 N.Y.S. 263. The record discloses more than dissension and quarreling between Elsbach and Mulligan, the only real persons having an actual interest in the business, regardless of whether it was of a corporate nature, or arising from a partnership or coadventure.

[13, 14] The main question on appeal is, should the action have been brought in the name of the corporation? Appellant contends that an individual stockholder has no interest in the corporate property as such; nor has he any legal right to sue upon wrongs done the corporation. This argument is based primarily upon the contention that since plaintiff participated in the formation of the corporation he may not now proceed in disregard of the corporate entity, since when a corporation supersedes a partnership or joint adventure, rights subsequently accruing to the partners or joint adventurers are not based on that relationship. The soundness of the contention generally may be admitted but there are exceptions to the general rule. If a corporation or a formal partnership is a mere agency for the purpose of convenience in carrying out a joint venture agreement, and independent and innocent third parties, such as creditors or stockholders, are not injured thereby (which does not appear in the present case), justice would seem to demand that in determining the rights of the parties they be placed in the position each occupied under the original agreement. Shorb v. Beaudry, 56 Cal. 446; Wise Realty Co. v. Stewart, 169 Cal. 176, 146 P. 534; Puccetti v. Girola, 20 Cal.2d 574, 128 P.2d 13; Continental Securities, etc., Co. v. Rawson, 208 Cal. 228, 280 P. 954. There may be conflicts in the evidence as to whether the operations of the parties constituted genuine corporate functions or whether the corporate form was employed merely as a convenient method of carrying out the agreement of the parties. The trial court's resolution of such conflicts finds ample support in the record. In Asamen v. Thompson, 55 Cal.App.2d 661, 131 P.2d 841, 846, the court said: "Where a corporation is but the instrumentality through which an individual, for convenience, transacts his business, all of the authorities hold such a corporation bound as the owner of the corporation might be bound, or conversely, hold the owner bound by the acts which would bind his corporation. Mirabito v. San Francisco Dairy Co., 8 Cal.App.2d 54, 47 P.2d 530; Mervyn Inv. Co. v. Biber, 184 Cal. 637, 194 P. 1037."

[15-17] In several instances the findings refer to the parties as partners. When the findings are read as a whole, however, it is plain that such references are merely to the

parties in their original relationship. The rules governing an association known as a joint venture essentially resemble those controlling partnerships. They are not identical, but are similar. Ordinarily if one partner has wronged another in respect of a partnership matter, the remedy is by general accounting, but this rule does not apply with equal force to the right of an adventurer to sue his coadventurer. He may sue at law for damage. In San Francisco Iron, etc., Co. v. American Milling, etc., Co., supra, 115 Cal.App. at page 249, 1 P.2d at page 1012, the court said: "The agreement was breached by the defendants at the very threshold of the enterprise by secretly negotiating for and purchasing the property on their own account, and the settled rule in such cases is, as stated in Keyes v. Nims, 43 Cal.App. 1, 184 P. 695, 699, '* * * that one party in a joint adventure may sue the other at law for a breach of the contract or a share of the profits or losses or a contribution for advances made in excess of his share, as where the adventure has been closed and a party thereto is entitled to a sum certain as his share of the adventure; but the right thus to sue at law does not preclude a suit in equity for an accounting. 15 Ruling Case Law, p. 507.' See, also, McCreery v. Green, 38 Mich. 172; Saunders v. McDonough, supra [191 Ala. 119, 67 So. 591]; Joseph v. Sulzberger, 136 App.Div. 499, 121 N.Y.S. 73; Lind v. Webber, 36 Nev. 623, 134 P. 461, 135 P. 139, 141 P. 458, Ann.Cas.1916A, 1202, 50 L.R.A.,N.S., 1046." In the present case a single action could have settled the whole controversy. An action confined alone to an accounting would not have covered the matter of damages for the wrongful maneuvering to change the agencies from Elsbach to the Mulligan company.

[18] Under such circumstances as the trial court found, a suit brought in plaintiff's own name is proper rather than to employ the round-about way of achieving the same result by the filing of a suit in the name of the corporation or by compelling plaintiff to seek redress in an accounting.

[19] An examination of appellant's over four hundred references, consisting of statutes, cases and treatises, in support generally of his views on the factual and legal questions, has failed to convince this court that an action will not lie by an adventurer against his coadventurer for a wrong inflicted by the latter in the carrying out of their joint undertaking, notwithstanding that for the purposes of convenience the enterprise has been clothed with a corporate form. In this case the resort to the corporate mechanism cannot efface the true purpose of the original joint adventure. The corporate entity and appellant's machinations disclosed by the evidence both before and after its creation were used with the fixed purpose of obtaining the interest and property of Elsbach. Imperial Ice Co. v. Rossier, supra.

We adopt the following from Young v. Young Holdings Corp., Ltd., supra, 27 Cal. App.2d at page 150, 80 P.2d at page 735: "The judgment rendered is just. If it were to be criticized at all, it would be upon the ground that it did not go far enough in restoring to plaintiff * * * that which defendants wrongfully took from them."

There is no appeal from the judgment insofar as action No. 280,212 is concerned.

It is hereby ordered that the judgment in favor of R. H. Elsbach is affirmed; the judgment that Herman W. Elsbach & Sons, Inc., take nothing by its cross-complaint is also affirmed.

PETERS, P. J., and KNIGHT, J., concurred.

Hearing denied; SCHAUER, J., dissenting.



58 Cal.App.2d 425

DEMMON v. SMITH et al.

Civ. 13737.

District Court of Appeal, Second District, Division 3, California.

April 29, 1943.

Hearing Denied June 24, 1943.

1. Negligence ⇐134(3)

Evidence that butcher knew of arrangement for employees of coffee department of market in which meat department was located to furnish coffee to butchers and to come behind meat counter to pick up empty cups, and that one of butchers without looking made a pivot with knife in his hand, striking an employee of coffee department who had come behind counter to pick up empty cups, was sufficient to support finding that butcher was negligent, so as to render

owner of meat department liable for injuries sustained by employee of coffee department.

2. Negligence ⇐32(1)

If employee of coffee department of market in which defendant's meat department was located who was injured when accidentally struck by butcher with a knife when behind meat counter for purpose of picking up empty cups in which coffee had been furnished to defendant's butchers was an invitee, defendant owed him duty of exercising ordinary care to avoid injury to him, and if employee was a licensee, defendant owed him duty of exercising ordinary care to avoid injury to him through active negligence, and such duty would have been breached if employee was injured as a proximate result of defendant's active negligence as distinguished from passive negligence.

3. Negligence ⇐32(1)

The rule that duty owed to a licensee is to refrain from wanton or wilful injury is a general rule which applies to cases relating to duty owed to a licensee with respect to condition of premises.

4. Negligence ⇐32(1)

The rule as to degree of care owed to a licensee injured by active negligence is that if licensee was upon a part of premises where the one who committed overt act of negligence knew, or had good reason to expect, licensee to be, duty owed to licensee was to exercise ordinary care to avoid injury to him.

5. Negligence ⇐32(1)

Where employee of coffee department of market in which defendant's meat department was located was injured when accidentally struck by a butcher with a knife while behind meat counter for purpose of picking up empty cups in which coffee had been furnished to defendant's butchers, degree of care owed to employee of coffee department was ordinary care, regardless whether such employee was an invitee or a licensee.

6. Appeal and error ⇐1008(1)

Whether a plaintiff has been guilty of negligence is usually a "question of fact" for trier of facts.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

7. Appeal and error ⇐996

To establish defense of contributory negligence as against verdict of a jury, evidence must be such that appellate court can say that there is no substantial conflict on the facts, and that from facts reasonable men can draw but one inference, which inference points unerringly to negligence of plaintiff proximately contributing to his own injury.

8. Negligence ⇐136(26)

Evidence was insufficient to establish as matter of law that employee of coffee department of market in which defendant's meat department was located who was injured when accidentally struck by butcher with a knife when behind meat counter for purpose of picking up empty cups in which coffee had been furnished to defendant's butchers was guilty of contributory negligence precluding recovery for his injuries.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Warren Demmon against E. F. Smith and another for injuries resulting from alleged negligent handling of a butcher knife by named defendant's employee when plaintiff was behind the counter of named defendant's meat market as an invitee or licensee, wherein the Firemen's Fund Indemnity Company intervened as lien claimant. From a judgment for plaintiff, the defendants appeal.

Affirmed.

Donald E. Ruppé and Chas. W. Bowers, both of Los Angeles, for appellant.

Steiner A. Larsen, Edwards & Taylor, and Harvey D. Taylor, all of Los Angeles, for respondent.

PARKER WOOD, Justice.

Plaintiff obtained judgment against defendant for damages for personal injuries resulting from the alleged negligent handling of a butcher knife by defendant's employee, a butcher, when plaintiff was behind the counter of defendant's meat market as an invitee or licensee.

Defendant owned and operated a retail meat market which was one of several departments in a general retail food market operated by him in Los Angeles.

Another department of the general market, a coffee concession across an aisle from the meat market, was conducted by

Manning's Coffee Company. Plaintiff was an employee of Manning's Coffee Company in that market and his duties included that of serving hot liquid coffee. He had been such employee about 3 months. During that time, and for at least 2 years prior thereto, the following custom prevailed: the employees of the meat market ordered cups of coffee from the employees of the coffee department during business hours and practically every day; the employees of the coffee department delivered the cups of coffee by placing them on the meat counter; the employees of the meat market paid for the coffee, and drank it when business was slack; the empty cups and the saucers were returned sometime during the day by handing them across the meat counter to the coffee employees or by taking them to the coffee counter if they had not been picked up by the coffee employees when night came; or, "as a rule" about once a day the coffee employees would go, at their convenience, behind the meat counter and get them from a shelf on the wall back of the meat counter or from a ledge on the inside of the counter, about 4 inches from the floor. The butcher, Lohman, referred to herein, knew that custom for at least 2 years. That practice was an arrangement between the meat market employees and the coffee department employees; however, the manager of the meat market had knowledge of such practice and on different occasions had seen plaintiff back of the meat counter picking up the cups and saucers. The manager did not discuss such practice with defendant Smith and defendant did not pay for the coffee or the service of it.

The front of the market building was on the north side of the building. The meat market was next to the east wall and extended from the front of the building to approximately the rear or south of the building. There was a rectangular refrigerator room in the southeast corner of the market. The meat counter extended the full length of the meat market, a distance of approximately 60 feet. The distance just referred to did not appear specifically in the evidence; however, three photographs of the meat market were received in evidence and there was testimony that one section of the counter, shown in one of the photographs was 10 feet in length. A comparison of that section with other sections of the counter as shown in the exhibits indicates that the above mentioned estimates as to distances are reasonable deductions to be drawn from the evidence. The entrance to the area behind the meat counter was at the south end of the counter. Two of the several meat blocks back of the counter were north of the refrigerator room. There was a shelf, referred to as a "back bar," on the building wall back of the meat blocks. It extended from the north end of the meat market to the north end of the refrigerator, was about 18 inches wide, about four feet above the floor, and a few inches higher than the tops of the meat blocks. The distance between the front or north meat block and the meat counter was 3 feet. There was a ledge in the back part of the meat counter 4 inches from the floor. Above the ledge in the back part of the counter there was an open space wherein wrapping paper racks and miscellaneous articles were kept. "As a rule" the empty coffee cups and saucers were placed on that ledge and it was from there that the coffee employees picked them up. Sawdust was on the floor back of the counter.

The ten butchers employed by defendant in that market worked in two shifts and at the time of the accident 4 or 5 were on duty, but only one was in the area behind the counter. The others were on the other side of the refrigerator or in the back. The different kinds of meat were placed in particular sections of the meat counter show case and each butcher cut and prepared a particular kind of meat; however, in serving the customers, the butchers were not confined to one kind of meat or section of the counter, but they went "back and forth" to the different sections of the counter and by the different meat blocks.

On January 3, 1940, about 11 a. m. plaintiff went behind the meat counter to get the empty cups and saucers in which he had served coffee to defendant's employees that morning. At that time only one butcher was in the area behind the counter. He had ordered coffee that morning and it had been delivered to him by the plaintiff. He was cutting veal chops on the front or north meat block and was standing on the south side of the block facing the front or north side of the building. That block was opposite the center of the section of the counter known as the chops counter. Before plaintiff went behind the counter to get the empty cups, that butcher had placed his empty cup and saucer on the ledge, near the bottom of the chops

counter and to the left of the center of that counter. Therefore, that empty cup and saucer were approximately 3 feet to the left of the butcher as he stood at the front block. The blade of the knife he used was 10 inches long, ½ inch wide, and had a very sharp point. The handle of the knife was 5 inches long. The total length of the knife was 15 inches.

Concerning the accident and happenings immediately preceding it, the butcher testified: that he had obtained 6 pieces or racks of meat, which he was cutting into chops, from the refrigerator and had placed them on the back bar at a place thereon which was to his right and behind him as he stood at the block; that he put one of the racks on the block, cut it into chops, and placed the chops on the back bar at a place thereon to his right and in front of him, to clear the block for the next rack; that he then intended to make a complete turn to his left to get another rack or uncut piece of meat to put on the block, from the racks which were immediately to his right and behind him on the back bar; that he intended also in making the complete turn to his left to look for customers at the counter to his left; that he held the knife in his right hand with the point of the knife extending upward at an approximate angle of 30 degrees and turned to his left on the ball of his foot, "performed what is called half a pivot," made "probably a half-circle," and "as he turned, Mr. Demmon was there," and the point of the knife cut plaintiff's arm about 3 inches above the wrist; that if he had known plaintiff was there he would have held the point of the knife down; that plaintiff was about "half the space between the counter and the block" or 18 inches to his left and slightly behind him when the knife struck him; that when the knife cut plaintiff, the dishes plaintiff had been carrying fell to the floor; that preceding the time he pivoted he did not hear any noise of dishes and did not hear plaintiff approaching; and that it was the practice of the butchers in going along the counter to watch out for the butchers who were handling the tools.

When the butcher was a witness he demonstrated his standing position at the block, the location of the back bar, how he held the knife, how he turned, and where plaintiff was when he was struck.

Concerning the accident and happenings immediately preceding it, plaintiff testified that he was walking north behind the counter to pick up the empty cups and saucers; that he had picked up 2 cups and saucers before the accident and had them in his right hand; that the butcher who was involved in the accident was the only person, other than plaintiff, behind the counter; that the butcher's back was toward plaintiff; that plaintiff saw and heard the butcher working at the block, cutting chops; that he noticed there were no customers at the counter; that as he proceeded along the counter he looked along the ledge or base of the counter for the cups, after he "realized Mr. Lohman [the butcher] was working at his block," and at the time of the accident he (plaintiff) was looking toward the ledge of the counter; that at the time the butcher made the "pivot" turn plaintiff was walking about 1½ or 2 feet from him and about 2 feet from the counter; that "just as I [plaintiff] got about opposite Mr. Lohman [the butcher] he suddenly turned, and the knife struck me in my right arm. The point of the knife"; and that no one ever objected to the fact that he went behind the counter to get the cups.

The trial court found that the butcher, Lohman, was the employee of defendant and was acting within the scope of said employment at the time plaintiff was cut with the knife; that at the time plaintiff was cut and for a long time prior thereto, it had been a common practice of defendant's employees in said meat market, including said butcher, Lohman, to order the service of coffee to them in said meat market, and for the employees of the coffee company, including plaintiff, to enter behind the meat counter for the purpose of recovering the empty cups theretofore delivered; that said practice was known to defendant; that plaintiff entered behind the meat counter on January 3, 1940, pursuant to said practice, for the purpose of recovering empty cups; that said butcher, Lohman, so negligently handled a sharp pointed knife that it struck and injured plaintiff; that the injuries sustained by plaintiff were the proximate result of the negligent handling of said knife by said butcher, and were the proximate result of the negligence of said butcher and the defendant; and that no negligence on the part of plaintiff caused or proximately contributed to plaintiff's injury.

Defendant contends that (1) defendant was not negligent; (2) plaintiff was a licensee and the only duty owed to him by defendant was to refrain from wilful in-

jury; and (3) plaintiff was guilty of contributory negligence as a matter of law.

Concerning his first contention, defendant asserts that the butcher did not know, and the defendant did not know, plaintiff was behind the counter or near the butcher just prior to the accident, and that there was no reason to anticipate plaintiff's presence near the butcher; that the butcher knew he was on duty alone and the other butchers were in the rear of the market; that he was aware of the custom that the butchers "watch out for" the butcher using the tools; that the sawdust on the floor prevented the butcher from hearing the approach of anyone; and there was no fixed time when plaintiff would come behind the counter to recover the cups.

[1] The butcher had been employed at least 2 years in the meat market referred to herein, and during that time he knew it was a prevailing custom that the employees of the coffee company would go behind the meat counter about once a day (but at no regular time during the day) to obtain the empty cups. He also knew that deliverymen and salesmen for meat companies, the owner of the market, and the market supervisor, went behind the meat counter at various times. He was required therefore to anticipate the presence of persons other than the other butchers behind the counter. The pieces of meat which he intended to cut into chops were on the back bar immediately to his right, and although it was necessary only for him to reach to his right in order to obtain another piece of uncut meat and place it on the meat block, he turned and pivoted to his left on the ball of his foot, intending to turn completely around to his left and obtain another piece of meat from the back bar and place it on the block. Instead of leaving the knife on the block as he turned, or holding the knife with its point extending downward, he held it in his right hand with its point extending upward at an approximate angle of 30 degrees and pivoted to the left until he had made a half-circle and struck plaintiff. He did not look to the left, or to the rear, or at all in the direction he intended to turn, before he started to pivot, and he did not see plaintiff until the injury occurred. He gave no warning of his intention to whirl or turn suddenly. In addition to the benefit of general observation of the witnesses while they were testifying, the trial court had the benefit of the demonstration made by the butcher, when he was a witness, as to the manner in which he held the knife as he turned and as to the rapidity of the turn. Although the practice of ordering and furnishing coffee was an arrangement between the employees of the meat and coffee departments, and the defendant did not pay for the coffee or the service of it, defendant's manager of the meat department, who was not one of the butchers, had knowledge of such practice and had seen plaintiff on different occasions back of the meat counter picking up the empty cups. The finding of the trial court that the butcher and defendant were negligent should not be disturbed.

[2-5] Defendant contends further that plaintiff was not an invitee but was a licensee and as such licensee the only duty owed by defendant to plaintiff was to refrain from wanton or wilful injury. If plaintiff was an invitee the defendant owed him the duty of exercising ordinary care to avoid injury to him. If plaintiff was a licensee the defendant owed him the duty of exercising ordinary care to avoid injury to him through active negligence, and that duty would have been breached if plaintiff was injured as a proximate result of defendant's active negligence as distinguished from passive negligence. It is not necessary, however, to determine whether plaintiff was an invitee, for the reason that the degree of care owed to plaintiff under the circumstances of this case, if he be regarded as a licensee (as defendant asserts he should be), is the same as if he be regarded as an invitee. The rule that the duty owed to a licensee is to refrain from wanton or wilful injury is a general rule which applies to cases relating to the duty owed to a licensee with respect to the condition of premises, that is to cases involving passive negligence as distinguished from active negligence. Colgrove v. Lompoc, etc., Club, 1941, 51 Cal.App.2d 18, 22, 124 P.2d 128; Yamauchi v. O'Neill, 1940, 38 Cal.App.2d 703, 102 P.2d 365. The rule as to the degree of care owed to a licensee injured by active negligence is that if the licensee was upon a part of the premises where the one who committed the overt act of negligence knew, or had good reason to expect, the licensee to be, the duty owed to the licensee was to exercise ordinary care to avoid injury to him. Colgrove v. Lompoc, etc., Club, supra; Yamauchi v. O'Neill, supra. In the present case the injury resulted from a movement

or overt act performed by the butcher. Plaintiff was at least a licensee. As shown hereinabove, the butcher was required to anticipate, and he had good reason to expect, the presence of plaintiff behind the counter. The degree of care owed to plaintiff was ordinary care.

[6-8] Defendant also contends that plaintiff was guilty of contributory negligence as a matter of law. His argument is that plaintiff could have avoided the injury by asking the butcher to hand the cups over the counter to him; and that plaintiff failed to keep a lookout for the butcher, and failed to give a warning of his presence. The empty cups were placed "as a rule" on the ledge in the back part of the counter about 4 inches from the floor, and it was from that ledge that plaintiff or other employees of the coffee department obtained the cups "as a rule" about once a day for at least 2 years. The matter of going behind the counter to obtain the cups on the occasion here involved was in keeping with that custom. The butcher knew of the custom. The fact that plaintiff went behind the counter to obtain the cups, rather than to ask for delivery of them over the counter, was not negligence. Plaintiff knew that the butcher was the only person, other than plaintiff, behind the counter. Before the accident plaintiff had gone about the length of the long counter and had picked up 2 cups and saucers. After he saw and heard the butcher working at the block, he looked along the ledge for cups and was looking toward the ledge at the time of the accident. The record does not show that plaintiff had had any previous experience while behind the counter or had made any observation, or had any information, by reason of which he should have anticipated that the butcher would suddenly whirl or pivot on the ball of his foot when he had a butcher knife in his hand, or that he would suddenly turn at all. As heretofore stated, the trial court had the benefit of the demonstration made in court by the butcher concerning the manner in which he stood at the block, turned, and held the knife. Whether a plaintiff has been guilty of negligence is usually a question of fact for the trier of the facts. It was said in Crawford v. Southern Pacific Co., 1935, 3 Cal.2d 427, at page 429, 45 P.2d 183, 184: "To establish the defense of contributory negligence as against the verdict of a jury, the evidence must be such that the appellate court can say that there is no substantial conflict on the facts, and that from the facts reasonable men can draw but one inference, which inference points unerringly to the negligence of the plaintiff proximately contributing to his own injury." Also Bellon v. Silver Gate Theatres, Inc., 1935, 4 Cal.2d 1, 14, 47 P.2d 462. It should not be concluded that plaintiff was guilty of contributory negligence as a matter of law.

The judgment is affirmed.

SHINN, Acting P. J., and SHAW, J. pro tem., concur.



58 Cal.App.2d Supp. 909

DAVIDSON v. GOLDSTEIN.

Civ. A 5446.

Appellate Department, Superior Court, Los Angeles County, California.

April 16, 1943.

1. Landlord and tenant ⇐134(3)

In the absence of a provision limiting the use to which lessee may put leased property, lessee may use the property for any lawful purpose not materially different from that in which they are usually employed, to which they are adapted, or for which they were constructed.

2. Evidence ⇐441(4)

Where a lease contained no limitation as to the use to which tenant might put the leased property, oral conversations between landlord and lessee prior to execution of lease could not have effect of limiting such use. Civ.Code, § 1625; Code Civ. Proc. § 1856.

3. Landlord and tenant ⇐199½ War ⇐4

Where a lease contained no limitation as to use to which leased premises could be put and lessee conducted therein the business of selling new and used tires, retreading, vulcanizing and recharging and renting batteries, act of federal government in restricting sale of tires did not terminate the lease and absolve tenant

from liability for rent under theory of "commercial frustration".

See Words and Phrases, Permanent Edition, for all other definitions of "Commercial Frustration".

4. Landlord and tenant ⇐105

A lease which does not restrict the use of the leased premises to a single purpose is not invalidated by a subsequent enactment prohibiting the use for less than all of the several purposes specified.

5. Landlord and tenant ⇐105

Where a lease restricts the use of premises to particular specified purposes and thereafter, because of enactment of valid governmental statutes, decrees or regulations, such use becomes unlawful, the subject matter of the lease is destroyed, and the covenants thereof will not be enforced against either party.

6. Landlord and tenant ⇐199½

A change in the law, during the term of the lease, which merely restricts but does not wholly prohibit the conduct of the business carried on, does not release tenant from his obligation to pay rent.

Appeal from Municipal Court of Los Angeles; Joseph L. Call, Judge.

Action by Rose Davidson against Michael Goldstein for rent under a written lease. From a judgment for defendant, plaintiff appeals.

Reversed and remanded for new trial.

Samuel Maidman, of Los Angeles, for appellant.

Walter H. Young, of Los Angeles, for respondent.

Stanley M. Arndt, of Los Angeles, amicus curiae.

SHAW, Presiding Judge.

Plaintiff sues for rent due on a written lease, made long before the United States entered into the present war. The only defense to which evidence was addressed at the trial is that defendant's use of the premises for the purposes for which the lease was made became unlawful or at least unprofitable by reason of certain regulations made by the Federal Government, under its war powers, regarding the sale of tires and tubes. In support of the judgment for defendant he invokes the doctrine of "commercial frustration," as it is sometimes called, claiming that he can no longer carry on with profit the business for which he leased the property and that he is for that reason freed from his obligations under the lease.

[1, 2] The lease contains no limitation of the uses to which the lessee may put the leased property. In the absence of such limitation, the tenant may use the property for any lawful purpose not materially different from that in which they are usually employed, to which they are adapted or for which they were constructed. 36 Cor. Jur. 84, 87; Keating v. Preston, 1940, 42 Cal.App.2d 110, 115, 108 P.2d 479. The fact that before the written lease was entered into the parties discussed defendant's use of the building, and defendant said he wanted to lease it to engage in the tire business and would engage in that and the battery business, does not limit his use to those purposes. The conversation does not purport to have that effect, and even if it did, it could not be given such effect against the written lease containing no such limitation. Section 1625, Civil Code; section 1856, Code of Civil Procedure; Gibbs v. Seeger, 1933, 130 Cal.App. 123, 128, 19 P.2d 514.

[3] It appears that after defendant took possession of the leased property he conducted therein the business of selling new and used tires, chiefly the latter, and did some business in taking in tires for retreading and vulcanizing, in fixing flat tires and in recharging and renting batteries. The property, as described in the record, was adapted and suitable for all these purposes, as well as others, and undoubtedly defendant had the right, under his lease, to engage in these and other lines of business for which such a structure could readily be used. The government regulations to which defendant refers did not affect at all the battery business or the fixing of flat tires, nor did they prohibit the selling of new or used tires or the retreading of tires altogether. They prohibited such sales and retreading except to persons who had certificates therefor from their ration boards and greatly limited the classes of persons who could obtain such certificates. Thus the defendant could carry on parts of his business as before, and was not altogether stopped in any of it, although the number of possible customers for the major part of the business as he conducted it was cut down and it was

probably thereby made unprofitable for him to continue in business.

[4] The law applicable to such a situation was declared in Grace v. Croninger, 1936, 12 Cal.App.2d 603, 607, 55 P.2d 940, 942, where property had been leased under a lease which limited the lessee to carrying on therein the business of a saloon and cigar store and a bootblack stand, and thereafter the saloon business was made unlawful by the War-Time Prohibition Act, 40 Stat. 1046, and the court held that this act did not invalidate the lease, and rent accruing after it took effect could be collected from a guarantor, saying: "* * * where the contract does not restrict the use of the leased premises to a single purpose, it is not invalidated by a subsequent enactment prohibiting the use for less than all of the several purposes specified." The same rule was followed in Burke v. San Francisco Breweries, Ltd., 1913, 21 Cal. App. 198, 203, 131 P. 83.

The same question arose under the present wartime regulation stopping the sale of new automobiles except to those who can obtain ration board certificates authorizing them to buy, in Byrnes v. Balcom, 1942, 265 App.Div. 268, 38 N.Y.S.2d 801, 803. That was an action by a landlord to recover rent due on a lease, and the defendant, who was an automobile dealer, set up the regulation just mentioned as a defense. On this point, the court said:

"Undoubtedly the lease contemplated the sale of new cars on the premises but the lessee is not restricted to the exclusive sale of such cars but may devote the property to other legal uses specified in the lease. This is not a case where the parties entered into a lease exclusively for a use which was not illegal when the contract was made but which was subsequently made illegal by operation of law. * * * Respondent is not entirely prohibited by governmental decree from selling new cars. His right to do so is restricted.

[5, 6] "There can be no doubt about the proposition that where a lease restricts and limits the use of premises let to a particular specified purpose and thereafter, because of the enactment of valid governmental statutes, decrees or regulations such use becomes unlawful, the subject matter of the contract is destroyed and the covenants of such lease will not be enforced against either party thereto. The rule is that where the lease is exclusive the subsequent passage of prohibitory laws terminates it. A change in the law during the term of the lease, however, which merely restricts but does not wholly prohibit the conduct of the business carried on, does not release the tenant from his obligation to pay rent."

Other recent New York cases are cited by the parties, but as they are decisions by trial courts or other tribunals inferior to the Appellate Division, we do not review them. None of them appears to be based on a view of the law inconsistent with that appearing in Byrnes v. Balcom.

The judgment is reversed, and the cause is remanded to the Municipal Court for a new trial, appellant to recover her costs on appeal.

FOX, J., and KINCAID, Judge pro tem., concurred.

22 Cal.2d 72

CLINKSCALES et al. v. CARVER.

S. F. 18480.

Supreme Court of California.

April 29, 1943

1. Negligence ⇐6

When a legislative body has generalized a standard of conduct from experience of community and prohibits conduct that is likely to cause harm, the court will accept formulated standards and apply them in a civil action, except where standards would serve to impose liability without fault.

2. Automobiles ⇐246(9)

In action for death of motorist as result of collision at intersection at which boulevard stop sign had been erected without official authorization, where it appeared that defendant did not stop at stop sign, instructions informing jury that, if defendant failed to make boulevard stop at intersection and such failure proximately caused accident, verdict should be for plaintiffs, was not erroneous, regardless of any irregularity attending authorization of the stop sign.

SHENK and EDMONDS, JJ., dissenting.

In Bank.

Appeal from Superior Court, Imperial County; Vaughn N. Thompson, Judge.

Action by Lois A. Clinkscales and others against Herman Roland Carver for death of plaintiffs' deceased as result of an automobile collision. From a judgment for plaintiffs, the defendant appeals.

Affirmed.

Prior opinion, 126 P.2d 906.

Hickcox & Provence and Ross T. Hickcox, all of El Centro, for appellant.

Syril S. Tipton and John J. Ford, both of Los Angeles, for respondents.

TRAYNOR, Justice.

This action was brought to recover damages for a death caused by an automobile collision that occurred May 20, 1937, at the intersection of Highline Road and Oat Canal Road in Imperial County. The defendant was driving north on Highline Road as Richard Clinkscales, the husband of one plaintiff and father of the other, was proceeding west on Oat Canal Road. There was a stop-sign at the intersection on Highline Road, placed there in 1936 by a road foreman, with the permission of the supervisor of that district, to give gravel trucks the right of way on Oat Canal Road. Although the defendant was familiar with this sign he did not stop his car before entering the intersection. He looked in both directions but did not see the other car coming. The resulting collision caused the death of Richard Clinkscales. Defendant appeals from a judgment entered on a verdict of the jury in favor of plaintiffs.

The defendant contends that the stop-sign was placed on Highline Road at this intersection illegally and that the trial court's instructions on that question were prejudicially erroneous. The court instructed the jury that any person operating a motor vehicle in a northerly direction on Highline Road at the intersection with Oat Canal Road was required to stop before entering it, by virtue of a resolution of the Board of Supervisors of Imperial County adopted on January 4, 1927, and section 577 of the Vehicle Code, St.1935, p. 190; that the right of way was controlled by section 552 of the Vehicle Code; and that if defendant failed to make the stop and this failure proximately caused the accident the verdict should be in favor of the plaintiffs.

At the time of the accident section 577 of the Vehicle Code provided: "Vehicles Must Stop at Through Highways. The driver of any vehicle upon approaching any entrance of a highway or intersection signposted with a stop-sign as provided in this code shall stop at such sign before entering or crossing such highway or intersection." Section 552 of the Vehicle Code provided: "Vehicle Entering Through Highway. The driver of any vehicle which has stopped as required by this code at the entrance to a through highway shall yield the right of way to other vehicles which have entered the intersection from the through highway or which are approaching so closely on the through highway as to constitute an immediate hazard, but said driver having so yielded may proceed and the drivers of all other vehicles approaching the intersection on the through highway shall yield the

right of way to the vehicle so about to enter or cross the through highway."

The resolution of January 4, 1927, provided: "It is hereby resolved, found and ordered that the general safety of the public and the proper and reasonable regulation and control of traffic on the public roads and highways in this county and outside of incorporated cities and towns require the establishment of 'Boulevard stops' at all roads intersecting all county and state highways in Imperial County outside of incorporated cities and towns, and such 'Boulevard stops' are hereby established at said intersections as provided and authorized by Ordinance No. 82 of this County."

Ordinance 82, referred to in the resolution, had been passed by the board on July 10, 1926, but never became effective because of admitted defects in publication. Defendant contends that since the resolution orders the establishment of boulevard stops "as provided and authorized by Ordinance No. 82," which was not legally adopted, there was no legal authorization for the stop sign, and that the instructions were therefore prejudicially erroneous.

[1] This contention would make the question of negligence per se turn upon the irregularity of the authorization. Whatever the effect of the irregularity on defendant's criminal liability, it cannot be assumed that the conditions that limit it also limit civil liability. The propriety of taking from the jury the determination of negligence does not turn on defendant's criminal liability. A statute that provides for a criminal proceeding only does not create a civil liability; if there is no provision for a remedy by civil action to persons injured by a breach of the statute it is because the Legislature did not contemplate one. A suit for damages is based on the theory that the conduct inflicting the injuries is a common-law tort, in this case the failure to exercise the care of a reasonable man at a boulevard stop. The significance of the statute in a civil suit for negligence lies in its formulation of a standard of conduct that the court adopts in the determination of such liability. (See Holmes, The Common Law, 120–129; Morris, The Relation of Criminal Statutes to Tort Liability, 46 Harv. L. Rev. 453.) The decision as to what the civil standard should be still rests with the court, and the standard formulated by a legislative body in a police regulation or criminal statute becomes the standard to determine civil liability only because the court accepts it. In the absence of such a standard the case goes to the jury, which must determine whether the defendant has acted as a reasonably prudent man would act in similar circumstances. The jury then has the burden of deciding not only what the facts are but what the unformulated standard is of reasonable conduct. When a legislative body has generalized a standard from the experience of the community and prohibits conduct that is likely to cause harm, the court accepts the formulated standards and applies them (Siemers v. Eisen, 54 Cal. 418; Cragg v. Los Angeles Trust Co., 154 Cal. 663, 98 P. 1063, 16 Ann.Cas. 1061; see cases cited in 19 Cal.Jur. 632 et seq., Osborne v. McMasters, 40 Minn. 103, 41 N.W. 543, 12 Am.St.Rep. 698; see Restatement: Torts, sec. 286), except where they would serve to impose liability without fault. Berkovitz v. American River Gravel Co., 191 Cal. 195, 215 P. 675; Burlie v. Stephens, 113 Wash. 182, 193 P. 684; Tedla v. Ellman, 280 N.Y. 124, 19 N.E.2d 987; see 13 Cal.L.Rev. 428; 37 Mich.L.Rev. 811.

[2] Even if the conduct cannot be punished criminally because of irregularities in the adoption of the prohibitory provisions, the legislative standard may nevertheless apply if it is an appropriate measure for the defendant's conduct. When the court accepts the standard it rules in effect that defendant's conduct falls below that of a reasonable man as the court conceives it. It does no more than it does in any ruling that certain acts or omissions amount as a matter of law to negligence. Restatement: Torts, sec. 285. An appellate court is concerned with determining whether the trial court arrived at a proper standard in a particular case. In this case the trial court rightly instructed the jury that measured by the standard set up by the resolution of the board of supervisors and the Vehicle Code it was negligence as a matter of law to disregard the stop-sign. Failure to observe a stop-sign is unreasonably dangerous conduct whether or not the driver is immune from criminal prosecution because of some irregularity in the erection of the stop-sign. If a through artery has been posted with stop-signs by the public authorities in the customary way and to all appearances by regular procedure, any reasonable man should know that the public naturally relies upon their

observance. If a driver from a side street enters the ostensibly protected boulevard without stopping, in disregard of the posted safeguards, contrary to what drivers thereon could reasonably have expected him to do, he is guilty of negligence regardless of any irregularity attending the authorization of the signs. Comfort v. Penner, 166 Wash. 177, 6 P.2d 604; Mayfield v. Crowdus, 38 N.M. 471, 35 P.2d 291; Fothergill v. Kaija, 183 Wash. 112, 48 P.2d 643, 53 P.2d 1198; Flood v. Miura, 120 Cal.App. 467, 8 P.2d 552. Such irregularity does not relieve a person from the duty to exercise the care of a reasonable man under such circumstances. Otherwise a stop-sign would become a trap to innocent persons who rely upon it.

The judgment is affirmed.

GIBSON, C. J., CURTIS and CARTER, JJ., and PETERS, J. pro tem., concurred.

SHENK, Justice.

I dissent. The trial court instructed the jury that the defendant was guilty of negligence as a matter of law if he failed to stop on Highline Road at its intersection with Oat Canal Road. The basis for the instruction was the false assumption that Highline Road was signposted with a stop-sign as then provided by section 577 of the Vehicle Code. There was no stop-sign so posted. Some stop signal was installed at the intersection but without any legal authorization therefor. The question of the defendant's negligence under the circumstances was, in my opinion, a question of fact for the jury. The cases cited in the majority opinion go no further than to hold that the jury may consider the existence of a so-called de facto stop-sign in determining the question of the defendant's negligence. The withdrawal of that issue from the jury in the present case was manifestly prejudicial. At the time of the impact the Clinkscales car was traveling on the left or wrong side of the road and, from the evidence of the physical facts, must have been going at an excessive rate of speed. Freed from the erroneous instruction the jury might well have found that the negligence of the deceased was the sole proximate cause of the collision.

EDMONDS, J., concurred.

CAMINETTI, Insurance Commissioner, v. PACIFIC MUT. LIFE INS. CO. OF CALIFORNIA et al. (two cases).

L. A. 18391, 18396.

Supreme Court of California.

April 30, 1943.

As Modified on Denial of Rehearing May 27, 1943.

1. Insurance ⇐44

Under rehabilitation agreement providing for assumption of old company's policies by new company with requirement that there be either a rejection or acceptance of agreement by policyholders within a definite period, if holders of non-cancellable policies in good standing chose to accept assumption by new company of the policies, acceptance would be binding upon them where agreement was part of plan to adjust affairs of old company and orderly method of adjusting affairs required acceptance or rejection within definite period.

2. Insurance ⇐44

Where rehabilitation plan provided for assumption of old company's policies by new company, with failure of policyholders to reject plan within 75-day period constituting acceptance and waiver of claims for damages, but order for liquidation permitted filing for damages within 6-month period, holders of non-cancellable policies could either accept, accept by failing to reject within 75-day period, or file for damages after expiration of 75-day period and within six-month period.

3. Insurance ⇐364

When a policy has lapsed, the insurance is suspended during the period that the right of reinstatement exists, and during the lapse the risk is not assumed by the insurer.

4. Insurance ⇐44

Under rehabilitation agreement providing for assumption of old company's policies by new company with failure to accept or reject plan within 75-day period considered acceptance of agreement by policyholders and waiver of right to claim damages, failure by holders of lapsed policies to reject within 75-day period did not bar right to file for damages within six-month period set therefor by order of liquidation.

5. Insurance ⇐44

Where rehabilitation agreement providing for assumption by new company of

old company's policies, and for payment of nonconsenting policyholders and creditors out of assets of old company, was part of plan to secure rights of policyholders and creditors, no interpretation of agreement would be adopted which would deny the right to allow claims of policyholder in favor of acceptance of new insurance.

6. Insurance ⇐44

Under rehabilitation agreement providing for assumption of old company's policies by new company with failure to accept or reject agreement within 75-day period considered acceptance and waiver of right to claim damages, failure to reject could give holder of lapsed policy nothing to accept so that failure to apply for reinstatement was rejection of plan and he could file for damages within six-month period set therefor by order of liquidation.

7. Insurance ⇐44

Where under one sentence of rehabilitation agreement providing for assumption of old company's policies by new company, holders of policies lapsed or not lapsed were given option of rejection or acceptance, and under another sentence failure to reject constituted acceptance a construction of agreement which did not make failure to reject an acceptance as to holders of lapsed policies unless there had been reinstatement, did not give a different meaning to the word "policyholders" as used in the two sentences in that under either sentence, holders of lapsed policies were in special class because of necessity for reinstatement of lapsed policies as condition to assumption of policies by new company.

See Words and Phrases, Permanent Edition, for all other definitions of "Policy Holder".

8. Insurance ⇐44

Where in construing rehabilitation agreement providing for assumption of old company's policies by new company it was held that holders of policies lapsed after effective date of agreement were not considered to have accepted agreement by failure to reject within 75-day period as provided in agreement since it was assumed new company could have refused reinstatement within 75-day period, interests of holders of policies lapsed after effective date of agreement but reinstated after 75-day period, were not jeopardized.

9. Insurance ⇐44

Where rehabilitation agreement provided for assumption of old company's policies by new company and payment of claims from assets of old company and by new company subject to certain contingencies, with failure by policyholders to reject agreement within 75-day period considered waiver of right to file claims, but liquidation order gave 6-month period to file claims, holding that holders of lapsed noncancellable policies not reinstated did not accept agreement by failure to reject and could file for damages after 75-day period and within six-month period, did not give them a "preference" under provision of agreement requiring payment in full of all claims.

See Words and Phrases, Permanent Edition, for all other definitions of "Preference".

10. Insurance ⇐44

Under rehabilitation agreement providing for assumption of old company's policies by new company wtih failure by policyholders to give notice of rejection within 75-day period considered as acceptance and waiver of right to file claims in liquidation, letter from liquidator advising policyholders that they could file claims provided there was notice of rejection did not constitute a "practical construction" contrary to liquidator's position that agreement meant that holders of lapsed policies failing to reject could file claims after 75-day period and within six-month period therefor set by liquidation order, where letter did not unequivocally state that by failure to reject there would be loss of both right to reinsurance and to file claim.

See Words and Phrases, Permanent Edition, for all other definitions of "Practical Construction".

In Bank.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Proceedings by Pacific Mutual Life Insurance Company of California, and another, against A. Caminetti, Jr., as Insurance Commissioner etc., to set aside an allowance of claims by the Insurance Commissioner as liquidator and conservator of an insurance company. From an order setting aside the allowance of claims, A. Caminetti, Jr., and another appeal.

Order reversed.

Earl Warren, Atty. Gen., and Mitchell, Silberberg & Knupp, of Los Angeles, for appellant Insurance Commissioner.

Manierre & Cuthbertson, of Los Angeles, for appellant John Harnish.

Lyman P. Robertson, Henry H. Childress, and Guthrie & Darling, all of Los Angeles, for respondents.

CARTER, Justice.

The appeal in the first above numbered cause is taken by the insurance commissioner as liquidator and conservator of the Pacific Mutual Life Insurance Company of California, referred to as the old company, from an order of the superior court made on February 14, 1941, setting aside the allowance by the insurance commissioner of claims in the liquidation of the old company made by the holders of non-cancellable (hereafter called non-can) insurance policies issued by the old company. The other appeal is by defendant John Harnish, one of such policyholders, from the same order. The latter appellant, in addition to the ground urged for reversal by the insurance commissioner urges several others.

The main controversy involves the construction and application of the rehabilitation and reinsurance agreement, dated July 22, 1936, the approval of which by the superior court, was affirmed by this court in Carpenter v. Pacific Mut. Life Ins. Co., 10 Cal.2d 307, 74 P.2d 761; see also Carpenter v. Pacific Mut. L. Ins. Co., 13 Cal.2d 306, 89 P.2d 637; Caminetti v. Pacific Mut. L. Ins. Co., L.A. No. 17,678. That agreement was ultimately approved by the superior court on December 4, 1936. The insurance commissioner had been appointed conservator of the old company. On February 2, 1937, the superior court made an order for liquidation of the old company and appointed the insurance commissioner liquidator. In that order it was declared that the holders of unmatured policies of the old company had been warned of the condition of that company; that many of said policyholders had permitted their policies to lapse since July 22, 1936; that the rights and liabilities of the creditors and policyholders shall be fixed as of July 22, 1936; and that notice be published advising all policyholders of the old company to file their claims with the insurance commissioner as liquidator within six months after date of the first publication. The first publication was made on May 6, 1937, hence the six months period expired in November, 1937. That order for liquidation was affirmed by this court. Carpenter v. Pacific Mut. L. Ins. Co., 13 Cal.2d 306, 89 P.2d 637.

The rehabilitation and reinsurance agreement contemplated the formation of a new company, Pacific Mutual Life Insurance Company, the stock of which was to be held by the insurance commissioner. Substantially all of the assets of the old company were transferred to the new company and it was to engage in the insurance business assuming the policies of the old company held by such persons as accepted the plan in the manner there provided. The non-can policies were assumed at the same premium, but with reduced benefits. The claims of creditors and non-can policyholders not consenting to the reinsurance by the new company were to be paid from the assets of the old company held by the insurance commissioner, and limited payments were to be made thereon by the new company.

Most of the holders of the non-can policies assented to the assumption of their policies by the new company, but some, including appellant Harnish, did not. They permitted their policies to lapse for non-payment of premiums after July 22, 1936, the effective date of the rehabilitation and reinsurance agreement and plan. Within the six months period permitted for filing claims in the order for liquidation of February 2, 1937, they filed their claims for damages with the liquidator, insurance commissioner, and he allowed them. Upon petition of the new company and a policyholder, the trial court on February 14, 1941, made its order from which the present appeals are taken setting aside the liquidator's allowance of those claims, apparently basing its conclusion on paragraph 24 of the rehabilitation and reinsurance agreement which reads: "Policyholders and policy claimants of the Old Company may elect to accept or reject the reinsurance and assumption hereunder of his policy, contract, or claim at any time within seventy-five (75) days after the entry of the order approving this agreement. The filing with the New Company after the entry of the order of the Court approving the agreement of any claim or proof of loss shall constitute an acceptance of this agreement and a waiver of any right to reject the same. *Any policyholder or policy claimant who shall fail to notify the New Company, in writing, of his rejection with-*

in said period shall automatically be deemed to have assented to and become bound by this agreement, and entitled to the benefits hereof.

"The filing of a claim with the Liquidator shall, unless such claim is withdrawn within seventy-five (75) days after the entry of the order of the Court approving this agreement, be deemed a rejection of such reinsurance and assumption. The New Company may nevertheless, with the consent of the Commissioner, and upon such terms as the New Company in its sole discretion may desire to impose, permit the withdrawal of a rejection whether or not the period for election herein fixed shall have expired, and permit the person so withdrawing his rejection to accept the reinsurance and assumption herein contained.

"Any person electing to accept the reinsurance and assumption herein contained shall thereby be deemed to have entered into a novation with the New Company, and to have released the Old Company from all claims, liabilities, or obligations with respect to his policy or policy claim hereby assumed or reinsured, whether wholly or partially assumed or reinsured." (Emphasis added.)

Inasmuch as the holders of non-can policies here involved did not expressly accept the reinsurance by the new company or reject the same in writing within the seventy-five (75) day period, but filed their claims with the liquidator after the expiration of the time, yet within the six months period, it is asserted that their claims cannot be allowed because they accepted the reinsurance by their failure to give written notice of rejection; that if they accepted the reinsurance they have no claims for the loss of their policies in the liquidation of the old company. With this contention we do not agree.

[1, 2] The rehabilitation and reinsurance agreement was a part of the plan for adjusting the affairs of the old company to the end that as much as possible of its assets be preserved. The new company was the corporate agency of the insurance commissioner as conservator for the purpose of continuing and preserving the business of the old company. Carpenter v. Pacific Mut. Life Ins. Co., 10 Cal.2d 307, 74 P.2d 761. If the holders of non-can policies in good standing chose to accept the assumption by the new company of their policies, that acceptance would be binding upon them. To enable the new company to be apprised of the policies which it thereby assumed and to insure an orderly and definite method of accomplishing that result, sound business policy required that there be either an acceptance or written rejection within a definite period. If the plan was not rejected it was deemed accepted by the policyholder. In addition to the foregoing, the policyholders had the right to file claims for breach of their policies as a result of the order for liquidation, and those rights were fixed as of July 22, 1936. Hence, it may be said that the holders of non-can policies which had not lapsed had a choice of three courses. They could expressly accept the assumption of their policies by the new company, or fail to reject the assumption, in either of which events they would have accepted insurance with the new company under the limitations stated in the rehabilitation and reinsurance agreement, and lose their right to claim damages for the loss of their policies resulting from the liquidation of the old company. If they did not accept the plan they could file their claims with the liquidator, the time for the doing of which extended beyond the period of acceptance or rejection. The option was given and was for the benefit of the policyholders. Paragraph 24 must be construed in the light of that factor.

[3, 4] Acceptance by failure to reject in writing or express acceptance were not the only methods of exercising that option, when the rights of holders of lapsed policies, here in question are involved. They are placed in a special category, and reasonably so, inasmuch as when a policy has lapsed the insurance may be said to be suspended during the period that the right of reinstatement exists. During the lapse the risk is not assumed by the insurer. That right to reinstatement is, of course, a valuable contractual right. Kennedy v. Occidental Life Insurance Co., 18 Cal.2d 627, 117 P.2d 3. That right is protected, and it is also clearly indicated that lapsed policies with that right are in a special category by paragraph 4 of the agreement. It reads: "The New Company will reinstate any policies heretofore issued, assumed, or reissued by the Old Company, * * * which at *the effective date of this agreement, (July 22, 1936)* by their terms, were entitled to reinstatement, provided that all requirements necessary to procure a reinstatement of said policies under their *terms* are fulfilled to the satisfaction of the New Company.

"The New Company will *also* reinstate, during the lifetime of the insured and provided the insured is not in such condition as to be eligible for benefits under the policy, *without evidence of insurability,* any of the policies * * * which have lapsed since the effective date of this agreement, *upon written application therefor by the insured and the payment of all premiums in arrears, if such application is made and premiums are paid within seventy-five (75) days after the entry of the order of the Court approving this agreement.* Upon the reinstatement of such lapsed policy it shall, for all purposes, be treated (but only from and after the date of reinstatement) the same as if it had been in force on the effective date of this agreement and be subject to the terms and conditions of this agreement." (Emphasis added.) Assuming the first sentence of the foregoing secures the right of reinstatement to all policyholders whose policies provide for reinstatement, whether the lapse occurred prior to or since July 22, 1936, if compliance is had with the terms of the policies with respect to reinstatement, and that a more liberal and additional right to reinstatement is given to the holders of policies which lapsed since July 22, 1936, the fact remains that such lapsed policyholders occupy a special status in regard to whether an acceptance of insurance in the new company results from failure to reject it in writing. If the holder of a policy which had lapsed either before or after July 22, 1936, desired to be reinstated under the first sentence he would be required, under the terms of the policy, to apply therefor, pay the premiums and supply evidence of insurability satisfactory to the insurer within six months from the date of default in the premium. That time might elapse before or after February 20, 1936, the date of the expiration of the seventy-five days in which the reinsurance could be accepted or rejected. The rights in that respect are peculiar to the holders of lapsed policies. The option lies with them. A failure to reject in writing the reinsurance agreement should not debar them from claiming damages because an election in that manner does not give them insurance in the new company except upon the condition that they give satisfactory evidence of insurability. An inability to comply with that requirement would result in the loss of the right to claim damages, if it be said they have accepted the reinsurance agreement and thus waived damages. It is not to be supposed that any such result was intended by the wording of paragraph 24 of the agreement. The only reasonable interpretation is that they be entitled to insurance in the new company by way of reinstatement, upon application, payment of premiums, and establishing insurability within the six months period specified in the policy; that while reinstatement forecloses their right to a claim for damages, a failure to give written notice of rejection within the seventy-five days will not, and that their claim is allowable if made in the time and manner required.

In regard to policies which have lapsed since July 22, 1936, under the second sentence of paragraph 4, the same reasoning applies. They may obtain reinstatement at any time within seventy-five days by application and payment of premiums without establishing insurability if they are not then entitled to benefits.

[5] In both cases the policy underlying the automatic acceptance clause of paragraph 24 will be satisfied, inequitable results will be avoided, and the right to claim damages will be preserved and protected. The new company presumptively should be able to ascertain from the records the date of the lapse of the policies and when the time will expire for reinstatement under the terms of the policies. Under the second sentence of paragraph 4, the reinstatement application must have been filed before the expiration of the seventy-five days. An important factor in interpreting the foregoing agreement is the background of the entire proceeding. The rehabilitation and reinsurance agreement was really a declaration of a part of a plan to adequately secure and safeguard the rights of all policyholders and creditors. The parties to the agreement were the Insurance Commissioner as conservator of the old company, and the new company, which was under the control of the commissioner, inasmuch as it was his corporate agency to accomplish the desired results, and he held all of the stock therein. The interests of all must therefore be fully protected. No interpretation should be adopted which will frustrate that purpose or deny the right to allow claims rather than accepting new insurance. It is not an agreement between two persons dealing at arm's length, but rather a plan for accomplishing beneficial results for all.

[6] If it be assumed that the proper construction of paragraph 4 is that the first

sentence applies only to policies which have lapsed prior to July 22, 1936, and that the second sentence applies only to policies lapsing since that time, and in that event no reinstatement right under the policy exists, but is governed solely by that agreement, the foregoing reasoning is even more persuasive. As to policies lapsing since July 22, 1936, compliance must be had with the second sentence, which would mean that failure to apply for reinstatement and payment of the premiums within the seventy-five days, would leave the policyholders without any insurance in the new company. Hence, their method of rejection of the new insurance would be a failure to apply for reinstatement, a matter of which the new company would be aware within the seventy-five days. They would be wholly deprived of a real exercise of an option to accept the assumption if failure to give written notice of rejection accomplished that result, because the new company would not grant new insurance if there had been no reinstatement. By their failure to reject they would be accepting and receiving nothing. Obviously, such results could not have been intended.

[7] Respondent urges that the foregoing construction gives a different meaning to the word "policyholders" as used in the first sentence of paragraph 24, than when used in the third sentence dealing with acceptance by failure to reject in writing. That does not necessarily follow. The first sentence gives the option of rejection or acceptance to all policyholders, lapsed or not lapsed. The third sentence deals with the manner of manifesting the acceptance or rejection. Under either sentence the holders of lapsed policies are in a special class inasmuch as their right to accept or reject the insurance assumption by the new company, under the first sentence, is qualified in that the requirements for reinstatement must be met. True, the assumption commenced as of the effective date of the agreement, but it was subject to the requirements necessary to accomplish reinstatement where policies had lapsed.

[8] Respondents argue that there are holders of policies which lapsed after July 22, 1936, but which were reinstated, pursuant to the terms of their policies, by the new company after the expiration of the seventy-five day period; that the new company passed a resolution to not issue non-can policies; that under the foregoing interpretation of paragraph 4 in aid of the construction of paragraph 24, the new company could not legally reinstate policies after the seventy-five day period, hence, such construction should not be given to paragraph 4 inasmuch as it would jeopardize the interests of those policyholders. The reasoning heretofore advanced is, however, that the new company could under the agreement have refused reinstatement after the seventy-five day period if paragraph 4 were given the above-mentioned interpretation. That does not mean that under proper circumstances the new company could not accept a late application for reinstatement. Whether it is now bound by such acceptance is not here involved.

It is urged that because many of the holders of lapsed policies did not file claims they will be unfairly treated. They would be much more unfairly treated under respondents' interpretation of paragraph 24 which would result in neither reinsurance nor the right to file claims.

[9] Under our interpretation of the rehabilitation and reinsurance agreement, there will be no preference given to holders of non-can policies who filed claims with the liquidator. These general claims are to be paid from the assets of the old company held by the liquidator, and by the new company subject to certain contingencies. Paragraph 15 of the agreement referred to by respondent as requiring the new company to pay in *full* all claims, refers only to such items as current expenses, taxes, and the like. It particularly excludes policy claimants. Other provisions of the agreement provide for payment of those claimants.

[10] It is contended by respondent that letters from the insurance commissioner sent to policyholders advising them that they would be able to file a claim with him as liquidator *provided they had given written notice of rejection to the new company,* constituted a construction placed upon the agreement by the parties contrary to the foregoing discussion, and that such interpretation is controlling, citing Union Sugar Co. v. Hollister Estate Co., 3 Cal.2d 740, 47 P.2d 273. However, the letter goes on to state that definite action by the policyholder is desirable prior to the expiration of the seventy-five days, and that inaction *may* result in loss of both the right to

reinsurance and to file a claim. It did not constitute an unequivocal position on the part of the commissioner contrary to his present stand. Such a letter should not compel the conclusion that the policyholders here involved should lose their right to file claims when all the circumstances are considered together in view of the commissioner's duty to all policyholders.

Inasmuch as a reversal is required for the reasons above stated, it becomes unnecessary to discuss the other grounds urged by appellant Harnish for a reversal of the same order.

The order from which the appeal is taken is reversed.

GIBSON, C. J., and SHENK and TRAYNOR JJ., concurred.

EDMONDS and SCHAUER, JJ., did not participate herein.



22 Cal.2d 104

FUNERAL DIRECTORS ASS'N OF LOS ANGELES AND SOUTHERN CALIFORNIA v. BOARD OF FUNERAL DIRECTORS AND EMBALMERS OF CALIFORNIA et al. (ARMSTRONG et al., Interveners).

L. A. 18604.

Supreme Court of California.

April 30, 1943.

1. Courts ⇐104

Supreme Court's initial action in issuing or declining to issue a prerogative writ of mandate on ex parte application does not constitute a "determination of cause" within meaning of constitutional provision requiring decisions of Supreme Court to be given in writing and grounds of decision stated, and it is only after an alternative writ has been issued that matter becomes a cause the determination of which requires a written decision. Const. art. 6, § 24.

See Words and Phrases, Permanent Edition, for all other definitions of "Determination of Cause".

2. Courts ⇐207(4)

The Supreme Court and District Courts of Appeal decline to exercise original jurisdiction in issuance of a preliminary prerogative writ, such as a writ of mandate, where circumstances are such that application for writ could properly have been made to a lower court, and under such circumstances, petition will be denied without prejudice to petitioners' right to seek such relief as they may be advised they are entitled to in the proper tribunal, even where petition is for peremptory writ in the first instance on notice to the other party.

3. Judgment ⇐552

Supreme Court's denial of application for writ of mandate by minute order without written decision was merely a refusal to exercise original jurisdiction, and hence order was not "res judicata" of subsequent proceedings in superior court for writ of mandate seeking same relief. Const. art. 6, § 24.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Mandamus proceeding by the Funeral Directors Association of Los Angeles and Southern California, a voluntary association, against the Board of Funeral Directors and Embalmers of the State of California and others to require the named respondent to desist from attempting to revoke, modify, suspend or alter a judgment suspending the license of Burton H. Armstrong and others, wherein Burton H. Armstrong and others intervened. From an adverse judgment, the plaintiff appeals.

Judgment reversed and cause remanded with directions to proceed with hearing.

For prior opinion, see 130 P.2d 455.

W. L. Pollard, of Los Angeles, for appellant.

Frank J. Barry, of Los Angeles, for respondents.

Morse Craig, of Los Angeles, and Moody & Whitney, of Glendale, for interveners and respondents.

SCHAUER, Justice.

The sole question before us is whether or not a minute order of this court denying, ex parte and without written decision, a petition made directly to this court for a writ of mandate to compel respondent Board of Funeral Directors and Embalmers to enforce a "judgment and sentence" pronounced by such board, renders res judicata a subsequent petition for the writ, made to the superior court and containing averments and exhibits substantially identical with those of the earlier petition to this court. The parties are the same. We state unequivocally that such minute order was not intended to, and did not, constitute a decision upon the merits of the petition, and therefore is not a bar to the subsequent proceeding.

The petition made directly to this court was filed on July 2, 1941, and on July 17, 1941, was denied by this court by the following minute order: "The petition for a writ of mandate is denied."

Thereafter and on August 15, 1941, petitioner filed in the Superior Court of Los Angeles County the second petition. An alternative writ was issued by the superior court on August 22, 1941, returnable on September 24, 1941. On the return day the superior court discharged the alternative writ and denied a peremptory writ on the ground that, as pleaded by respondents, the denial by this court of the earlier petition rendered res judicata the matters set forth in the petition to the superior court.

Petitioner (appellant herein) contends:

1. That under article VI, section 24, of the California Constitution, it is entitled to a written decision from this court, stating the grounds thereof, and that therefore the minute order of July 17, 1941, if intended as a judgment on the merits, is void. The mentioned section of the Constitution provides: "* * * In the determination of causes all decisions of the supreme court and of the district courts of appeal shall be given in writing, and the grounds of the decision shall be stated."

2. That this court's denial by minute order of the earlier petition may have been intended not to constitute a judgment on the merits, but to be merely a refusal to take jurisdiction for any one or more of seven suggested reasons, including failure by petitioner to show that the matter involved was of sufficient moment to justify the court in exercising its original jurisdiction (see Calif.Const. art. VI, §§ 4, 4½, 5; Code Civ.Proc. § 1085; rule XXVI of Rules of the Supreme Court and District Courts of Appeal).

3. That to sustain a plea of res judicata it must be proved that the judgment or decision pleaded in support thereof was on the merits.

4. That if the plea of res judicata is sustained petitioner will be denied both a hearing and a judgment on the merits.

[1] Petitioner's first contention may be disposed of by stating that this court has never considered and does not now consider that its initial action in issuing or declining to issue a prerogative writ on ex parte application, constitutes such a "determination of [a] cause" (Calif.Const., art. VI, sec. 24) as to require a written decision. It is only after an alternative writ has been issued that the matter becomes a "cause," the determination of which, i.e., the granting or denying of a peremptory writ, requires a written decision. As was stated by this court, speaking through Mr. Justice Shenk, in Metropolitan Water District v. Adams, 1942, 19 Cal.2d 463, 468, 122 P.2d 257, 259: "When not conducting an open session, the [Supreme] court is convened in executive sessions at least two times each week. At these sessions numerous matters are ruled upon, such as applications for writs, petitions for transfer from the District Courts of Appeal, and petitions for rehearing of our own decisions. These matters are disposed of by order of at least four members of the court, but no oral argument thereon is provided for by the Constitution or otherwise permitted and no grounds for the rulings are stated in writing, except in very rare cases in the discretion of the court."

Petitioner cites the cases of Oliver v. Superior Court, 1924, 193 Cal. 61, 223 P. 558; Matter of Application of Davidson, 1914, 167 Cal. 727, 729, 141 P. 216, and People v. Hayne, 1890, 83 Cal. 111, 123, 23 P. 1, 7 L.R.A. 348, 17 Am.St.Rep. 211, in support of its contention that it was entitled to a written decision. Scrutiny of those cases discloses that the only one seemingly in point is Oliver v. Superior Court, and it is readily distinguishable from the instant case in that there *an alternative writ*

was issued by the District Court of Appeal and a peremptory writ was *thereafter* denied without written opinion. Upon application for transfer to this (the Supreme) court, *in respect to the situation then before us,* we stated that the provisions of the Constitution requiring written decision applied to mandamus proceedings. That is the law; there was, however, no suggestion that the issuance or denial of an *alternative* writ required a written opinion stating the grounds of the decision.

In answer to petitioner's second contention—that the minute order of July 17, 1941, may have been merely a refusal by the Supreme Court to assume jurisdiction—respondents argue that the cases of (1) Napa Valley Electric Co. v. Board of Railroad Com'rs, 1920, 251 U.S. 366, 40 S.Ct. 174, 64 L.Ed. 310; (2) People v. Hadley, 1924, 66 Cal.App. 370, 226 P. 836; (3) Reilly v. Police Court, 1924, 194 Cal. 375, 377, 228 P. 860; and (4) Gubin v. Superior Court, 1930, 104 Cal.App. 331, 333, 285 P. 1071, have settled conclusively that the minute order constituted an adjudication on the merits that upon the facts stated in the petition for writ of mandate petitioner was not entitled to the writ. With this argument we do not agree.

In the Napa Valley case, supra, application was first made by an electric company to this court for a writ of review for the purpose of annulling certain orders of the *State Railroad Commission* fixing the rates to be charged by the company. This court refused, without written decision, to issue a preliminary writ. Thereafter the company sought in the District Court of the United States to enjoin enforcement of the Commission's orders, and that court dismissed the proceedings upon the ground that the controversy was res judicata. Upon appeal to the Supreme Court of the United States it was held (at page 373 of 251 U.S., page 176 of 40 S.Ct., page 313 of 64 L.Ed.) that "the denial of the petition [for writ of review, by the California Supreme Court] was necessarily a final judicial determination, * * * based on the identical rights", and that "Such a determination is as effectual as an estoppel as would have been a formal judgment * * *." Also, in People v. Hadley, 1924, supra, 66 Cal.App. 370, 375, 226 P. 836, 839, it was held, on the authority of the Napa Valley case, supra, that the denial by this court without written opinion of an application for writ of review of an order of the Railroad Commission constituted "a final adjudication of the correctness and the validity of the decision which it is attempted to have reviewed." As pointed out by petitioner, however, in both the Napa Valley case and People v. Hadley the application was for review of an order of the *Railroad Commission,* over whose orders this court has *exclusive* power of review (Public Utilities Act, § 67 [Stats.1915, pp. 115, 161, Act 6386, Deering's Gen.Laws (1937), p. 3175]; Truck Owners', etc., Inc. v. Superior Court, 1924, 194 Cal. 146, 153, 228 P. 19; Miller v. Railroad Commission, 1937, 9 Cal.2d 190, 195, 70 P.2d 164, 112 A. L.R. 221), while in the case before us the court was dealing with an application for a prerogative writ which could (and properly should) have been presented to the *superior court* in the first instance. Brougher v. Board of Public Works, 1928, 205 Cal. 426, 440, 441, 271 P. 487; Roma Macaroni Factory v. Giambastiani, 1933, 219 Cal. 435, 436, 438, 27 P.2d 371. The same situation as in the Napa Valley and Hadley cases appears in Southern Calif. Edison Co. v. Railroad Comm., 1936, 6 Cal.2d 737, 747, 59 P.2d 808; Wallace Ranch Water Co. v. Railroad Com'n, 9 Cir., 1931, 47 F.2d 8, 9; and Betts v. Railroad Commission, D.C.Cal. 1933, 6 F.Supp. 591, 592. In each of those cases it was held that this court's denial without written opinion of an application to review an order of the *Railroad Commission* constituted a determination on the merits of the questions presented by the application. In Geibel v. State Bar, 1939, 14 Cal.2d 144, 93 P.2d 97, this court's denial without written opinion of a petition to set aside a previous decision rendered by it was held to render res judicata the issues on a subsequent motion, made on the same grounds as the earlier petition, to vacate and set aside the same decision. There, again, however, this court was the sole tribunal available in the premises, and our denial of the earlier petition necessarily included a determination of the merits thereof.

Reilly v. Police Court, 1924, supra, 194 Cal. 375, 228 P. 860, the third case relied upon by respondents as establishing that our minute order of July 17, 1941, constituted a decision on the merits, was an application for a writ of prohibition. In that case the court points out that it was expressly alleged in the petition for the writ that a prior application to the District Court of Appeal had been denied on the ground that

petitioner's proper remedy would be by appeal. The court says, "Petitioner expressly alleges herein in effect that the adjudication of the district court was on the merits." Therefore, the statement made in that case (at page 377 of 194 Cal., at page 861 of 228 P.) that "It has * * * been decided that denial *ex parte* and without the filing of an opinion by an appellate court of an original application for a writ (other than the writ of *habeas corpus*) is a final adjudication that, upon the facts stated in the application, assuming them to be true, the petitioner is not entitled to the writ prayed for", may be considered to be in the nature of a dictum, so far as applicability to the instant case is concerned, and neither controlling nor persuasive as to it. Likewise, in Dawson v. Superior Court, 1910, 158 Cal. 73, 110 P. 479, relied upon in Reilly v. Police Court, supra, the petition to this court for a writ of prohibition showed on its face that there had been a prior application to and denial of the writ by the District Court of Appeal *on the merits,* and the time within which an application for hearing in this court could be made, had expired. Since the petition showed on its face that the prior adjudication was final and had been rendered *on the merits* of the application, it was an effective bar to the later original application here.

In the fourth case cited by respondents, as listed above, Gubin v. Superior Court, 1930, supra, 104 Cal.App. 331, 285 P. 1071, 1072, a writ of mandate was denied for the reason that "a proper case was not made out for the use of the writ." Although the ground of the decision was that quoted, the court by way of dictum stated (at page 333 of 104 Cal.App., at page 1072 of 285 P.): "Our attention is directed to Reilly v. Police Court, [supra], * * * in which case it was decided that the denial of a writ of prohibition by the District Court of Appeal without the filing of a written opinion, to prevent an inferior court from proceeding with the trial of an action, is a bar to a subsequent application to the Supreme Court for the same relief upon the same facts. The correctness of this conclusion cannot be doubted." Such dictum was obviously unnecessary to the decision and is disapproved insofar as its implications conflict with the views we here express.

Refreshingly precise is the language used by Judge Roche in Consolidated Freightways v. Railroad Commission, D.C.Cal.1941, 36 F.Supp. 269, 270: "* * * the question for decision is as follows: Is an order of the Railroad Commission of the State of California, upheld by the State Supreme Court in its ruling denying a writ of review, a bar to further litigation on the same subject matter in this tribunal?

"The case of Napa Valley Electric Co. v. [Board of] Railroad Commissioners of California, * * * raised a similar question. Plaintiff sought an injunction against a rate order of the Railroad Commission of the State of California after the State Supreme Court had denied a petition for a writ of review, without an opinion. In the Napa case * * * the court held that the matter was res judicata and that the bill of complaint must be dismissed." Limited by such exactitude of expression, it is obvious that the holding does not lend itself to implications contrary to the views we entertain.

[2] Both this court and the District Courts of Appeal have consistently declined to exercise original jurisdiction in the issuance of a preliminary prerogative writ where the circumstances are such that application for the writ could properly have been made to a lower court. Under such circumstances the petition will be denied "without prejudice to the right of petitioners to seek such relief as they may be advised they are entitled to in the proper tribunal." See Roma Macaroni Factory v. Giambastiani, supra, 1933, 219 Cal. 435, 436, 438, 27 P.2d 371, 372. And this is true even where, as stated in the Roma Macaroni case, at pages 435, 436 of 219 Cal., at page 371 of 27 P.2d, the petition to this court is for the peremptory writ in the first instance, on notice to the other party, thus not "extending to the [Supreme] court in the first instance an opportunity of declining to assume jurisdiction by the denial of the alternative writ, * * *." We reiterate that "It has never been the policy of this court to encourage the institution of proceedings herein * * * when such proceedings could as well have been instituted in the first instance in the superior court of the county where the controversy arose." Brougher v. Board of Public Works, supra, 1928, 205 Cal. 426, 440, 441, 271 P. 487, 493.

[3] The denial shown by our minute order of July 17, 1941, of petitioner's application for a writ of mandate must be construed to constitute simply a refusal by this

court to exercise its original jurisdiction. It does not appear that any sufficient reason was shown for not making the application to the superior court in the first instance. The minute order, under such circumstances, was not intended to be and is not an adjudication upon the merits of the facts presented in the application.

This determination of the effect of our minute order of July 17, 1941, renders it unnecessary to discuss petitioner's third and fourth contentions, set out above.

The judgment is reversed and the cause is remanded to the trial court with directions to proceed with the hearing on the return to the alternative writ.

GIBSON, C. J., and SHENK, CURTIS, CARTER, and TRAYNOR, JJ., concurred.

EDMONDS, J., concurred in the judgment.



58 Cal.App.2d 383

DIEL v. BAXTER et al.

Civ. 3072.

District Court of Appeal, Fourth District, California.

April 27, 1943.

Hearing Denied June 24, 1943.

1. Pleading ⇐406(7, 8)

Objections that a complaint is either uncertain or that it contains a misjoinder of causes of actions must be made by motion, demurrer or answer or they are "waived". Code Civ.Proc. § 434.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

2. Appeal and error ⇐193(2, 6)

It could not be urged for first time on appeal that complaint was uncertain or that it contained a misjoinder of causes of action. Code Civ.Proc. § 434.

3. Appeal and error ⇐882(3)

Where action was tried on theory that it was action for breach of contract, appellants could not urge on appeal that it was an action for conversion.

4. Appeal and error ⇐882(3)

The theory upon which case is tried in the court below must be adhered to on appeal.

5. Evidence ⇐461(1)

In action for breach of contract of sale, evidence was properly admitted for purpose of interpreting contract and determining the intention of the parties as to whether particular bottles were included in contract.

6. Sales ⇐181(11)

In buyer's action for breach of contract of sale for failure to deliver certain bottles, verdict that bottles not delivered were included in contract was sustained by the evidence.

7. Appeal and error ⇐1001(1)

Verdict sustained by evidence could not be disturbed on appeal.

8. Trial ⇐260(1)

Refusal to give requested instruction was not error where jury were fully and fairly instructed on the subject matter.

9. Trial ⇐202

The duty of the court is performed when the jury is properly instructed as to the law of the case.

10. Sales ⇐481

Where bottling plant was bought on installment contract and buyer brought action on account of sellers' failure to deliver certain bottles, buyer was not entitled to judgment for full value of the bottles sold before payment of entire purchase price of plant so that the full amount of judgment and costs would be applied on unpaid portion of purchase price. Civ.Code, § 3300.

11. Appeal and error ⇐1152

Where bottling plant was bought on installment contract and before payment of full purchase price buyer brought action for failure to deliver certain bottles and judgment was obtained for full value of bottles together with costs and disbursements judgment would be modified on appeal so as to provide for application of judgment on purchase price. Civ.Code, § 3300.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by Fred E. Diel against Augusta J. Baxter, as executrix of the estate of John

K. Baxter, deceased, and Augusta J. Baxter for damages for breach of contract of sale. From a judgment for plaintiff for $1,150, the defendants appeal.

Judgment modified and as modified affirmed.

G. L. Aynesworth and Harry Sarkisian, both of Fresno, for appellants.

Fred J. Rogers and Matt Goldstein, both of Fresno, for respondent.

GRIFFIN, Justice.

For some time prior to May 15, 1938, defendants and appellants owned a soda bottling works at 808 R Street in Fresno. Immediately to the rear of the bottling works but facing on S Street at No. 817 was erected a garage or storehouse which was used in storing empty bottles and cases. The business was operated under the name of Ideal Bottling Works. About three months prior to May 15, 1938, respondent commenced negotiations with appellants for the purchase of the business. In furtherance of these negotiations, on *May 20, 1938*, there was brought to John K. Baxter a document called an option to buy the Ideal Bottling Works. It was signed by Baxter and Fred E. Diel, and provided generally that Baxter gave Diel an option "on all of my equipment, good will and business, as now established and operating at 808 R Street, Fresno * * * until June 1, 1938, for $13,000." The price included all "furniture, fixtures, equipment of every nature and description, as now being used in connection with the above business, including bottles, cases, stock on hand, syrups, soda water, labels, labeling machines * * * and any and all other merchandise or furniture, fixtures and equipment used but not specifically mentioned." Below the date line appears the notation: "All 7 & 8 oz. discarded bottles are not in this deal." On *June 2, 1938*, the parties signed an agreement of sale whereby respondent agreed to purchase from the Baxters "all that personal property now being located at 808 R Street * * * the same being particularly described in Exhibit A * * * hereto annexed and made a part and portion hereof", for $13,000, payable as follows: $3,000 down and $1,000 per year thereafter. Right of possession was given as of *June 8, 1938*. It was provided that "none of the personal property shall be removed from said place of business except for the purpose of carrying on the business." It then set forth the rights of the respective parties in case of default in payment, and for a bill of sale of the property if all payments were made, and provided that if the Baxters were called upon to defend any action to protect any of their rights under the agreement, a reasonable attorney's fee should be paid to the prevailing party. Exhibit A, attached to the agreement, listed the property included in the above contract of sale and, so far as material here, included "*all* soft drink cases and bottles marked with the brand 'Ideal Bottling Works' and *all cases and bottles of every other kind and character now being the property of the parties of the first part* (defendants) * * * one Cleveland Union Soaker, completely installed * * * approximately 3,500 cases with bottles * * * *all* bottles containing 'Ideal' name including 6-1/2 Hexagon 'Ideal' bottles and 9 oz. 'Ideal' bottles * * * *All* 6-1/2 splits, the 12 oz. plain glass bottles, there being approximately 500 cases thereof * * *. *All* Moxie bottles and cases, approximate number being 600". (Italics ours.)

The dates above italicized are significant because the agreement for sale, although dated and executed by the parties on June 2, 1938, did not give the purchaser the right of possession until June 8, 1938. It was between these two dates, according to the complaint and the respondent's evidence but disputed by appellants, that the appellants wrongfully removed and disposed of approximately 3500 cases filled with bottles which respondent claims were included in the sale and which were at the time stored in the garage and warehouse at No. 817 S Street, which was immediately to the rear of 808 R Street.

The evidence discloses that sometime during the early negotiations, Mr. Baxter was endeavoring to install a new bottle-washer or "soaker" in his plant, and had made some arrangements with a Los Angeles firm for its purchase. When Baxter returned from a trip to that city he informed respondent that he could not accept the $12,000 offer he had made due to the fact that he was installing a new soaker and was turning in the old one; that therefore the purchase price would have to be $13,000.

The respondent then testified that he consented to pay the additional $1,000 if the new soaker would be installed, which was to be about June 1st. The evidence

discloses that it arrived at the plant about June 3d or 4th, and it further shows that the Baxters, at that time, delivered to the firm in Los Angeles where he purchased the soaker, at least 2,000 cases of bottles at 30¢ per case and 1,000 cases at 20¢, which bottles were in storage in the garage at 817 S Street. Appellants claim that these particular bottles were not included in the sale and were their bottles at that time. Respondent maintains an opposite claim, and upon discovery of the fact that Baxter had sold these particular bottles, he brought this suit for damages in the sum of $1,600. The jury returned a verdict in the sum of $1,150. This appeal followed.

The predominant note sounded throughout appellants' brief is that this is not an action for breach of contract but rather one for conversion, and arguing from this premise, they urge that since the right to possession is a sine qua non of an action for conversion and since the respondent neither alleged nor proved that he was entitled to possession of the bottles until June 8, 1938, no cause of action was either alleged in the complaint or proved by the evidence.

Paragraph I of the complaint alleges the making of the written agreement and incorporates it by reference and annexation. Paragraph II alleges compliance by the plaintiff with all the terms and conditions of the agreement on the plaintiff's part to be performed. Paragraph III alleges the breach by the defendants and that they "have wrongfully failed and refused to deliver up to the plaintiff approximately thirty-five hundred (3500) soft drink cases and bottles so sold under said agreement by said defendants unto plaintiff" but wrongfully "appropriated" them to their own use and disposed of them, and "made it impossible for them (defendants) to ever convey" them to plaintiff and "that the reasonable value of said personal property was and is the sum of $1600". Paragraph IV alleges damages in that sum. These are the essential allegations of the complaint.

[1, 2] The most that can be said in support of the appellants' position is that the complaint was either uncertain and ambiguous or that it contained a misjoinder of causes of action. These objections must be made by motion, demurrer or answer or they are deemed waived. Sec. 434, Code Civ.Proc. The record shows that the defendants failed to do so and they may not now raise these matters for the first time on appeal. Reynolds v. Hook, 109 Cal.App. 226, 235, 292 P. 1000; Hicks v. Scott, 48 Cal.App.2d 481, 484, 120 P.2d 107. The case was apparently tried upon the theory of breach of contract. Appellants endeavored to recover $500 counsel fees, by way of cross-complaint, under the provisions of the contract. The cross-complaint so interposed would have had no place whatever in the action if it had been based upon conversion.

[3, 4] In instructing the jury the court stated that this action was brought for damages "alleged to be sustained by the plaintiff as the result of the failure of the defendants to deliver unto the plaintiff 3500 soft drink cases and bottles, in accordance with the terms of a certain written agreement made and executed by and between the plaintiffs and the defendants * * * and that any liability on the part of the defendants, if any, must thus be determined by the obligations imposed on them under the terms of said agreement of sale made on June 2nd, 1938, between plaintiff, as buyer, and defendants as sellers". Appellants did not request that a single instruction be given to the jury upon the theory of conversion. At the request of appellants, however, an instruction was given to the jury to the effect that it was for them to determine whether the *agreement* had been breached by the defendants. It can thus be seen that the matter was presented in the court below to the jury as one for breach of contract. The appellants may not now endeavor on appeal to change the theory of the suit to one for conversion. It is well settled that the theory upon which a case is tried in the court below must be adhered to on appeal. 2 Cal.Jur. p. 237, sec. 68; Marra v. Ætna Construction Co., 15 Cal.2d 375, 379, 101 P.2d 490; United States Farm Land Co. v. Darter, 42 Cal.App. 292, 303, 183 P. 696.

[5-7] During the course of trial evidence was offered and admitted, over objections, for the purpose of interpreting the agreement and determining the intention of the parties as to whether these particular bottles in question were or were not included in its terms. The evidence was plainly admissible, as disclosed by a mere reading of the contract. The jury was fully authorized to consider that evidence, as well as the evidence offered by appellants in that respect, in construing it. Its determination was a reasonable one and may not therefore be disturbed on ap-

peal, Sec. 1860, Code Civ.Proc.; Kenney v. Los Feliz Investment Co., Ltd., 121 Cal. App. 378, 9 P.2d 225; Lemm v. Stillwater Land & Cattle Co., 217 Cal. 474, 479, 19 P.2d 785; 6 Cal.Jur. 278, sec. 171.

It is next argued that the court erred in refusing to give appellants' proffered instruction to the effect that "only bottles and cases mentioned and described in the agreement were such bottles and cases as on the date of said agreement, namely, June 2nd, 1938, were located at 808 R Street * * * and which bottles and cases were, on said date, the property of the defendants * * * that is, were owned by said defendants", and that "therefore, if you find that certain bottles and cases had been sold by John K. Baxter to the Armstrong Bottle Company before June 2nd, 1938, then I instruct you that plaintiff has no right to a recovery against the defendants"; and that if they should find "that defendants either gave or agreed to give the same to the plaintiff as a gift and subsequently failed to deliver to plaintiff as many bottles and cases as they represented they would give * * * any such failure will not justify recovery for plaintiff".

[8, 9] Even if we assume that the instructions as offered were correct, which we do not, the court did give an instruction, offered by appellants, to the effect that it must bear "in mind at all times that any liability on the part of the defendants, if any, must at all times be determined by the obligations imposed on them under the terms of said agreement of sale made on June 2nd, 1938, between the plaintiff as buyer and defendants as sellers", and that "if you find that the defendants have delivered to the plaintiff all bottles and cases, which were meant and described in the agreement of sale, then your verdict should be for the defendants". The jury was fully and fairly instructed on the subject matter. The duty of a court is performed when the jury is properly instructed as to the law of the case. Nelson v. Southern Pacific Co., 8 Cal.2d 648, 67 P.2d 682.

The next complaint involves an instruction on the measure of damages. Respondent requested and the court gave an instruction that if "your verdict is for the plaintiff you may award such damages within the amount claimed by the plaintiff as, in your opinion, will, under the circumstances of the case, justly compensate the plaintiff for his pecuniary damages, which shall be in a sum equal to the price for which plaintiff might have bought an equivalent number of cases and bottles, which the defendants may have failed to deliver to plaintiff under said contract, in the market nearest to the place where the property ought to have been put into the possession of the plaintiff, and at such time after the breach of duty upon which plaintiff's right of damages is founded as would suffice, with reasonable diligence, for him to make such a purchase."

[10, 11] The respondent apparently endeavored to set forth the rule in reference to the measure of damages in case of a breach of contract under sec. 3300 of the Civil Code. Appellants argue that respondent was not entitled to a judgment for the full value of the bottles sold if he was only purchasing them under a contract of sale, i. e., his interest in the bottles was a conditional interest depending on compliance by him with the terms thereof, and if he failed to make the necessary payments on the contract his interest in and to the bottles here involved would of necessity, by the terms of the contract, cease. There is merit to this argument, as there would otherwise be a judgment in full against appellants, payable forthwith, for the claimed breach of the contract by them. Respondent's right to a recovery in full was conditional on his compliance with the contract.

While the judgment can be and should be supported as to the amount found due, it should be and is modified by striking out the last paragraph thereof and inserting in lieu thereof the following: "Wherefore, by virtue of the laws and by reason of the premises aforesaid, it is ordered, adjudged and decreed that Fred E. Diel have and recover from defendants $1150, together with costs and disbursements incurred in the action, amounting to the sum of $144.10; that $1150 thereof be applied on the purchase price of the property under the contract of sale."

The judgment is affirmed as modified. Respondent to recover his costs on appeal.

BARNARD, P. J., and MARKS, J., concur.

58 Cal.App.2d 178

PEOPLE v. BUELLTON DEVELOPMENT CO., Inc., et al.

Civ. 13616.

District Court of Appeal, Second District, Division 3, California.

April 14, 1943.

1. Appeal and error ⇐78(3)

An order striking out a cross-complaint, seeking relief against several of cross-complainants' codefendants as well as plaintiff, was in effect a "final judgment" and hence appealable.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Judgment".

2. Appeal and error ⇐919

On appeal from order striking out cross-complaint, for purpose of determining the propriety of cross-complaint, appellate court accepted its allegations as true.

3. Eminent domain ⇐85

An easement over land for passage of cattle between their owners' adjacent land and a creek is "property" which cannot be taken or damaged for public use without payment of compensation.

See Words and Phrases, Permanent Edition, for all other definitions of "Property".

4. Eminent domain ⇐192

In proceeding by state to condemn land for state highway wherein defendants, claiming easement over part of land for passage of their cattle, filed cross-complaint against state and other defendants attempting to obtain determination that cross-complaining defendants owned the easement and to have extent of it fixed, cross-complaint was not maintainable against the state. St.1935, p. 255, § 102; St.1939, p. 2201, § 104; Code Civ.Proc. §§ 442, 1246, 1246.1, 1247, 1248, 1256.

5. Eminent domain ⇐192

Provision of statute authorizing a cross-complaint whenever defendant seeks affirmative relief against any party relating to or depending on contract, transaction, matter, happening, or accident on which the action is brought, is not applicable to a condemnation proceeding. Code Civ.Proc. § 442.

6. Eminent domain ⇐192

A condemnation proceeding is within provision of statute authorizing cross-complaint whenever defendant seeks affirmative relief against any party affecting property to which the action relates. Code Civ.Proc. § 442.

7. Eminent domain ⇐192

In condemnation proceeding, defendant may file a cross-complaint affecting property sought to be acquired by plaintiff, except as eminent domain statute otherwise provides. Code Civ.Proc. §§ 442, 1246, 1246.1, 1247, 1248, 1256.

8. Eminent domain ⇐192

In proceeding by state to condemn land for state highway, defendants could obtain, without a cross-complaint, a determination, as against the state, of existence and extent of defendants' easements and amount to be paid them for their taking and damage, and the clear implication from statute which enables such determination to be obtained by answer is that no cross-complaint is to be filed for the same purpose. Code Civ.Proc. §§ 442, 1246, 1246.1, 1247, 1248, 1256.

9. Eminent domain ⇐192

In proceeding by state to condemn land for state highway, cross-complaint was not maintainable on theory that it stated elements of damage against the state arising from trespass on cross-complainants' easements which were not recoverable as part of damages for the taking, since, so regarded, the cross-complaint was a prohibited "suit against the state" without its consent.

See Words and Phrases, Permanent Edition, for all other definitions of "Suit Against the State".

10. Eminent domain ⇐192

In proceeding by state to condemn land for state highway, where defendants contended that cross-complaint was necessary for recovery of damages arising from trespass because the damages did not flow from taking of property, constitutional provision providing for compensation when property is taken or damaged for public use could not be relied on as authority for the maintenance of the cross-complaint. Const. art. 1, § 14.

11. Constitutional law ⇐33

Constitutional provision providing for compensation when property is taken or

damaged for public use is "self-executing" and operates to grant consent for suit against the state to recover compensation for such a taking. Const. art. 1, § 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Self-Executing".

12. States ⇐191(1)

The statute authorizing suit against the state on express contract or for negligence does not authorize action against state for damages for a trespass. Pol.Code, § 688.

13. Action ⇐6
Eminent domain ⇐192

In proceeding by state to condemn land for state highway, defendants claiming easement over part of land could not maintain cross-complaint against state to quiet title to easement or for declaratory relief, since defendants could assert that title by answer for purpose of obtaining an award of damages to the part of the easement not taken. St.1935, p. 255, § 102; St.1939, p. 2201, § 104; Code Civ.Proc. §§ 442, 1246, 1246.1, 1247, 1248.

14. Pleading ⇐354(2)

An order striking a cross-complaint as a whole can properly be made only if the cross-complaint as a whole is improper for any purpose.

15. Pleading ⇐354(2)

A motion to strike out cross-complaint could not be used to raise questions of uncertainty or of misjoinder or other matters which might afford proper grounds of demurrer.

16. Eminent domain ⇐246(2)

The statutory provision, forbidding voluntary dismissal of action wherein affirmative relief is sought by cross-complaint, is inapplicable to condemnation proceeding and does not forbid abandonment of such proceeding by plaintiff even though there is a cross-complaint. Code Civ.Proc. §§ 581, 1255a, 1256.

17. Pleading ⇐147

In action involving land as its subject matter, a cross-complaint affecting that land and also other land may properly be filed, where cause of action set up therein affects such other land and that described in the complaint as a unit, or in such manner that one cannot be separated from the other without prejudice to the party filing the cross-complaint.

18. Eminent domain ⇐192

In proceeding by state to condemn land for state highway, defendants, claiming easement over part of land for passage of their cattle between their adjoining lands and creek, could maintain cross-complaint against codefendants as owners of land condemned to quiet title to the easement. St.1935, p. 255, § 102; St.1939, p. 2201, § 104; Code Civ.Proc. §§ 442, 1246, 1246.1, 1247, 1248, 1256.

Appeal from Superior Court, Santa Barbara County; Ernest D. Wagner, Judge.

Proceeding by the People of the State of California, acting by and through the Department of Public Works, against Buellton Development Company, Incorporated, Beatrice E. Cobb and Charles L. Cobb, and others, to condemn land for a state highway, wherein defendants Cobb filed a cross-complaint. From an order striking out the cross-complaint, the cross-complainants appeal.

Reversed.

For prior opinion, see 131 P.2d 23.

W. P. Butcher, of Santa Barbara, for appellants.

Holloway Jones, George C. Hadley, Lincoln V. Johnson, Francis J. Carr, and Jack M. Howard, all of San Francisco, for respondent.

SHAW, Justice pro tem.

Plaintiff brought this proceeding to condemn land for a state highway, seeking by the complaint to take the fee of the land, as it was authorized to do by sections 102 and 104 of the Streets and Highways Code, St.1935, p. 255, St.1939, p. 2201. The appellants, who were made defendants, filed an answer and also a cross-complaint. By this cross-complaint the appellants alleged that they had certain easements covering a part of the land to be condemned and other land, and for the protection of these easements they sought relief against several of their co-defendants, as well as the plaintiff. A demurrer filed by plaintiff to this cross-complaint was sustained, and on plaintiff's motion the cross-complaint was then stricken out. Some of the other defendants to the cross-complaint also made a motion to strike the cross-complaint, but their motion does not appear to have been acted on.

The appeal before us is from the order striking out the cross-complaint.

[1] The respondents have raised no question regarding the right of appellants to appeal from this order, but we have given some consideration to that question and conclude that the order is in effect a final judgment and hence is appealable. Had the cross-complaint been aimed at the plaintiff alone, the case would have been within the ruling in Yandell v. City of Los Angeles, 1931, 214 Cal. 234, 4 P.2d 947, and other like cases, and no appeal would lie from the order striking it out, the defendant filing it being left to an appeal from the judgment finally rendered. But as to the other defendants to the original action, against whom the cross-complaint was filed, the case is the same as Howe v. Key System Transit Co., 1926, 198 Cal. 525, 533, 246 P. 39, where it was held that, as to such defendants, an order striking out a cross-complaint is a final judgment, in legal effect, and therefore is appealable. This case was not overruled in Yandell v. City of Los Angeles, supra, but merely distinguished by reason of the difference just stated in the facts.

[2] The appellants, in their cross-complaint, alleged that they were the owners of a large tract of land, which as far as we can discover from the record, did not include any part of the land which plaintiff sought to condemn by its complaint. The cross-complaint further alleged, however, that, as appurtenant to said tract of land, appellants owned easements over described parcels of land belonging to the defendants Gregersen and California Diatomite and Asphalt Corporation, which parcels did include a part of the land sought to be condemned by plaintiff; that said easements were for the purpose of allowing cattle to pass between appellants' land and Zaca Creek, where they were accustomed to water and rest; that in the space covered by said easements there were two cattle passes built by the plaintiff under the existing state highway, which cattle used in going to Zaca Creek; that plaintiff and defendants Gregersen claimed that the defendants Gregersen had the sole right to use the southerly of said two cattle passes, which was on land owned by them subject to the state highway easement, and denied that appellants had any right therein or to any of the easements alleged to be owned by appellants over the Gregersen land and had conspired to exclude appellants from the use of said easements; that the defendant California Diatomite and Asphalt Corporation denied that appellants had any right in that portion of said easements of appellants which extended over its land and threatened to shut off the northerly of said cattle passes and to tear down fences, so making appellants' easement useless. The cross-complaint further alleged that a controversy existed between appellants and these other defendants and the plaintiff with relation to appellants' rights in these easements, giving details of it, and that all the cross-defendants had torn down appellants' fences, and otherwise trespassed on its easements, to its damage in the sum of $2,500, and prayed for a judgment quieting appellants' title to these easements against plaintiff and the other defendants and granting it declaratory relief to the same effect, and also for the fixing of the amount to be paid appellants for the taking of their easements, and for general damages in the sum of $2,500. For the purpose of determining the propriety of the cross-complaint we must accept its allegations, which we have thus summarized, as true.

[3, 4] The situation then resolves itself down to this: The plaintiff has made appellants parties to this action for the purpose of condemning their easement in the land which plaintiff desires to take for a state highway; plaintiff's declared intention of taking the fee, with no reservation or exception of any easement in appellants, will, when carried into a decree of condemnation, completely end appellants' present easement, so far as the land described in the complaint is concerned; and since that land intervenes between appellants' land and Zaca Creek, where, according to the cross-complaint, appellants' cattle go for water by using the easement, it will apparently deprive appellants of any practical use of the entire easement. Such an easement is property, which cannot be taken or damaged for public use without payment of compensation. Erro v. City of Santa Barbara, 1932, 123 Cal.App. 508, 512, 11 P.2d 890; McCandless v. City of Los Angeles, 1931, 214 Cal. 67, 71, 4 P.2d 139. According to the cross-complaint, appellants' ownership of this easement is disputed, not only by plaintiff, but by the other defendants named, and appellants by their cross-complaint are attempting to have it determined that they do own the easement and have the extent of it fixed.

As against the plaintiff, this cross-complaint was not maintainable, and the demurrer to it was properly sustained.

[5-7] Eminent domain, or condemnation, proceedings are provided for by Title VII, Part III, of the Code of Civil Procedure, in which is included section 1256, providing: "Except as otherwise provided in this title, the provisions of part two of this code are applicable to and constitute the rules of practice in the proceedings mentioned in this title." Part II, here referred to and adopted, includes the general rules of practice in civil actions, one of which is section 442 authorizing cross-complaints, as follows: "Whenever the defendant seeks affirmative relief against any party, [1] relating to or depending upon the contract, transaction, matter, happening or accident upon which the action is brought, or [2] affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint." (Numbers inserted by us.) The first alternative stated here, sometimes called the "transaction" clause because it originally referred only to a transaction, is not applicable to a condemnation proceeding, for no transaction or other subject matter now referred to in that alternative is involved in such a proceeding. Such a proceeding is, however, within the second alternative, for it relates to property, that is, the property which the plaintiff seeks thereby to acquire. Consequently, a defendant may file a cross-complaint affecting that property, except of course, as the provisions of the title on eminent domain otherwise provide.

[8] They do otherwise provide as far as the plaintiff is concerned. Section 1246, which is a part of that title, provides that each defendant must, by answer, set forth his estate or interest in the property sought to be condemned and the amount he claims as damages by reason of its taking. Section 1248 declares what items of damages are recoverable, so as to include the value of the land to be taken and the damages to the remainder of any larger parcel of which it is a part. Section 1247 empowers the court to pass on conflicting claims to the property to be condemned, and section 1246.1 entitles the plaintiff to have the whole award determined as between the plaintiff and all defendants claiming any interest in the property sought to be condemned, leaving the segregation of these amounts among the defendants to be made later. Thus the appellants here could obtain, without a cross-complaint, a determination, as against the plaintiff, of the existence and extent of their easements and the amount to be paid them for their taking and damage. The clear implication from the provisions which enable this to be done by answer is that no cross-complaint is to be filed for the same purpose.

[9-12] Appellants claim, however, that the cross-complaint states elements of damage against plaintiff, arising from trespass on their easements, which are not recoverable as a part of the damages for the taking of the property and hence the cross-complaint is necessary. But so regarding it, it is an effort to sue the State in a case where it has not consented to the suit. This cannot be done. 23 Cal.Jur. 578; State v. Royal Cons. Min. Co., 1921, 187 Cal. 343, 347, 202 P. 133. Since, by the premise of this argument, these damages do not flow from the taking of the property for public use, authority, if any exists, for their recovery does not come from sec. 14, Art. I of the California Constitution, providing for compensation when property is taken or damaged for public use, and appellants' action therefor is not within the ruling in Rose v. State of California, 1942, 19 Cal.2d 713, 724, 123 P.2d 505, that the constitutional provision just referred to is self-executing and operates to grant consent for a suit against the state to recover compensation for such a taking. Section 688 of the Political Code, which authorizes suit against the State on express contract or for negligence, of course does not cover a case of trespass. Other statutes exist consenting to suits against the state, but appellants cite none and we know of none which authorizes a suit for a trespass or other willful tort. The code provision for cross-complaints, even where applicable, does not amount to a consent by the state to the filing of a cross-complaint in an action filed by it. State v. Royal Cons. Min. Co., supra, 1921, 187 Cal. 343, 347, 202 P. 133.

[13] Appellants further urge their right to maintain the cross-complaint against the plaintiff insofar as it seeks to quiet their title to the easements or asks for declaratory relief. Since plaintiff seeks to condemn the land in fee, the question of title to the land taken is material only to the question of damages to be awarded and may be presented by answer. The same is true of

appellants' right to the easement over other land, so far as it is a part of the same easement. Appellants may assert their title by answer for the purpose of obtaining an award of damages to the part of the easement not taken. The maintenance of the cross-complaint to obtain declaratory relief against plaintiff is not within the decision in Hoyt v. Board of Civil Service Com'rs, Cal.Sup.1942, 132 P.2d 804, on which appellants rely. That case holds that laws relating to declaratory judgments affect practice and procedure only and that an action for declaratory relief may, under some circumstances, be maintained against the state, but it limits the right to a case where "an acceptance of liability and subjection to suit on the part of a sovereign body is found elsewhere in the statutes of the state and the declaratory judgment procedure is not barred by the provisions of the waiver of immunity * * *." 132 P.2d 806. There being no statute by which the state accepts any such liability as the cross-complaint here seeks to enforce against it, the cross-complaint cannot be maintained as one for declaratory relief.

[14, 15] For the foregoing reasons, we regard the order sustaining plaintiff's demurrer to the cross-complaint as correct, although it is not in question on this appeal, and had the cross-complaint been directed at plaintiff alone, the order striking it would also have been proper. But an order like that here, striking a cross-complaint as a whole, can properly be made only if the cross-complaint as a whole is improper for any purpose. The motion to strike could not be used to raise questions of uncertainty or of misjoinder or other matters which might afford proper grounds of demurrer. Allerton v. King, 1929, 96 Cal.App. 230, 234, 274 P. 90.

Here the cross-complaint prayed for relief against several of the defendants to plaintiff's action by way of quieting title to the easement claimed by appellants. This easement covered a part of the land to which the action related, that is, the land which plaintiff sought to condemn, and the relief demanded by appellants therefore affected that land, and was within the permission for cross-complaints granted by section 442 of the Code of Civil Procedure.

Plaintiff argues that this is a special proceeding in which the court exercises a limited and statutory jurisdiction, and it should be confined to issues directly connected with the judgment sought by the condemnor. Whether it should be so confined is a matter of legislative discretion, with which the courts are not concerned. Here the legislative provisions, according to their literal and obvious construction, do sanction the cross-complaint, as against other defendants. We think such construction of them is also in harmony with the general legislative plan and in furtherance of its purposes. As already stated, section 1247, Code of Civil Procedure, authorizes the court in an eminent domain proceeding to hear and determine all adverse or conflicting claims to the property sought to be condemned and the damages therefor, and section 1246.1 declares that the plaintiff is entitled to have an award made for the property as a whole, as between plaintiff and all defendants claiming any interest in it, and that thereafter "the respective rights of such defendants in and to the award shall be determined by the court, jury, or referee and the award apportioned accordingly." Both of these provisions contemplate the framing of issues between defendants whose claims to the property may be conflicting. The ordinary mode of framing such issues is not by answer; indeed, upon the usual form of answer in an ordinary action it is not proper to render a judgment determining the rights of defendants between themselves. Tanaka v. Highway Farming Co., 1926, 76 Cal.App. 590, 594, 245 P. 434. On the other hand, the code provision for cross-complaints (Code Civ.Proc. sec. 442) is directed to the case where a defendant seeks affirmative relief against any party and thus directly covers the case where one defendant desires to proceed against another; and it provides for adequate notice to such other defendant of the demand against him and for an opportunity for him to plead to it. The provision for an answer in eminent domain cases requires the defendant to set forth therein his estate or interest in the property to be condemned, but it makes no provision for service thereof upon another defendant who may have a conflicting claim, or for the framing of issues upon such conflicting claims. No doubt a statute could raise such issues without pleadings, and it would probably be within constitutional limits if it required that a defendant, after service of process to bring him into the action, should, without further service of notice upon him, be charged with notice of adverse claims made upon him, in regard to

the subject matter of the action, by the pleadings filed by any of the parties thereto. But this would be an uncertain and inconvenient procedure for framing and trying such issues, and we see no reason for placing such a construction upon a statute if another more reasonable one is permitted by its language.

Plaintiff has cited cases holding that no cross-complaint is permitted in unlawful detainer proceedings and argues that they are applicable here, calling our attention to the fact that section 1177 of the Code of Civil Procedure, which governs such proceedings, is the same as section 1256 above cited as relating to eminent domain proceedings, in its provisions adopting the general rules of practice for such special proceedings except as otherwise provided. The earliest reasoned statement of the rule in unlawful detainer proceedings appears to be in Knight v. Black, 1912, 19 Cal.App. 518, 527, 528, 126 P. 512, where it is put upon the ground that unlawful detainer was intended to provide a summary remedy for restitution of premises unlawfully withheld by tenants, which would be frustrated by the interposition of the defenses usually permitted in ordinary cases at law. This line of reasoning is not applicable to a proceeding where the property of a defendant is being taken from him against his will. However special the proceeding, it should not be so summary that the court cannot take the time to investigate any issue reasonably relevant to its purpose which a defendant may raise. The defendant in such a case has rights of a higher nature than those of a tenant unlawfully withholding property from his landlord.

One of the cases cited by plaintiff is Schubert v. Lowe, 1924, 193 Cal. 291, 223 P. 550, 552, where it was held that the provision of section 1170 of the Code of Civil Procedure that the defendant in unlawful detainer proceedings "may appear and answer or demur" in effect "limits the defendant to an answer or demurrer" and is therefore inconsistent with the general rules of practice adopted by section 1170, and prevents a defendant in such a proceeding from filing a cross-complaint. Since section 1246, Code of Civil Procedure, provides that in an eminent domain proceeding "Each defendant must, by answer, set forth his estate or interest in each parcel of property described in the complaint" etc., it is argued that this is also an exclusive provision and prevents a defendant from filing any other pleading. The same reasons do not exist here as in Schubert v. Lowe, supra, for reaching such a conclusion. As already suggested, an eminent domain proceeding, while special, is not analogous to one in unlawful detainer. Here, the constitutional right of the landowner is involved, and it should have full consideration and protection without undue haste. There, the tenant is seeking to delay the surrender of possession which is obligatory upon him by an inquiry into other matters which cannot avert the surrender. If haste is essential to the needs of the plaintiff in eminent domain, such plaintiff can, with some exceptions, obtain an order for immediate possession, under section 14 of Article I of our Constitution, without awaiting the termination of proceedings.

The statutory provision under consideration in Schubert v. Lowe, supra, appears from its very wording to be intended as a list of defendants' pleadings. Section 1246, Code of Civil Procedure, has no such appearance. It purports merely to provide what the contents of the answer shall be. See Matter of Bonds of Reclamation Dist. No. 900, 1913, 22 Cal.App. 439, 443, 134 P. 726, giving that effect to a statute providing for appearance by "answer" in a special proceeding. It does not even mention a demurrer, as does the provision construed in Schubert v. Lowe, supra. According to plaintiff's argument, this omission would operate to deny a defendant the right to demur, in an eminent domain proceeding. The actual practice, however, has been to the contrary. Defendants filed demurrers to the complaints and upon them the rights of the plaintiffs to proceed were determined, in County of Sutter v. McGriff, 1900, 130 Cal. 124, 62 P. 412; County of Sonoma v. Crozier, 1897, 118 Cal. 680, 50 P. 845; Lake Pleasanton Water Co. v. Contra Costa Water Co., 1885, 67 Cal. 659, 8 P. 501, and Stratford Irrig. Dist. v. Empire Water Co., 1941, 44 Cal.App.2d 61, 111 P.2d 957. It appears that demurrers had been filed in the proceedings involved in Harrington v. Superior Court, 1924, 194 Cal. 185, 187, 228 P. 15, and City of San Diego v. Cuyamaca Water Co., 1930, 209 Cal. 152, 155, 287 P. 496. While none of these decisions passed upon the right to file a demurrer, they constitute a long-standing recognition of its propriety, which could hardly have occurred if section 1246 cut off the right to demur.

[16] Plaintiff argues that a cross-complaint cannot be permitted in an eminent domain proceeding because it would prevent the abandonment of the proceeding, and the consequent dismissal, authorized by section 1255a of the Code of Civil Procedure. This effect of such a cross-complaint, it is argued, would follow from the provision of section 581 of the Code of Civil Procedure, which forbids a voluntary dismissal by the plaintiff in an action where affirmative relief is sought by cross-complaint. The argument is not sound. Section 581 is one of the rules of practice in civil actions which apply to eminent domain proceedings only by virtue of their adoption therefor by section 1256 of the Code of Civil Procedure, above quoted, and only insofar as not otherwise provided in the title on eminent domain. Since it is "otherwise provided" in section 1255a, a part of that title, the provision of section 581 just referred to is not applicable and does not forbid the abandonment of such a proceeding by the plaintiff even though there is a cross-complaint. The issues raised on a cross-complaint are severable from those upon the original complaint, and apparently the case could proceed upon the cross-complaint after plaintiff's abandonment (see Pacific Finance Corp. v. Superior Court, 1933, 219 Cal. 179, 25 P.2d 983, 90 A.L.R. 384), but we need not so decide at this time, as there is nothing in the record before us to show such an abandonment.

[17, 18] Plaintiff objects that the cross-complaint covered other land than that to be condemned, as described in the complaint, and raised issues as to the title to such other land. But it is well established that in an action involving land as its subject matter, a cross-complaint affecting that land and also other land may properly be filed, where the cause of action set up therein affects such other land and that described in the complaint as a unit, or in such manner that one cannot be separated from the other without prejudice to the party filing the cross-complaint. Stockton Sav. & Loan Soc. v. Harrold, 1900, 127 Cal. 612, 618, 60 P. 165; Newhall v. Bank of Livermore, 1902, 136 Cal. 533, 535, 69 P. 248; Tonini v. Ericcsen, 1933, 218 Cal. 43, 47, 21 P.2d 566; H. & J. Mabury Co. v. Bryant, 1937, 9 Cal.2d 586, 590, 71 P.2d 1111; Brown v. Luddy, 1932, 121 Cal.App. 494, 507, 9 P.2d 326; Halterman v. Pacific Gas & Elec. Co., 1937, 22 Cal.App.2d 592, 594, 71 P.2d 855. The cross-complaint here comes well within this rule. The appellants, having been brought into court in a proceeding which necessitates a determination of the existence and extent of their claimed easement as between them and the plaintiff, are entitled to have a determination which will be binding on the other defendants also, as owners of the servient tenement. The fact that appellants' claim is only of an easement does not prevent them from maintaining their cross-complaint for that purpose. Tonini v. Ericcsen, supra; Halterman v. Pacific Gas & Elec. Co., supra.

The order striking appellants' cross-complaint is reversed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.



CATE v. CERTAIN-TEED PRODUCTS CORPORATION.

Civ. 3078.

District Court of Appeal, Fourth District, California.

May 6, 1943.

Hearing Granted July 1, 1943.

1. Bankruptcy ⇐306

In action by trustee in bankruptcy to recover alleged preferences, where it was alleged in complaint and denied in answer that bankruptcy petition was filed on date less than four months after alleged preferences, reviewing court assumed, in absence of finding on that question, that petition was filed on date alleged. Bankr.Act § 60, 11 U.S.C.A. § 96.

2. Bankruptcy ⇐159

A preference occurs when transaction is completed so that no bona fide purchaser could acquire rights adverse to creditor preferred by bankrupt.

3. Bankruptcy ⇐303(1)

In action by trustee in bankruptcy to recover alleged preference, trustee has burden of proving debtor's insolvency at time

of preference, that preference occurred within four months of filing of bankruptcy petition, and that creditor at time of transfer had reasonable cause to believe that debtor was insolvent. Bankr.Act § 60, subs. a, b, 11 U.S.C.A. § 96, subs. a, b.

4. Bankruptcy ⇐160

In determining whether bankrupt was insolvent at time of alleged preference, debtor's books showing assets in excess of liabilities do not necessarily demonstrate its solvency and do not excuse further investigation by creditor, and oral statements by debtor cannot be given greater weight.

5. Bankruptcy ⇐160

In determining whether debtor was insolvent at time of alleged preference, debtor's property must be estimated at its true or actual value, and not at value placed upon it by debtor.

6. Bankruptcy ⇐303(4)

Evidence showing that most of debtor's assets were carried on its books in amounts greatly in excess of their reasonable worth established that debtor was insolvent at time of alleged preference.

7. Bankruptcy ⇐306

In action by trustee in bankruptcy to recover alleged preferences, where there is no issuable question of fact on reasonable belief of creditor as to debtor's insolvency, and finding on that question is in favor of defendant, the failure to find on question of debtor's insolvency does not constitute reversible error.

8. Bankruptcy ⇐166(4¾)

Although creditor may not have had actual knowledge of facts which would have reasonably caused belief that debtor was insolvent, creditor having knowledge of facts that would have caused a reasonable person to make inquiry concerning solvency of debtor should be charged with knowledge of facts which would have been disclosed by inquiry. Bankr.Act § 60, sub. b, 11 U.S.C.A. § 96, sub. b.

9. Bankruptcy ⇐306

Under federal law, question of whether creditor had reasonable cause to believe that debtor was insolvent at time of alleged preference is one of fact for trier of fact where there is any conflict in evidence. Bankr.Act § 60, sub. b, 11 U.S.C.A. § 96, sub. b.

10. Appeal and error ⇐996

Where there is any substantial evidence or reasonable inferences to be drawn from it supporting findings, judgment will not be reversed because of insufficient evidence.

11. Bankruptcy ⇐166(4⅝)

The phrases "having reasonable cause to believe such a person is insolvent" and "having reasonable cause to suspect such a person is insolvent" are not synonymous, since a creditor must not only suspect insolvency of his debtor but he must have such a knowledge of facts as to induce a reasonable belief of debtor's insolvency in order to invalidate a security taken for his debt. Bankr. Act § 60, sub. b, 11 U.S.C.A. § 96, sub. b.

See Words and Phrases, Permanent Edition, for all other definitions of "Having Reasonable Cause to Believe Such a Person Is Insolvent" and "Having Reasonable Cause to Suspect Such a Person Is Insolvent".

12. Bankruptcy ⇐304

Where creditor when obtaining first alleged preference was aware that bankrupt had been slow in paying its account and that bankrupt's visible assets were under attachment, and bankrupt could not pay its bill in cash, there was evidentiary support for trial court's finding that further inquiry concerning bankrupt's solvency was not required, but situation was not such as to excuse a finding by court on question of bankrupt's actual insolvency. Bankr. Act § 60, sub. b, 11 U.S.C.A. § 96, sub. b.

13. Bankruptcy ⇐166(4¼)

Where creditor at time of second alleged preference was aware that postdated check previously received by it from bankrupt had been twice dishonored and that bankrupt was selling its stock in trade in bulk, creditor was charged with knowledge of bankrupt's insolvency, which an investigation required by existing circumstances would have disclosed. Bankr.Act § 60, sub. b, 11 U.S.C.A. § 96, sub. b.

Appeal from Superior Court, Fresno County; Dan F. Conway, Judge.

Action by Clyde E. Cate, as trustee in bankruptcy for the Central Valley Wholesale Lumber Company, against the Certain-Teed Products Corporation to recover al-

leged preferences given by the bankrupt to the defendant. Judgment for the defendant, and the plaintiff appeals.

Judgment reversed.

Henry O. Wackerbarth, of Los Angeles, and Ralph Robinson, of Fresno, for appellant.

David E. Peckinpah and L. N. Barber, both of Fresno, for respondent.

MARKS, Justice.

This is an appeal from a judgment in an action brought by a trustee in bankruptcy to recover alleged preferences given by the bankrupt to defendant. Judgment was rendered for defendant and this appeal followed.

[1] It is alleged in the complaint, and denied in the answer, that a petition to declare the Central Valley Wholesale Lumber Company (hereinafter called Central Valley) a bankrupt was filed on June 24, 1939. There is no finding on this question but as no question is raised on this subject here we will assume that the petition was filed on that date which was less than four months after the alleged preferences were given. This is important in a case of this kind. Sec. 96, Title 11 U.S.C.A.

Central Valley was a wholesale lumber dealer with its principal place of business in Fresno, California. Certain-Teed Products Corporation (hereinafter called Certain-Teed) dealt in certain kinds of builders supplies.

Central Valley commenced purchasing supplies from Certain-Teed in June, 1938. It was given thirty days credit on some merchandise and sixty days credit on other goods. It fell behind in its payments and some deliveries received in August, 1938, were not paid for until January, 1939. Deliveries in and after September, 1938, were not paid for until March, 1939, which payments constitute the transactions involved here. The credit manager of Certain-Teed testified that he suspended the credit of Central Valley during the last of November, 1938, though one exhibit indicates that some merchandise of small value was delivered in December.

On September 29, 1938, Certain-Teed received a report from Dun & Bradstreet showing that Central Valley had assets of the value of about $27,000 more than its liabilities. A balance sheet was attached showing an operating loss of $281.50 between August 17 and August 31, 1938. Other reports were received showing that Central Valley was slow in paying some of its bills and prompt with others. A report was received in January, 1939, warning Certain-Teed that the account should be watched. A credit statement was then made to Certain-Teed by Dun & Bradstreet based on oral statements of Bert LeCrone, manager and principal stockholder of Central Valley, that the latter had increased its net worth to about $30,000.

On March 1, 1939, Central Valley owed Certain-Teed $1,956.36, all of which was past due. On March 2nd C. E. Parker, credit manager of Certain-Teed, went to Fresno to secure a settlement of the indebtedness. He found the place of business of Central Valley under attachment with a keeper in charge.

Central Valley had an arrangement with the Commercial Credit Company to secure working capital. When a sale was made the bill was assigned to Commercial Credit Company and Central Valley received 75% of its face value in cash. 25% was retained by Commercial Credit Company to cover possible losses in collections. By March 1, 1939, a credit in favor of Central Valley had accumulated from those collections.

Parker secured an order from Central Valley on Commercial Credit Company for $1,400, and a check on its bank for $506.36. The check, while given on March 2nd, was post dated March 6th. This check was deposited for collection on March 6th but was returned because of insufficient funds. It was again sent through the banks for collection but payment was refused a second time for the same reason. Central Valley's bank balance was $42.14 on March 7th, $3.55 on March 8th, and $.78 on March 15th. The balance did not exceed $129.80 at any time during March.

Commercial Credit Company accepted the order for $1,400 on March 3, 1939. Parker made no investigation of the financial condition of Central Valley at the time he received the payments, but testified he did not suspect that it was insolvent.

On March 15, 1939, Dun & Bradstreet notified Certain-Teed that Central Valley had published notice of a bulk sale of its merchandise to be effected on March 21, 1939. Parker pressed for payment of the check which had been dishonored twice and it was discovered that the balance due Certain-Teed was $556.36 after crediting the

order for $1,400. The bulk sale was completed on March 21, and LeCrone purchased a certified check for $556.36 and mailed it to Certain-Teed on that day. It was cashed and thus Certain-Teed received payment of its bill in full.

[2] It seems to be the rule that where a preference is claimed, it occurs when the transaction is completed so that no bona fide purchaser could acquire rights adverse to the creditor. In re Aughenbaugh, D.C., 33 F.Supp. 671; Brown Shoe Co. v. Carns, 8 Cir., 65 F.2d 294; Irving Trust Co. v. Jacob Weckstein & Sons, 2 Cir., 64 F.2d 333. Thus we have here two separate alleged preferences which must be weighed by the facts known or apparent to the creditor at the time each occurred. The first was on March 3, 1939, when Commercial Credit Company accepted the order drawn on it for $1,400. The second was on March 21, 1939, when the certified check for $556.36 was mailed to Certain-Teed.

[3] In cases of this kind the plaintiff has the burden of proving three elements in order to succeed. Barbour v. Priest, 103 U. S. 293, 26 L.Ed. 478; Canright v. General Finance Corp., D.C., 35 F.Supp. 841.

[4, 5] He must first prove that the debtor was insolvent at the time of the alleged preference. As we have observed, there was an issue presented by the pleadings on this question but the trial court failed to find on it. The books of the debtor showing that at the time of the transactions it had assets in excess of its liabilities do not necessarily demonstrate its solvency and may not excuse further investigation by the creditor on the question of solvency. Prudential Insurance Co. v. Nelson, 6 Cir., 96 F.2d 487; Grandison v. National Bank of Commerce, 2 Cir., 231 F. 800. Nor can oral statements by the debtor be given greater weight. Teiger v. Stephan Oderwald, Inc., D.C., 31 F.Supp. 626. In determining the question of solvency the property of the debtor must be estimated at its true or actual value and not at the value placed upon it by the debtor. Mansfield Lumber Co. v. Sternberg, 8 Cir., 38 F.2d 614.

[6, 7] The evidence taken at the trial, principally that of LeCrone, shows rather clearly that Central Valley was insolvent both before and after March 2, 1939. Among its assets which were carried on its books at face value was a debt of over $9,000, owed by a bankrupt, that was wholly uncollectable. LeCrone had overdrawn his account several thousand dollars and could not pay this debt. The buildings and lumber sheds of the company, which were on leased ground, were carried on the books at a valuation of over $6,000. They were sold in March, 1939, for $1,500. The principal assets of Central Valley consisted of accounts receivable. A considerable majority of them were over due and at the time of the alleged preferences were not reasonably worth the face value at which they were carried on the company books. It therefore appears that Central Valley was insolvent at the times of both the alleged preferences and the trial court should have so found. Plaintiff estimates that the creditors will receive thirteen cents on the dollar if he is unsuccessful in this action. However, in Cusick v. Second National Bank, 73 App.D.C. 16, 115 F.2d 150, it was held that if there was no issuable question of fact on the reasonable belief of the creditor on the matter of the insolvency of the debtor, and the finding on that question is in favor of defendant, as it is here, the failure to find on the question of insolvency does not constitute reversible error.

The second element which must be proved by the plaintiff is that the alleged preferences occurred within four months from the date the petition in bankruptcy was filed. Sub. a, Sec. 96, Title 11 U.S.C.A. As we have observed, the pleadings put this question in issue and there is no finding on it. The question is not argued here and it seems to have been assumed at the trial that the petition was filed in due time. We will therefore make the same assumption here.

The third element to be established by plaintiff in order to set aside an alleged preference is that "the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent." Sec. 96, sub. b, Title 11 U.S.C.A. The trial court here found that the creditor had no such reasonable cause to believe that its debtor was insolvent.

[8-10] It is thoroughly settled that although the creditor may not have had actual knowledge of facts which would have reasonably caused a belief that the debtor was insolvent, still if it has knowledge of facts that would have caused a reasonable person to make inquiry concerning the sol-

vency of the debtor, it should be charged with knowledge of such facts as would have been disclosed by such reasonable inquiry. It is also held by the Federal courts that the question of whether or not the creditor had reasonable cause to believe that the debtor was insolvent at the time of the alleged preference is one of fact for the trier of fact where there is any conflict in the evidence on the subject. See, Campanella v. Liebowitz, 3 Cir., 103 F.2d 252; In re Campion, D.C., 256 F. 902. This conforms to the settled rule in California that where there is any substantial evidence or reasonable inferences to be drawn from it supporting the findings the judgment will not be reversed on appeal because of a lack of evidence to support the findings of fact.

[11] It has also been held that the fact that the debtor was behind in his bills, and had failed to meet them promptly when due, and that his credit had been suspended under the rules of a merchant's association so he was permitted to purchase merchandise for cash only, were not sufficient to put the creditor receiving the alleged preference on inquiry as to the solvency of the debtor. In re Eggert, 8 Cir., 102 F. 735. Such knowledge has been held to be sufficient to cause a suspicion of, but not a reasonable belief of, insolvency. The approved and followed rule of suspicion of insolvency is stated in Grant v. First National Bank, 97 U.S. 80, 81, 24 L.Ed. 971, as follows: "Some confusion exists in the cases as to the meaning of the phrase, 'having reasonable cause to believe such a person is insolvent.' Dicta are not wanting which assume that it has the same meaning as if it had read, 'having reasonable cause to suspect such a person is insolvent.' But the two phrases are distinct in meaning and effect. It is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt. To make mere suspicion a ground of nullity in such a case would render the business transactions of the community altogether too insecure. It was never the intention of the framers of the act to establish any such rule. A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well-grounded belief of the fact. He may be unwilling to trust him further; he may feel anxious about his claim, and have a strong desire to secure it,—and yet such belief as the act requires may be wanting. Obtaining additional security, or receiving payment of a debt, under such circumstances is not prohibited by the law." See, also, Simandl v. Paragon Paint & Varnish Corp., D.C., 8 F.Supp. 1011, and cases cited.

It has been held that knowledge by the creditor of dishonored checks given by the debtor is sufficient notice of probable insolvency to require the creditor to make inquiry concerning the solvency of the debtor. In Brown Shoe Co. v. Carns, supra [65 F.2d 297], it was said: "While it has been held that the knowledge of the failure of a debtor to discharge his obligations promptly is alone insufficient to establish reasonable cause to believe that a preference is being effected [Citing cases], knowledge of dishonored checks has been considered as evidence tending to show reasonable cause for such belief. Pittsburgh Plate Glass Co. v. Edwards [8 Cir.], 148 F. 377; Grandison v. National Bank of Comm. of Rochester [2 Cir.], 231 F. 800, 809; Lowenstein v. Salop, [2 Cir.], 55 F.2d 889, 891; Buchanan State Bank v. De Groot [6 Cir.], 39 F.2d 397, 398; R. H. Herron Co. v. Moore [9 Cir.], 208 F. 134, 136; Conners v. Bucksport Nat. Bank, D.C., 214 F. 847, 850 affirmed, [1 Cir.], 216 F. 990; Williams v. Plattner, D.C. 46 F.2d 467, 468; 4 Remington on Bankruptcy (3d Ed., 1923) Sec. 1832." See, also, In re Campion, supra; Pender v. Chatham Phenix Nat. Bank & Trust Co., 2 Cir., 58 F.2d 968.

It has also been held that knowledge of the giving of a chattel mortgage by the debtor on its merchandise in bulk should put the creditor on his inquiry as to the solvency of the debtor. In re Kent's, Inc., D. C., 9 F.Supp. 216.

[12] When we consider the knowledge of Certain-Teed as to the first alleged preference, measured under the foregoing rules, we find the following facts brought to its attention: Central Valley had been slow in paying its accounts for several months. On March 2, 1939, Parker found its visible assets under attachment and a keeper in charge. Central Valley could not pay its bill in cash but gave an order on a credit it had with Commercial Credit Company and also a postdated check. While these transactions were unusual, and most certainly would have supported a find-

ing that Certain-Teed should have made inquiry as to the solvency of Central Valley, and should have been charged with the facts such inquiry would have disclosed, we do not find it necessary to hold that the inference drawn from them by the trial court to the effect that they did not contain sufficient warning of insolvency to require Certain-Teed to make inquiry is wholly without evidentiary support.

Certainly it cannot be said there was no issuable question of fact presented by the evidence on the question of reasonable belief of the insolvency of the debtor to excuse a finding on the question of its actual insolvency under the rule announced in Cusick v. Second National Bank, supra.

[13] In considering the second payment to Certain-Teed on March 21, 1939, we find that in addition to the foregoing facts, the following were known to Certain-Teed: The check for $506.36 had been twice dishonored and Central Valley was selling its stock in trade in bulk. We cannot distinguish between the effect of the mortgage of a stock in trade in bulk by a debtor and its sale in bulk as far as notice to the creditor is concerned. If the mortgage of a stock of trade in bulk is a warning to a creditor of the probable insolvency of the debtor sufficient to require the creditor to make an investigation of the debtor's insolvency, a bulk sale should be held to be a like warning.

Under the authorities already cited, we must conclude that at least on March 21, 1939, Certain-Teed had knowledge of the dishonor of the check on two occasions, and the bulk sale of merchandise, which were sufficient facts pointing to the insolvency of Central Valley to require Certain-Teed to investigate the solvency of the debtor. Certain-Teed must be charged with knowledge of those facts which such an investigation would have disclosed, namely, that Central Valley was then insolvent. It follows that the finding to the effect that Certain-Teed had no reasonable cause to believe Central Valley insolvent when it received the payment of $556.36, lacks evidentiary support. Such a finding is necessary to the support of the judgment.

The judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

58 Cal.App.2d 333

In re BELL'S ESTATE.

ELLIS et al. v. CHENOWETH.

Civ. 6846.

District Court of Appeal, Third District, California.

April 23, 1943.

1. Executors and administrators ⇐471

Notice of time and place of hearing of administrator's final account duly posted, and proof thereof made by clerk in manner required by Probate Code confers jurisdiction on probate court, and order settling account is binding though hearing is repeatedly continued before account is finally approved. Probate Code, §§ 926, 1205.

2. Executors and administrators ⇐471

After notice of hearing of administrator's final account was properly given, it was duty of all interested parties to keep themselves informed by diligent inquiry of subsequent continuances of the hearing. Probate Code, §§ 926, 1205.

3. Executors and administrators ⇐471

Where parties objecting had not only constructive notice of time and place of hearing of administrator's final account but actual notice at time of last continuance, there was no necessity of giving additional notice of hearing. Probate Code, §§ 926, 1204, 1205.

4. Executors and administrators ⇐471

The giving of additional notice of hearing of administrator's final account is a matter of discretion on part of court reviewable only for abuse. Probate Code, §§ 926, 1204, 1205.

5. Executors and administrators ⇐510(9)

Where a decree settling administrator's final account found that proof was made to satisfaction of court that clerk had given notice of settlement in manner and for time prescribed by law, presumption on appeal was that adequate evidence was adduced. Probate Code, § 926.

6. Courts ⇐202(1)

The issues of fact joined in probate proceedings must be tried in conformity with the rules in civil actions. Probate Code, § 1230.

7. Jury ⇐19(7)

There is no right to trial by jury on issues raised by objections to an administrator's account. Probate Code, § 1230.

8. Jury ⇐25(2), 28(9)

Any right to trial by jury on objections to administrator's final account was "waived" by failing to appear at trial, and by neglecting to demand a jury trial. Probate Code, § 1230; Code Civ.Proc. § 631.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

9. Executors and administrators ⇐507(2)

It is not necessary for probate court to adopt formal findings upon settlement of accounts of administrators or executors. Probate Code, § 1230.

10. Executors and administrators ⇐507(2)

On hearing of objections to administrator's final account, evidence showed that hearing was conducted in manner required by Probate Code. Probate Code, § 1230.

11. Executors and administrators ⇐510(8)

Where allowed preferred claims would absorb all the money and property for distribution, order approving administrator's final account was not prejudicial to persons not holding preferred claims even if all objections thereto should have been allowed. Probate Code, §§ 1230, 1240.

Appeal from Superior Court, Shasta County; Albert F. Ross, Judge.

Proceeding in the matter of the estate of Albert C. Bell, deceased, by Helen Erma Ellis and another, minors, etc., against Orr M. Chenoweth, as administrator. From an order settling the final account of the administrator, Helen Erma Ellis and another, minors, etc., appeal.

Order affirmed.

Prior opinion, 130 P.2d 723.

J. Oscar Goldstein and Burton J. Goldstein, both of Chico, for appellants.

Chenoweth & Leininger, of Redding, for respondent.

THOMPSON, Justice.

Helen Erma Ellis and Betty Jean Ellis, minor children of Albert C. Bell, deceased, represented by their guardian ad litem, Otis Ellis, have appealed from an order of the Probate Court of Shasta County settling the final account of the administrator of said estate.

The chief contention of the appellants is that the final account of their father's estate was settled without their presence and without the giving of legal notice of that hearing.

Albert C. Bell died intestate December 1, 1937, in Shasta County, California, possessed of real and personal property, and leaving surviving him his widow, Mazie Bell, and the two minor daughters of the deceased, previously mentioned. Josie Bell, the mother of the two minor children, had divorced Albert C. Bell and subsequently married Otis Ellis, and the children assumed his name. Upon application therefor, Orr M. Chenoweth was duly appointed administrator of said estate. Letters of administration were issued December 31, 1937. Notice to creditors was published as required by law. An inventory and appraisement was filed showing the real and personal property to be of the value of $7,317.75. Pending administration, two suits were brought against the estate, each of which was compromised and settled with the approval of the Probate Court. Another suit to quiet title to a leasehold in the Sacramento Hotel in Redding, California, was brought against said estate and the heirs of Albert C. Bell, deceased, by Twila Bragg and Elizabeth Richards. Josie Ellis and the two minor children, represented by the children's guardian, appeared and answered the complaint in that suit. J. Oscar Goldstein and his son, Burton J. Goldstein, acted as their attorneys. On January 22, 1942, the children and their mother, Mrs. Ellis, abandoned their claim to an interest in the property involved in that action by filing their written consent to a judgment in favor of the plaintiffs. They did not appear at the trial. The estate was represented at that trial by Mr. Chenoweth. Judgment was rendered January 28, 1942, for the plaintiff as prayed for.

April 3, 1940, the administrator filed in said estate his final account and petition for discharge. The account showed total receipts amounting to $5,272.74, and disbursements in the sum of $3,795.24, including attorneys' fees, both normal and extraordinary, aggregating $885, leaving a balance of only $1,477.50 to apply on unpaid allowed claims in excess of $10,000. The

account included preferred labor claims amounting to $1,710.24, and an allowed claim for an unpaid judgment in favor of Josie Ellis for $11,840.75.

Notice of the time and place of hearing said account was duly posted and proof thereof was made by the clerk in the manner required by section 926 of the Probate Code. On account of the pending lawsuits, heretofore mentioned, the hearing of said account was regularly continued from time to time, under the provisions of section 1205 of the Probate Code, until February 2, 1942, when it was heard and allowed as presented and filed. The decree settling that account was rendered and entered February 3, 1942. Neither the minor children nor their said attorneys were present at that hearing. From that order the children have appealed.

[1, 2] We are satisfied the clerk's notice of the time and place of hearing said final account conferred jurisdiction on the Probate Court. The order settling that account was binding on these appellants, notwithstanding the fact that the hearing was repeatedly continued before the account was finally approved. It has been uniformly held that notice of the hearing of an account, given in the manner and form required by law, confers jurisdiction of the res involved on the court and brings all interested parties before it for that purpose. Langdon v. Blackburn, 109 Cal. 19, 28, 41 P. 814; Abels v. Frey, 126 Cal.App. 48, 14 P.2d 594, 596; 3 Bancroft's Probate Practice, 1659, sec. 980; 11b Cal.Jur. 573, sec. 1118. After notice has been properly given in the first instance, it becomes the duty of all interested parties to keep themselves informed by diligent inquiry of subsequent continuances of the hearing. Langdon v. Blackburn, supra; Abels v. Frey, supra. In the case last cited it is said in that regard: "The presumption being that proper notice has been given when there is no allegation to the contrary, *it is the duty of the person notified to make inquiry as to the proceedings pending.*" (Italics added.)

In the present proceeding the appellants not only had constructive notice of the time and place of hearing, but they had actual notice at the very time of the last continuance on January 12, 1942. They filed objections to that account on June 20, 1940. They knew that the litigation which was pending against the estate necessarily delayed the hearing and settlement of that account. Their attorneys wrote a letter to the administrator of the estate on January 19, 1942, stating that they had received notice that the trial of the case entitled "Bragg v. Ellis et al." would be held on January 28, 1942, and they suggested that their objections to the final account be heard on that same date. That letter infers that the determination of that suit would also decide the merits of the contest to the account. The letter reads in part: "If both matters are heard by the court at the same time I believe that the decision thereon [of the pending lawsuit] will be determinative *as to the entire situation,* and the matter can thus be brought to a conclusion. * * *" (Italics added.)

Two days later the same lawyers, in behalf of these appellants, sent to the attorney for the plaintiffs in that suit a written consent to the entry of judgment in favor of the plaintiffs. The cause was heard and judgment was rendered accordingly on January 28, 1942. Neither the appellants nor their attorneys were present at that trial, in spite of the fact that they had suggested that the hearing of the final account should take place at the same time. These letters were presented to the judge at the time of the trial. In the affidavit filed in this court by the trial judge on respondent's petition for diminution of the record, he states that the letters were presented to him at that time with a suggestion by the administrator that the order setting the hearing of the account for February 2, 1942, be set aside and that the matter be advanced in accordance with appellants' request to be heard at the same time as the trial of the lawsuit; that since neither the minors not their attorneys were present for that trial, and because they had consented in writing to a judgment against them in that suit, and since he assumed they had abandoned their contest of the account, there was no necessity for changing the time previously set for hearing the account. The suit was tried and determined in accordance with the stipulation for judgment, and the account was heard and approved on February 2, 1942. Neither the appellants nor their attorneys were present. Apparently no inquiry was made by the appellants or their attorneys regarding the hearing on the account until after it had been settled and approved.

[3] The foregoing facts clearly obviate the necessity of directing additional notice of hearing the account as provided by section 1204 of the Probate Code. That section

reads: "Whenever the court deems that the notice which has been given of any proceeding or hearing is insufficient, it may require further and additional notice to be given as it deems proper."

[4] No further notice is required of postponements of hearings unless in the discretion of the court it is deemed to be necessary and is so ordered. (Sec. 1205, Probate Code.) The giving of additional notice is a matter of discretion on the part of the court and the failure to direct it is reviewable only for abuse. In re Jessup, 81 Cal. 408, 437, 21 P. 976, 22 P. 742, 1028, 6 L.R.A. 594; 11a Cal.Jur. 153, sec. 86. No abuse of discretion appears in the present proceeding.

The appellants contend that the court erred in failing to try the issues raised by their objections to certain items of the final account "according to the rules of practice in civil cases," as required by section 1230 of the Probate Code. They are not specific with respect to any particular alleged omissions, with the exception of the claim of lack of service of notice of the hearing. As we have previously stated, it appears that due and legal notice of the time and place of hearing the account was given as required by law. The decree settling the account specifically finds that: "Proof was made to the satisfaction of the court, that the Clerk had given notice of settlement of said account and report in the manner and for the time prescribed by law."

[5, 6] In the absence of evidence to the contrary, we assume that adequate evidence was adduced to that effect. It is true that issues of fact which are joined in probate proceedings must be tried in conformity with the rules in civil actions. 11a Cal. Jur. 164, secs. 98, 99. In certain proceedings, including a contest of will, the contest of allowed claims, the determination of heirship and the restoration to mental capacity, the Probate Code specifically authorizes trials by jury in the manner provided by the Code of Civil Procedure.

[7] It has been frequently held that since the Probate Code does not specifically authorize a trial by jury upon issues raised by objections, to an administrator's account that right does not exist. In Estate of England, 214 Cal. 298, 5 P.2d 428, 429, it is said in that regard: "It has several times been expressly held that, in the absence of a statute so providing, trials by jury in the settlement of accounts in probate are not allowed. Estate of Moore, 72 Cal. 335, 13 P. 880; In re Sanderson's Estate, 74 Cal. [199], 208, 15 P. 753; Estate of Franklin, 133 Cal. [584], 587, 65 P. 1081."

[8] Moreover, if the appellants had been entitled to a jury trial on their objections to the account in this proceeding, which we do not concede, they waived it by failing to appear at the trial, and because they neglected to demand a jury trial. (Sec. 631, Code Civ.Proc.) Section 1230 of the Probate Code provides that "If no jury is demanded, *the court must try the issues joined,* and sign and file its decision in writing."

[9, 10] It is not necessary for the probate court to adopt formal findings upon the settlement of the accounts of administrators or executors. Estate of Machado, 186 Cal. 246, 248, 251, 199 P. 505; Estate of Tretheway, 32 Cal.App.2d 287, 293, 89 P.2d 679. The order settling the account in this proceeding, however, did adopt findings sufficient to support the order. There is no merit in appellants' contention that the hearing of the account was not conducted in the manner required by section 1230 of the Probate Code.

[11] Assuming that the appellants had a right of appeal from the order settling the final account of the administrator, as provided by section 1240 of the Probate Code, they were not harmed by that order, for the reason that the allowed preferred claims would absorb all the money and property for distribution if every one of their objections to the account were allowed. The appraised value of the estate was $7,317.75. The costs of administration and labor claims allowed amounted to $3,795.24. A preferred claim for an unpaid judgment was allowed Josie Ellis, in the sum of $11,840.75. The aggregate sum of all the items of said account which were contested by the appellants, including the regular and extraordinary attorneys' fees which were allowed, does not exceed the sum of $2,500.

The order is affirmed.

PEEK, J., and ADAMS, P. J., concurred.

CAMPBELL (STATE COMPENSATION INSURANCE FUND, Intervener) v. FONG WAN et al.

HOCKING (STATE COMPENSATION INSURANCE FUND, Intervener) v. SAME.

PEGNEM et al. v. SAME.

Civ. 12247.

District Court of Appeal, First District, Division 2, California.

April 28, 1943.

Rehearing Granted May 28, 1943.

1. Master and servant ⇐332(3)

Evidence presented question for jury as to whether contractor who had control of construction of improvements on defendants' premises was an "independent contractor", or whether he was an "employee" of defendants, so as to render defendants liable for injuries sustained by employees of a subcontractor as result of contractor's negligence in erection of scaffolding.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee" and "Independent Contractor".

2. Appeal and error ⇐1050(1)

Permitting expert testimony relating to custom and usage of building contractors constructing scaffolding in face of safety rules of Industrial Accident Commission, which required less bracing than testified to, did not constitute reversible error, where duty to provide for plaintiffs a safe place of work arose outside of employer-employee relation.

3. Negligence ⇐136(27)

Where plaintiffs who were injured as result of alleged negligence in erection of scaffolding were claiming defects in addition to use of but one ledger, some of which were not patent, question of contributory negligence was properly for jury, notwithstanding that two of plaintiffs testified that they saw that scaffolding was constructed with but one ledger before going upon it and that third plaintiff testified that he paid no attention to it.

4. Negligence ⇐136(27)

Where there is evidence of negligence in construction and maintenance of an instrumentality, which is not patent and could not be observed by use of ordinary care, question of negligence of party using instrumentality is a "question of fact".

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

5. Negligence ⇐120, 136(13)

In consolidated actions against owners of building for injuries sustained by employees of a subcontractor as result of alleged negligence in erection of scaffolding, where one of defendants, though not a record owner of building, was conducting cafe upon premises, and, in all of his dealings with labor and material, held himself out as at least a part owner of premises, burden was upon such defendant of proving that his activities were limited to relation of agent for record owners, and question of such defendant's relation was for jury.

Appeal from Superior Court, Alameda County; S. Victor Wagler, Judge.

Consolidated personal injury actions by James Campbell, Richard Hocking, and James Pegnem, against Fong Wan and others, wherein the State Compensation Insurance Fund, as compensation insurance carrier for the employer of the three plaintiffs, was allowed to intervene. From judgments in favor of plaintiffs and intervener, the defendants appeal.

Affirmed.

John L. McNab, of San Francisco, and D. W. Brobst, of Oakland, for appellants.

Weinmann, Quayle & Berry, of Oakland, for respondents James Campbell and Richard Hocking.

Nichols & Richard and Leonard Dieden, all of Oakland, for respondents James Pegnem and State Compensation Insurance Fund.

NOURSE, Presiding Justice.

These three actions were brought for personal injuries by Hocking, Pegnem and Campbell against Fong Wan and his two sons Richard R. Fong and Edward E. Fong. The cases were consolidated for trial and the jury returned a verdict in favor of each of the plaintiffs upon which three judgments were entered. The State Compensation Insurance Fund was allowed to intervene, it being a compensation insurance carrier for the employer of the three plaintiffs, and it also had judgment against defendants to recover compensation

paid. The defendants above named appeal from the judgments entered against them.

The plaintiffs, Hocking, Pegnem and Campbell, were employed by Witt as plasterers in remodeling the New Shanghai Cafe in Oakland, which property stood in the names of Richard and Edward Fong, but which was managed by Fong Wan, who was an alien incapable of holding real property in his own name. The plaintiffs were injured when they fell from a scaffolding placed in front of the New Shanghai Cafe building. One Lloyd Dawson, a contractor, had supervised the erection of the scaffolding and had sublet the plastering job to Witt. Dawson was paid $10 a day plus a fixed percentage of the cost if he kept the cost of building within certain limits; he supervised the work, but all workmen, insurance, both social security and workmen's compensation, and materials were paid for through Fong Wan's office; Dawson had not posted a bond, but he secured the building permit; and some testimony was given that Fong Wan was around the job frequently, and urged the workmen to rush the completion of the remodeling. The scaffolding was constructed in the general method prescribed by building regulations put out by the Industrial Accident Commission in their safety rules. However, another contractor was permitted to testify that contractors ordinarily interlaced supports on the building side of the scaffolding, and used two ledgers instead of the one required by these safety rules. Two of the plaintiffs testified that they noticed that the ledger holding the planks on which they worked was single, and hence not interlaced. Fong Wan testified that he was making the improvements for himself and for his sons. He put some of his own funds into the job. He managed the New Shanghai Cafe when it was in operation and his sons had no interest in the venture, other than their ownership of the realty. The rentals from the real property were collected by him, and he would turn part over to his sons. At the time they purchased the real property, Fong Wan told the sons that they would have to take title because he was an alien who could not hold property.

[1] Appellants, on the basis of Lloyd Dawson's deposition, contend that there is insufficient evidence to support the implied finding of the jury that Dawson was an employee of the appellants, but they contend that this evidence shows that he was an independent contractor having complete control over the construction of the improvements, though paid upon a per diem basis. After this deposition was taken special counsel was employed for the witness and his testimony at the trial was directly contrary to that given in his deposition. The jury chose to accept the testimony given at the trial, and that ends the controversy.

[2] Next appellants contend that the court committed reversible error in allowing the expert testimony relating to the custom and usage of building contractors in constructing scaffolding in the face of the safety rules of the Industrial Accident Commission which required less bracing than that testified to.

Whether the scaffolding was constructed in full compliance with these safety regulations is not clear. There was some testimony tending to show that it was insecurely nailed, and that, in other respects, it was negligently built. The appellants do not contend that the construction complied strictly with these safety rules. Their point is that testimony of the "usual and standard custom and practice" was improperly admitted over their objection. When this testimony was offered, their objection was that these "safety rules" were the best evidence. If the controversy had been between an employer and employee there would be much merit in the objection. But here all the respondents were employees of the sub-contractor Witt. The duty to provide for them a safe place of employment arose outside of the employer-employee relation, and it is in that relation that the rules of the Industrial Accident Commission apply. That such rules do not determine a standard of care as to those who are not in the employer-employee relation see Hayden v. Paramount Productions, Inc., 33 Cal.App.2d 287, 91 P.2d 231.

[3, 4] Next it is argued that the respondents were guilty of contributory negligence as matter of law. Two of them testified that they looked at the scaffolding before going up and saw that it was constructed with but one ledger, the third testified that he paid no attention to it. If the only claimed defect in the construction of the scaffolding was the use of one ledger the argument of appellants would be more persuasive. But where other defects were claimed, some of which were not patent, the question of contributory negligence was

properly left with the jury. To put it in another way, where there is evidence of negligence in the construction or maintenance of an instrumentality, which is not patent and cannot be observed by the use of ordinary care, the question of the negligence of the party using the instrumentality is one of fact.

[5] Finally it is argued that the judgment should not stand against appellant Fong Wan since he was merely the agent of his two sons. It appears that the sons were the record title owners of the premises, that Fong Wan, independent of the sons, conducted the cafe upon the premises, that plans to repair the building were found impractical, hence the contract to construct a new building. Into this building Fong Wan put some of his own funds, and paid for the work and materials. Whether his status was that of a trustee, agent, or equitable owner cannot be determined from the record. In all his dealings with labor and material he did not represent himself as agent for his sons, but held himself as at least a part owner in the premises. He was sued as such, and the burden was upon him to prove that his activities were limited to the relation of agent for his sons. Thus the question of that relation was one of fact for the jury, and the implied finding that he was an owner of some interest is supported by substantial evidence.

The judgments are affirmed.

SPENCE, J., concurs.



58 Cal.App.2d 196

MAHONY v. CROCKER et al.

EQUITABLE LIFE ASSUR. SOC. OF THE UNITED STATES v. MAHONY et al.

Civ. 12214.

District Court of Appeal, First District, Division 1, California.

April 16, 1943.

Rehearing Denied May 15, 1943.

Hearing Denied June 14, 1943.

1. Trusts ⇐37½

A valid voluntary trust could be created in death benefits of life policies without a formal assignment of the policies to trustee.

2. Trusts ⇐13

No consideration is necessary to create a binding voluntary trust.

3. Trusts ⇐59(1)

Valid, irrevocable, voluntary "trust" was created in death benefits under life policies upon delivery of the trust res to trustee and the change of the beneficiary at insured's request to trustee.

See Words and Phrases, Permanent Edition, for all other definitions of "Trust".

4. Insurance ⇐586

A beneficiary in a policy which authorizes the insured to change the beneficiary does not ordinarily acquire a "vested right" in the policy even where the policy is delivered to the named beneficiary accompanied by words of gift.

See Words and Phrases, Permanent Edition, for all other definitions of "Vested Right".

5. Insurance ⇐586

The interest of named beneficiary in a policy authorizing insured to change beneficiary is normally merely an "expectancy" of an "inchoate gift" which becomes "vested" upon the death of the insured and during his lifetime the insured may revoke the "incomplete gift" and change the beneficiary.

See Words and Phrases, Permanent Edition, for all other definitions of "Expectancy", "Inchoate Gift", "Incomplete Gift" and "Vested Interest".

6. Gifts ⇐10
Insurance ⇐587

The power to change the beneficiary may be waived and may itself be the subject of a gift.

7. Insurance ⇐586

If by contract or by way of gift the right to change the beneficiary in insurance policy is waived, the beneficiary secures a "vested interest" which may not be defeated by the insured's attempting to change the beneficiary.

See Words and Phrases, Permanent Edition, for all other definitions of "Vested Interest".

8. Insurance ⇐209

No particular form is required for an assignment of insurance policy.

9. Gifts ⇐28(3)
Insurance ⇐214, 587

Where by terms of irrevocable trust in death benefits of life policies insured gave up his power to change beneficiary and had bank named beneficiary as trustee and delivered the policies to it, and trust specially prohibited insured from modifying it and waived insured's right to change beneficiary during trust, insured's rights were measured by trust and insured was not entitled to have beneficiary changed, since there was in legal effect an "assignment" of the policies, a formal assignment not being indispensable to complete a "gift" of the death benefits.

See Words and Phrases, Permanent Edition, for all other definitions of "Assignment" and "Gift".

10. Evidence ⇐413

Trust instruments and assignments covering disability and death benefits could not be contradicted by parol evidence that they were made in contemplation of death at a time when insured did not expect to live more than a month. Civ.Code §§ 1149–1151.

11. Gifts ⇐57

A "gift causa mortis" takes effect only on death.

See Words and Phrases, Permanent Edition, for all other definitions of "Gift Causa Mortis".

12. Gifts ⇐56

There can be no "disability benefits" after death of insured, and the gift of disability benefits to take effect only on death would be a nullity.

See Words and Phrases, Permanent Edition, for all other definitions of "Disability Benefits".

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Jeremiah J. Mahony against Doris G. Crocker and others to quiet title to two insurance policies on plaintiff's life wherein the Equitable Life Assurance Society of the United States filed a complaint in intervention asking a determination of the status of its policy and the Aetna Life Insurance Company sought similar relief by its answer to the cross-complaint in intervention. From an adverse judgment the plaintiff appeals.

Affirmed.

A. B. Bianchi, of San Francisco, and Augustin Donovan, of Oakland, for appellants.

Henry F. Boyen and Frank J. Fontes, both of San Francisco, for respondents Doris G. Crocker and Marjorie Catherine Mahony.

Chickering & Gregory and Stephen R. Duhring, all of San Francisco, for respondent Crocker First Nat. Bank.

PETERS, Presiding Justice.

Jeremiah J. Mahony appeals from a judgment rendered in an action brought by him to quiet his title to two insurance policies on his life containing provisions for both death and disability payments. He sought a determination that his former wife, now Doris G. Crocker, his daughter, Marjorie Catherine Mahony, and the Crocker First National Bank of San Francisco have no interest in these policies. The Equitable Life Assurance Society of the United States, one of the insurers, filed a complaint in intervention asking a determination of the status of its policy, and the Aetna Life Insurance Company sought similar relief by its answer to the cross-complaint in intervention. The trial court determined that plaintiff had no rights in either the death or disability benefits of the policies other than were limited to him by virtue of certain declarations of trust covering the proceeds of the policies, which had been previously executed by him, and enjoined him from attempting to change the beneficiary from the Crocker First National Bank of San Francisco, as trustee, to his present wife, Helen G. Mahony.

There are two main issues presented on this appeal. First has appellant lost the power to change the beneficiary in the two policies from the trustee, the Crocker bank, by reason of his having executed irrevocable trusts of the proceeds, and second, if such trusts have been validly created in form, did the trial court erroneously exclude evidence that they were executed as gifts causa mortis? Appellant urges that, so far as the death benefits are concerned, there was only a naked declaration of trust without assignments, and that, so far as both the death and disability benefits are concerned, even if the trusts were valid in

form, they were created causa mortis and may be revoked by him.

The facts are as follows: Prior to 1924 appellant was married to respondent Doris G. Crocker. There was one child the issue of such marriage, respondent Marjorie Catherine Mahony. In 1942 appellant secured the two policies in question, one with the Equitable Life Assurance Society of the United States, and one with the Aetna Life Insurance Company. Each policy has two major benefits as part of the contract, one a death benefit in the sum of $25,000, and the other a disability benefit carrying a monthly payment of $250 during disability. If disabled, each policy provides for a waiver of premium. Each policy was purchased out of separate funds of appellant. In 1925 appellant became disabled, within the meaning of the policies, and began to receive disability benefits. Early in 1929 appellant and respondent Doris G. Crocker separated, and in June of 1932 respondent secured a final decree of divorce from appellant, the decree awarding her no alimony or support for their child. The custody of the child was awarded to her. A short time later in the same year she married Crocker. In 1936 appellant married Helen G. Mahony, his present wife, and the person he wants to substitute as beneficiary of the policies.

Both policies contain the usual provisions that the insured has the right to change the beneficiary upon written request to the company provided that there has been no written assignment of the policy on file with the company.

In July of 1930 appellant, by written assignment filed with the company, assigned the disability and death benefits of the Equitable policy to his then attorney Frank O'Connell, as trustee. In November of 1930 appellant made a similar assignment of the death and disability benefits of the Aetna policy to O'Connell, as trustee. According to the terms of the O'Connell trust, the trustee was to collect all payments made on the policies and pay one-half thereof to respondent Doris G. Crocker then the wife of appellant, but living separate and apart, and one-half to be expended by O'Connell for the benefit of appellant. On November 30, 1932, O'Connell, in writing, reassigned the two policies back to appellant.

Prior to the reassignment by O'Connell, and while the policies were still subject to the O'Connell trust, on October 22, 1930, appellant executed a declaration of trust by which the death benefits of the two policies were to go to the Crocker bank, as trustee, and by it to be disbursed as provided in the trust agreement. The document recites that it is "between Jeremiah J. Mahony and Doris G. Mahony, his wife, hereinafter referred to and called the 'Trustors'" and the Crocker bank as trustee, and that the trustors have caused the trustee to be named as beneficiary of the two life policies. It provides that the trustee shall collect all the proceeds of the two policies and pay the net income to Doris G. Mahony until the termination of the trust; that if Doris shall die before the termination of the trust the net income shall be paid to Marjorie Catherine Mahony until the termination of the trust; that if both Doris and Marjorie be then living the trust shall terminate January 2, 1954, and any proceeds of the policies then in the hands of the trustee shall be paid to Doris, and, if she has died, to Marjorie; that if both Doris and Marjorie die prior to that date, upon the death of the survivor the trust shall terminate and the trust property shall then vest in Jeremiah, if living, or, if not living, then in the living issue of Marjorie, and, if none, to go to her heirs at law. The trustee is authorized to use the corpus of the trust for the benefit of either Doris or Marjorie in an emergency. The trust is expressly declared to be irrevocable and not subject to modification by any person. It is provided that the "policies shall not be assigned, pledged or used for any purpose other than that herein provided, nor shall the beneficiary thereof be changed from the aforesaid Trusteeship." It is also provided that the trust shall apply only to the proceeds of the two policies payable on Mahony's death or upon the maturity of the policies and shall not apply to disability benefits paid under the policies—those are to be paid directly to Jeremiah by the insurance company. The document is signed by Jeremiah and Doris Mahony, and by an officer of the Crocker bank.

It will be noted that when this trust was executed the policies had been lawfully assigned to O'Connell. O'Connell reassigned the policies to appellant on November 30, 1932. Under date of December 1, 1932, appellant, on the regular form furnished by the Equitable, sent the policy to the Equitable and requested that company to change the beneficiary of its policy to "Crocker

First Federal Trust Company, as Trustee, under Trust Agreement dated October 22, 1930." Pursuant to this request and designation, on December 21, 1932, the Equitable endorsed, as beneficiary, the Crocker bank as trustee as requested by the insured. Early in January, 1933, the Equitable forwarded the policy to the trustee bank, and the policy has remained in the possession of the bank ever since.

A similar request was made by appellant of the Aetna Company in July of 1934 and that company at that time changed the beneficiary to the Crocker bank "as trustee under Trust Agreement dated October 22, 1930." That policy has also been delivered to the bank as trustee and has remained in its possession. These transactions involved only the death benefits payable under the policies.

The disability benefits were the subject of separate transactions. Under date of December 27, 1932, Jeremiah and Doris as trustors executed another trust indenture dealing with these benefits. The document recites that the trustors "are about to assign to the Trustee the moneys received and to be received on account of the disability payments provided for" in the two policies. The trust authorizes the trustee—the Crocker bank—to collect the moneys due under these provisions and during Jeremiah's life to pay one-half to him and one-half to Doris, his wife; that if Doris predecease Jeremiah, her one-half to Marjorie; but, if both predecease Jeremiah, then all to him. This trust was to terminate upon Jeremiah's death, any funds then on hand to be distributed in accordance with the prior trust to which reference is made. The trust expressly provided that it was irrevocable and not subject to modification. The other provisions of the first trust, above mentioned, were likewise inserted in this trust agreement. About the time this second trust was executed appellant formally assigned, on forms furnished by the respective insurers, the disability benefits to the trustee. In the case of the Equitable assignment, the assignment was broad enough to include the death benefits, but the Aetna assignment was limited to the disability benefits. Appellant has been disabled since before the second trust was executed, so that since 1932 the trustee has collected all disability benefits from the insurers and disbursed the same in accordance with the provisions of the trust. Appellant accepted payments from the trustee as provided in the trust without objection until August 22, 1940, on which date he requested both insurers to change the death beneficiaries of their respective policies from the trustee bank to his present wife, Helen Mahony. Both refused without presentation of the policies, both policies being then in the possession of the trustee bank. The trustee refused to forward the policies, it contending that in view of the provisions of the trust indenture appellant was without power to revoke the trust and change the beneficiary.

On these facts the trial court concluded that such policies were subject to the provisions of the two trust indentures.

So far as the death benefits are concerned, appellant urges that the trust document of October 22, 1930, was unaccompanied by any assignment; that under the terms of the policies, in the absence of a valid assignment, he, as the insured, had the absolute right to change beneficiaries; that in the absence of an assignment there was a mere naked declaration of trust amounting to no more than a promise to make a gift; that such a promise will not be enforced.

[1-3] The basic premise of this argument is that the only way a valid voluntary trust could have been created in the death benefits was by a formal assignment of the policies to the trustee. This basic premise is unsound. No consideration is necessary to create a binding voluntary trust. National Bank v. Exchange Nat. Bank, 186 Cal. 172, 199 P. 1; Kopp v. Gunther, 95 Cal. 63, 30 P. 301; Taber v. Bailey, 22 Cal.App. 617, 135 P. 975. Under the terms of the trust indenture of October 22, 1930, it was expressly provided that the trust should be irrevocable, and should continue at least until 1954. In that document appellant granted away his right to assign the policy. It is true that when the trust agreement was executed the death benefits were subject to the O'Connell assignments, but the policies were reassigned to appellant on November 30, 1932. On the very next day appellant formally requested the Equitable to change the death beneficiary of its policy, in accordance with the terms of the trust, to the Crocker bank as trustee "under Trust Agreement dated October 22, 1930." On December 21, 1932, the Equitable complied with the request, changed the beneficiary to the bank, and, with appellant's consent, delivered the policy to the bank as trustee. In July of 1934 the Aetna,

pursuant to a similar request by appellant, changed the beneficiary of its policy to the bank as trustee under the terms of the October, 1930, trust, and delivered its policy to the bank. It is obvious that at least upon delivery of the trust res to the trustee a valid irrevocable voluntary trust was created. By that trust appellant has parted with his right to change the death beneficiary of the policies. The trustee and the donee beneficiaries gained indefeasible interests pursuant to the terms of the trust agreement which cannot be affected by any attempt to revoke the trust. If the trusts were not complete upon their acceptance by the trustee they certainly became complete when the beneficiary of the two policies, at the request of appellant, was changed to the trustee and the policies delivered to it.

[4-9] It is true, as urged by appellant, that a beneficiary in a policy which authorizes the insured to change the beneficiary does not ordinarily acquire a vested right in the policy, even where the policy is delivered to the named beneficiary accompanied by words of gift. Normally, the interest of the named beneficiary is merely an expectancy of an inchoate gift which becomes vested upon the death of the insured. During the lifetime of the insured he may revoke the incomplete gift and change the beneficiary. Mutual Life Ins. Co. v. Franck, 9 Cal.App.2d 528, 50 P.2d 480; Blethen v. Pacific Mut. Life Ins. Co., 198 Cal. 91, 243 P. 431. But the power to change the beneficiary may be waived. That power may itself be the subject of a gift. If, by contract or by way of gift, the right to change the beneficiary is waived, the beneficiary secures a vested interest which may not be defeated by the insured attempting to change the beneficiary. Mutual Life Ins. Co. v. Franck, 9 Cal.App.2d 528, 50 P.2d 480; McEwen v. New York Life Ins. Co., 42 Cal.App. 133, 183 P. 373; Shoudy v. Shoudy, 55 Cal.App. 344, 203 P. 433; Lo Presti v. Manning, 125 Cal.App. 442, 13 P.2d 1002. Here, by the terms of the trusts they were irrevocable for a set period and the insured was prohibited from modifying them in any way. The insured gave up his power to change the beneficiary, and completed the gift by having the bank named beneficiary as trustee and delivering the policies to it. A formal assignment of the policies was not indispensable to complete the gift of the death benefits. However, even if an assignment were necessary, such assignment, in fact, here existed. No particular form is required for an assignment. Here the insured had the bank named beneficiary, as trustee under the trust of October, 1930. Thus, so far as the rights of the bank and donee beneficiaries are concerned, the trust provisions were incorporated by reference into the policy. Those provisions made the trust irrevocable, specifically prohibited the insured from modifying the provisions of the trust, and waived the insured's right to change the beneficiaries. During the period of the trust the insured's rights were to be measured by the trust. He transferred his powers over the policy to the trustee. That, together with delivery of the policies, is tantamount to an assignment in fact, if such were needed.

[10-12] As to the disability benefits, there were formal assignments executed by appellant. As to these benefits, appellant concedes that the gifts were complete in form, but urges that such gifts were made in contemplation of death and may now be revoked by him. §§ 1149, 1150, 1151, Civ. Code. During the trial appellant offered to prove that all the documents were executed when he was very ill (he has been totally disabled under the terms of the policies, and has been drawing disability benefits since 1925) and were made in contemplation of death; that at the time the documents were executed he did not expect to live more than a month; that it was his undisclosed intent that the gifts were to take effect only in the case of his death. The trial court sustained objections to that evidence. The ruling was correct. The proffered evidence directly contradicted the terms of the trusts. The death benefit trust was made irrevocable and was to last far in the future. Two years after the first trust was executed the appellant caused the beneficiary of the Equitable policy to be changed to the trustee, and some four years after the execution of that trust the beneficiary of the Aetna policy was changed to the bank as trustee. Yet appellant urges that in 1930 and 1932 when the trusts were executed, he believed he was in immediate danger of death and could not live more than a month. For eight years appellant acted under, and accepted the benefits of, the 1932 trust. So far as the disability benefits are concerned, the contention that they were the subject of a gift causa mortis approaches the absurd. A gift causa mortis takes effect only at death. The

disability benefits would cease upon the death of the insured. There can be no disability benefits after death. Obviously, if the gift of the disability benefits was to take effect only upon death, the 1932 trust was a nullity.

This contention of appellant was obviously an afterthought on his part. It was not mentioned in any of the pleadings filed by him. To permit this donor to challenge completed gifts eight and ten years after the gifts were consummated by his evidence that it was his intent, completely undisclosed until the offer of proof was made at this trial, would be to violate the parol evidence rule.

The judgment appealed from is affirmed.

WARD, J., and DOOLING, J., pro tem., concurred.



58 Cal.App.2d 899

PEOPLE v. BROWN.

Civ. 2651.

District Court of Appeal, Fourth District, California.

May 7, 1943.

Appeal and error ⇐1099(6)

Where judgment of dismissal based upon sustaining demurrer was reversed on ground that a cause of action was alleged, and the action was one in which attachment was permissible, contemporaneous order dissolving an attachment must be reversed on subsequent appeal. Code Civ.Proc. § 537, subd. 5.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by the People against Porter L. Brown. From an order dissolving an attachment, plaintiff appeals.

Reversed.

Earl Warren, Atty. Gen., and Walter L. Bowers and Gilbert F. Nelson, Deputy Attys. Gen., for appellant.

Irvine P. Aten, Richard V. Aten, and G. L. Aynesworth, all of Fresno, for respondent.

PER CURIAM.

A judgment of dismissal in this case, based upon the sustaining of a demurrer without leave to amend, was heretofore reversed. People v. Brown, 57 Cal.App.2d 1018, 134 P.2d 305. This appeal is from an order dissolving an attachment which order was made at the time the demurrer was sustained. It having been determined by the reversal of the judgment that a cause of action was alleged, and this being an action in which an attachment is permitted (Code of Civil Procedure, Sec. 537, subd. 5), the order dissolving the attachment is reversed.



58 Cal.App.2d 508

NATIONAL AUTOMOBILE INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 14014.

District Court of Appeal, Second District, Division 3, California.

May 4, 1943.

Workmen's compensation ⇐1880

The District Court of Appeal was without jurisdiction to review an order of the Industrial Accident Commission where petition for review was not presented until the 31st day after the commission made order sought to be reviewed. St.1937, p. 304, § 5950.

Petition by National Automobile Insurance Company for review of an order by the Industrial Accident Commission of the State of California, in which petition Fred Ough and B. W. H. Poole were also named parties respondent.

Petition denied.

C. W. Bowers, of Los Angeles, for petitioner.

Everett A. Corten and Fred G. Goldsworthy, both of San Francisco, for respondent Industrial Accident Commission

PER CURIAM.

Application has been made for a review of an order of the Industrial Accident Commission, upon rehearing, awarding compensation to one Fred Ough. The petition was filed with the clerk of this court on the 31st day after the Commission made its award. Counsel for the Commission question the jurisdiction of the court to review the award, where the petition for review was not presented within 30 days after the date of the award, as allowed by section 5950 of the Labor Code, St.1937, p. 304. The point is well taken; we have no jurisdiction of the attempted proceeding, and the petition is therefore denied. North Pacific S. S. Co. v. Soley, 1924, 193 Cal. 138, 140, 141, 223 P. 462; Neal v. Industrial Acc. Comm., 1918, 36 Cal.App. 40, 171 P. 696; North P. S. S. Co. v. Industrial Acc. Comm., 1917, 34 Cal.App. 488, 168 P. 30. See, also, Thaxter v. Finn, 1918, 178 Cal. 270, 273, 173 P. 163.



58 Cal.App.2d 455

LOPEZ v. WISLER et al.

Civ. 6767.

District Court of Appeal, Third District, California.

April 30, 1943.

Hearing Denied June 28, 1943.

1. Evidence ⇐254

Admission by defendant that plaintiff was driving only 30 to 35 miles per hour would not constitute "affirmative evidence" of speed.

See Words and Phrases, Permanent Edition, for all other definitions of "Affirmative Evidence".

2. Witnesses ⇐397

When witness is impeached by proof of prior inconsistent statements, the effect is merely to discredit him as a witness, and the prior statements are incompetent for any other purpose.

3. Appeal and error ⇐1048(6)

Where defendant testified that plaintiff was driving 55 to 60 miles per hour at time of collision, refusal to permit cross-examination as to whether defendant had told traffic officer that plaintiff was driving only 30 to 35 miles per hour was not prejudicial, where officer's testimony that defendant had made such statement was subsequently introduced.

4. Appeal and error ⇐1170(9)

The giving of instruction requiring verdict denying recovery if plaintiff motorist failed to keep proper lookout or failed to keep his automobile under such control as would enable him in exercise of ordinary care to avoid collision, or failed in situation which required slowing up and stopping, and if such failure was proximate cause of collision, did not result in "miscarriage of justice" so as to require reversal. Const. art. 6, § 4½.

See Words and Phrases, Permanent Edition, for all other definitions of "Miscarriage of Justice".

5. Trial ⇐253(9)

Under evidence that plaintiff motorist, in position of peril, could have attempted to stop or could have turned to the left or turned to the right, either applying his brakes or accelerating his speed, requested instruction assuming that plaintiff had but two courses open to him was properly refused. Vehicle Code, § 670, St.1935, p. 222.

6. Negligence ⇐72

A requested instruction assuming that a party in imminent peril could not be deemed negligent unless he had time to stop and investigate and determine what was the right or safe course to pursue before acting was properly refused.

7. Trial ⇐194(16)

A requested instruction that if plaintiff motorist, in imminent danger, did not have time to stop and investigate, his turning to the right instead of to the left was not negligence was properly refused as taking from jury determination of whether plaintiff's conduct was reasonable.

8. Negligence ⇐136(28)

One who, when confronted with imminent peril, chooses certain course of conduct is not as a matter of law free from charge of negligence based on such conduct.

9. Negligence ⇐141(7)

An instruction that if a party in imminent danger has not the time to consider and determine which is the better or safer course to pursue, and which is the unsafe course, his choosing the unwise or unsafe way is not necessarily negligence, was not erroneous.

10. Automobiles ⇐245(89)

Whether course pursued by plaintiff motorist when confronted with imminent peril of collision was that of a reasonably prudent man under the circumstances was for jury.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by M. J. Lopez against Lee Dean Wisler and another for injuries sustained in an automobile accident. From a judgment for defendants, plaintiff appeals.

Affirmed.

Gumpert & Mazzera, of Stockton, for appellant.

Neumiller & Ditz, Irving L. Neumiller, and Dudley W. Sheppard, all of Stockton, for respondents.

ADAMS, Presiding Justice.

Appeal from a judgment for defendants entered upon the verdict of a jury in an action for damages for personal injuries arising out of an automobile collision.

On the day of the accident in question defendant Wisler, who was employed by defendant Doudell, was driving his employer's truck and trailer in a northwesterly direction on a paved highway between Stockton and Thornton, known as the Lower Sacramento Road, which road connects with the Thornton Road about five miles north of Stockton. At the point of intersection the Lower Sacramento Road makes a turn to the right and proceeds in a northeasterly direction toward Sacramento, while the road to Thornton continues almost due north. Just before the accident Wisler was driving his truck and trailer between 35 and 38 miles an hour, and prior to entering the intersection, by use of a mechanical arm on the truck, he signaled that he was not going to follow the curve of the Lower Sacramento Road to the northeast, but, instead, was going to continue northwesterly onto the Thornton Road. He testified that he looked for traffic coming toward him from the direction of Lodi around the curve of the Lower Sacramento Road but saw no vehicles coming from that direction; that he then observed a car driven by Harry Price Palmer coming toward him from the northwest on the Thornton Road, Palmer at that time being about 450 feet away; that after seeing that there was no vehicle approaching the intersection other than the Palmer car he crossed the center white line of the Lower Sacramento Road and proceeded in practically a straight line into the Thornton Road; that he watched the oncoming Palmer car until he reached a point about 8 to 15 feet from the point of collision, at which point, for the first time, he saw the Hudson car driven by plaintiff coming from the northeast on the Lower Sacramento Road, at a speed which he estimated to be from 55 to 60 miles an hour. He saw that the Hudson car was leaving the curve of the Lower Sacramento Road and was cutting directly across in front of him and at right angles to the Thornton Road, and he applied his brakes, but could not avoid the oncoming Hudson car, the left side of which struck the right front corner of the truck so hard that the truck was knocked entirely across the Thornton Road to the west where it was turned over, and completely around, and severed from the trailer.

At the time of the accident plaintiff Lopez was driving a new Hudson sedan and was accompanied by Neil Guyman, the Hudson agent at Stockton, who was demonstrating the car to Lopez. The latter testified that he was not familiar with this car, had never driven it before, and that the gear shift was on the steering wheel while his own car had the gear shift on the floor. He testified that he saw the truck approaching the intersection when it was approximately 200 feet away from him, that when it neared the junction of the Thornton Road it swerved to the left suddenly; that it was then approximately 100 feet from him; that he stepped on the gas and swerved to the right and the collision resulted; that he did not apply his brakes; that it all happened so suddenly that he thought his only alternative was to turn to the right; that he was unable to say to what speed he increased; that he did not see Wisler give a signal of his intention to turn, and that he did not look in the direction of the Thornton Road and did not at any time see the car driven by Palmer which was then so close that it, too, was involved in the accident. There was a "side road" sign on his approach to the intersection and also two "slow" signs painted on the pavement. Though plaintiff testified that the truck was proceeding around the curve of the Lower Sacramento Road and suddenly made a quick left turn onto the Thornton Road, his testimony in this regard was refuted by witness Palmer who testified that the truck

continued to travel in the same direction from the point where he first saw it to the point of collision, and that at the moment of impact it was headed in approximately the same direction in which it had been traveling.

Appellant makes two contentions on this appeal, the first that the trial court committed reversible error in curtailing plaintiff's cross-examination of defendant Wisler, and second, that the court erred in the giving of certain instructions. As to the first contention, Wisler was called by plaintiff under section 2055 of the Code of Civil Procedure, and during his interrogation by Mr. Gumpert, plaintiff's counsel, he was asked at approximately what rate of speed the Lopez car was going when he first saw it. He said: "Well, my best judgment, he was traveling fast; I imagine around between 55 or 60." When asked if he remembered having talked with the traffic officer immediately following the accident, and said he did, he was then asked:

"You remember having had a conversation with him in which he asked you how fast the automobile of Mr. Lopez was going, the Hudson? A. I don't remember if he asked me that or not. * * *

"Q. State whether or not it isn't the fact that at that time and place—

"Mr. Neumiller: Just a moment. If Your Honor please, the witness has stated he doesn't remember whether he said anything about the speed or not, and in view of that answer he obviously cannot answer the other question which counsel is prepared to put to him, and object to it upon that ground." Objection was sustained.

"Mr. Gumpert: Q. Well now, for the purpose of refreshing your recollection, Mr. Wisler, isn't it the fact and isn't your recollection refreshed by the fact, if it be a fact, that you told Officer Raleigh—following the accident—"

At this point further objection was interposed by counsel for defendant, and sustained by the court. Mr. Gumpert then stated:

"I don't want to go contrary to Your Honor's ruling, if Your Honor please, but I am going to lay a foundation for the question for impeachment.

"Mr. Gumpert: Q. State whether or not following the accident at the scene of the accident on the night of September 30th, 1940, you did not tell Officer Homer Raleigh—Highway Patrolman of this county—"

Again objection was interposed and sustained.

Mr. Gumpert then asked:

"Well, will you deny that you had a conversation with Officer Homer Raleigh, irrespective of what speed you told him? A. I had a conversation with him.

"Q. Yes. And in that conversation will you deny that you told Officer Homer Raleigh, respecting the speed of the Lopez automobile—"

An objection that the question was argumentive was then interposed and sustained.

Mr. Gumpert then asked:

"Did you following this accident, Mr. Wisler, have a different opinion as to the speed at which Mr. Lopez' car was going, other than what you have testified to?"

An objection was again interposed by counsel for defendant and overruled, whereupon the witness answered:

"Only that he was going fast."

Mr. Gumpert then asked:

"Then it is your testimony that you did not tell the officer anything other than that the other car was going fast, is that correct?

An objection was again sustained, whereupon Mr. Gumpert asked:

"Did you form the opinion as to the speed of Mr. Lopez' car before or after you hit? A. After we hit.

"Q. Yes. And how long after you hit did you form that opinion, which you now express, Mr. Wisler?"

Objection to this question being overruled, the witness answered that it was after the accident, but he did not know how long after. On direct examination by his own counsel he was asked upon what he had based his estimate that the speed of the Lopez car was between 55 and 60 miles an hour, and said:

"Well, I based that after I had the accident, a little while after, after I had kind of realized what had happened, and the speed—when I first seen the car of Mr. Lopez, I had no more than seen it than it happened; and the damage that it did to the truck by turning it around and turning it over; by that I realized he was driving at a high rate of speed, that is why I thought he was going between 55 and 60 miles an hour."

Thereafter he was again interrogated by plaintiff's counsel as follows:

"Mr. Gumpert: Q. Now then, you have testified on redirect examination of your

counsel this morning that it was some time after the accident, after you had a chance to think over and look over the machines—the machine, the truck, that you formed this opinion as to the speed of the Lopez automobile, correct? A. Yes.

"Q. Yes. Was that before or after you had talked to the traffic officer that you formed that opinion? A. I believe it was afterwards.

"Q. It was after you had talked to the traffic officer? A. Yes.

"Q. So, that at the time you talked to the traffic officer, what was your opinion as to the speed of the Lopez automobile? A. I didn't make no—

"Mr. Neumiller: Now, just a moment. If Your Honor please, we object to that question; calling for opinion and conclusion of the witness.

"The Court: Objection overruled. * * *

"A. I don't believe I made any estimate of his speed right then.

"Q. Well, isn't it the fact that at that time and place, at the scene of the accident on the night of September 30th, 1940, that Traffic Officer Raleigh of the California Highway Patrol asked you this question: 'Approximately how fast was the Lopez automobile going when you saw it?' And didn't you * * *. And didn't you answer 'Approximately 35 miles per hour'?"

Objection having again been interposed and sustained, Mr. Gumpert stated:

"Now, if Your Honor please, we intend to put Mr. Raleigh on. That is proper impeaching evidence, if Your Honor please, in order to lay the foundation. * * *

"The Court: The objection will be sustained. He said he didn't remember."

Subsequently, without objection, the traffic officer, Raleigh, called by plaintiff, testified that he had a conversation with Wisler after the accident, that he asked Wisler how fast the Hudson automobile was going, and that he answered, approximately 35 miles an hour.

[1, 2] Appellant contends that in spite of the fact that the testimony of Raleigh was admitted to impeach Wisler, plaintiff was nevertheless prejudiced by the rulings of the trial court as above set forth, his argument, as we understand it, being that he should have been permitted to exact from the witness Wisler a direct yes or no answer as to whether he stated to Raleigh that Lopez was traveling between 30 and 35 miles per hour. He argues that if Wisler had admitted that he did so state, his admission would have been affirmative evidence that Lopez' speed was but 30 or 35 miles per hour; and that his denial would have justified the jury in disbelieving the rest of his testimony. As to the former contention we cannot agree that if Wisler had admitted the making of the statement to Raleigh this admission would have constituted affirmative evidence that Lopez' speed was 30 to 35 miles per hour. It has been held in numerous cases that when a witness is impeached by proof of prior inconsistent statements the effect is merely to discredit him as a witness, and that the former statements made by him are incompetent for any other purpose. Albert v. McKay & Co., 174 Cal. 451, 456, 163 P. 666; Mattson v. Maryland Casualty Co., 100 Cal.App. 96, 98, 279 P. 1045; Fortenbery v. Riddle, 129 Cal.App. 529, 530, 18 P.2d 996; Goodwin v. Robinson, 20 Cal. App.2d 283, 288, 66 P.2d 1257; Gajanich v. Gregory, 116 Cal.App. 622, 629, 3 P.2d 389; Overton v. Harband, 6 Cal.App.2d 455, 462, 44 P.2d 484; 28 R.C.L. 633. Furthermore, Wisler said he did not see the Hudson car until it was within 15 feet of him, and his estimate that its speed was then 55 or 60 miles an hour is entirely consistent with Lopez' testimony that when he saw Wisler turn he "stepped on the gas."

As to the argument that if Wisler had denied making the statement the jury would have been justified in disbelieving the rest of his testimony, we fail to see how his admission of the former statement—that is, in effect, his self-impeachment—would have a greater tendency to discredit him than the testimony of the impeaching witness would have. Furthermore, Wisler did, in effect, deny the making of such statement when he said that he did not remember whether the traffic officer asked him how fast the Hudson car was going and also when he said "I don't believe I made any estimate of his speed right then." It is noted, too, that plaintiff's counsel stated twice that his reason for asking the questions to which objections were sustained, was to "lay a foundation for the question of impeachment," and that he intended to call Mr. Raleigh to impeach Wisler. This he was permitted to do.

Appellant puts his principal reliance upon People v. Brady, 56 Cal.App. 777, 206 P. 668, where the court reversed a judgment of conviction on the ground that defendant's cross-examination had been

prejudicially curtailed. But that case is clearly distinguishable as no testimony of prior inconsistent statements by the complaining witness was there admitted.

[3] But whether the trial court erred or not in restricting the cross-examination of Wisler, we are satisfied that there was no such prejudicial error as would justify reversal. In Wilson v. Davis, 11 Cal. 2d 761, 769, 81 P.2d 971, where complaint was made that the court's refusal to permit counsel to ask a witness concerning certain conversations was reversible error, the Supreme Court said that if any error occurred, it was cured since the court later permitted another witness to testify fully as to these matters. Also see Johnson v. Ulrey, 201 Cal. 456, 469, 257 P. 505; Berkowitz v. Tyderko, Ltd., 13 Cal.App.2d 561, 565, 57 P.2d 173; Umemoto v. McDonald, 6 Cal.2d 587, 591-593, 58 P.2d 1274; Fortenbery v. Riddle, supra.

Appellant's second contention is that the trial court erred in giving the following instruction:

"The operator of an automobile is bound to anticipate that he may meet others at any point on the highway and he must, in order to avoid a charge of negligence, keep a proper lookout for them and keep his machine under such control as will enable him to avoid a collision with another person using proper care and caution, and I also instruct you that if the situation requires, he must slow up and stop.

"I instruct you that if you find that plaintiff, M. J. Lopez, failed to keep a proper lookout for other cars on the highway or failed to keep his machine under such control as would enable him in the exercise of ordinary care to avoid a collision with another person using proper care and caution, or failed in a situation which required slowing up and stopping, and if you find that such failure, if any, in all or any one of these instances, was the, or a, proximate cause of said collision, then you must not award any damages to the plaintiff, and your verdict must be for the defendants."

It is urged that this "formula" instruction took from the jury the question of fact as to whether or not any failure in a situation requiring slowing up and stopping was or was not contributory negligence upon the part of Lopez. It is the statement of the instruction in the alternative, particularly the portion of it regarding slowing up and stopping, to which appellant makes objection. He could hardly object to what preceded this since at his request the court gave three similar instructions as to the duty of Wisler. Appellant says that this instruction imposed an absolute requirement, as a matter of law, upon Lopez to slow up and stop. We do not so read the instruction, for it says that if Lopez failed in a situation "which required slowing up and stopping," and his failure to do so, if any, was a proximate cause of the collision, he could not recover. It was left to the jury to decide whether there was a situation which required slowing up and stopping, and the instruction did not state that his failure to do so under the circumstances of the case constituted negligence as matter of law. The portion of the instruction referred to might have been better had the words "in the exercise of ordinary care" been repeated before the words "required slowing up and stopping," but they were used in the preceding phrase of the sentence, and the court also instructed the jury elsewhere on the doctrine of contributory negligence.

[4] In view of all of the facts in the case, and the provisions of section 4½ of article VI of the Constitution, we cannot say that the giving of this instruction resulted in a miscarriage of justice. Reuter v. Hill, 136 Cal.App. 67, 76, 28 P.2d 390; Mahoney v. Murray, 140 Cal.App. 206, 209, 35 P.2d 612; Christiansen v. Hollings, 44 Cal.App.2d 332, 346, 112 P.2d 723; Walsh v. Maurice Mercantile Co., 20 Cal.App.2d 45, 48, 66 P.2d 181; Klenzendorf v. Shasta Union High School District, 4 Cal.App.2d 164, 171, 40 P.2d 878; Casalegno v. Leonard, 40 Cal.App.2d 575, 579, 105 P.2d 125; Godfrey v. Brown, 220 Cal. 57, 62, 29 P.2d 165, 93 A.L.R. 1092; Ward v. Read, 219 Cal. 65, 68, 25 P.2d 821; Hilton v. Carey, 41 Cal.App.2d 375, 378, 106 P.2d 944.

The other alleged error relied upon by appellant is the refusal of the court to give the following instruction requested by him: "When a person is in imminent danger, without fault on his part, he is not called upon to exercise that intelligence and judgment he would be expected to exercise were he not in danger. So if such a party in imminent danger has two ways open to him, but has not the time to stop and investigate, and determine which is the right or safe way, and which is the wrong or unsafe way, his choosing the latter is not, under the circumstances, negligence on his part. So if you should find from the evidence in this case that Lopez, without fault on his part, found himself in imminent danger or had reasonable ground to believe that he was in such

danger, and had not time to stop and consider and determine the better course to pursue, then you are instructed that his choosing to turn one way instead of the other in such emergency was not negligence on his part even though in so doing he may have ridden right against Wisler's approaching truck instead of away from it."

Instead, the court instructed as follows: "When a person finds himself suddenly placed in a position of peril, without fault on his part, he is not called upon to exercise that intelligence and judgment he would be expected to exercise were he not in imminent danger. If such a party in imminent danger has not the time to consider and determine which is the better or safer course to pursue and which is the unsafe course, his choosing the unwise or unsafe way is not necessarily negligence."

[5-7] The instruction in the form suggested by appellant assumes that plaintiff had but two courses open to him when he found himself in a position of peril. This is a false assumption. He might have put on his brakes and attempted to stop, which, if he was traveling at the rate of speed claimed by him, he should have been able to do (California Vehicle Code, § 670); he might have turned to the left or turned to the right either applying his brakes or accelerating his speed. It also assumes that a party in imminent peril cannot be deemed negligent unless he has time to *stop and investigate* and determine what is the right or safe course to pursue before acting. Neither stopping nor investigating is necessarily preliminary to determining the safe course to pursue. If a driver has time to stop and investigate he cannot be said to be in imminent peril. Furthermore, the instruction as framed by appellant in effect would have told the jury that as a matter of law, if plaintiff did not have time to stop and investigate, his turning to the right instead of to the left was not negligence. Such an instruction would have been improper, since it would have taken from the jury the determination of whether what he did was or was not reasonable under the circumstances. He testified that when he saw the truck swerve to the left he pulled to the right and "stepped on the gas", with the idea that he was going to try to get around in front of the truck; that it happened so suddenly he *"thought"* the only alternative was to turn to his right. He thus states that he did think, and did not act on impulse alone.

[8] The contention that the course chosen by him, as a matter of law could not be considered negligence is unsound. It is said in 19 Cal.Jur., pp. 598–600: "One who, without negligence upon his part, is suddenly confronted with imminent danger or seeming imminent danger is not required to exercise that degree of care and skill which is required in the commission of an act after careful deliberation; he is required to act only as a reasonably prudent man would act under similar circumstances. Accordingly, where a situation requires an immediate choice between alternative courses of conduct, negligence may not be inferred from an unwise choice, *if a a reasonable man, under similar circumstances, would choose similarly.* And under such circumstances one may be excused if he loses his presence of mind, momentarily forgets, errs in judgment, or omits cautionary measures which should otherwise have been taken, even though the effect of his conduct is to cause him to encounter the danger sought to be avoided. Whether a person in a position of imminent danger acted reasonably is a question of fact for the jury, but in determining the question, conduct must be viewed in the light of the confusion and excitement of the moment and not in view of the circumstances and surroundings of one not in danger." (Emphasis ours.)

In Van Fleet v. Heyler, 51 Cal.App.2d 719, at page 732, 125 P.2d 586, at page 593, where the court, at the request of defendant who was relying upon the sudden peril rule, gave an instruction which was held erroneous, the court said: "As a statement of the sudden peril rule this instruction is erroneous. It excuses the defendant if he used *his* best judgment and followed the course of action which *seemed to him* best suited to prevent a collision. One who is subject to this rule is required to act as a reasonably prudent person would act under similar circumstances. 19 Cal. Jur. 598; Mortensen v. Fairbanks, 1934, 1 Cal.2d 489, 492, 35 P.2d 1030."

In Mortensen v. Fairbanks, 1 Cal.2d 489, 35 P.2d 1030, 1031, a portion of an instruction directed that if the jury should find that in an effort to extricate himself from danger plaintiff "failed to act in such manner as a careful and prudent person would have done under the circumstances, then it was not negligence or contributory negligence on his part in driving ahead in an effort to get out of the path of the car driven by the defendant." It was con-

cluded that this instruction was erroneous in that it informed the jury that one in imminent peril need not exercise reasonable care, and that it took from the jury the issue as to the reasonableness of plaintiff's conduct under the circumstances. The court said, 1 Cal.2d at page 492, 35 P.2d at page 1031:

"We are of the opinion that the instruction is objectionable on both grounds. The rule is now well settled that a person suddenly confronted with an unexpected danger, without any fault on his part, is only required to use such means for avoiding the danger as would be used by a person of ordinary prudence under similar circumstances, and he is not held to that strict accountability which would require that the course chosen be the most judicious one. McPhee v. Lavin, 183 Cal. 264, 268, 191 P. 23; McLaughlin v. Los Angeles Ry. Corp., 180 Cal. 527, 532, 182 P. 44; Tousley v. Pacific Electric Ry. Co., 166 Cal. 457, 463, 464, 137 P. 31; Carnahan v. Motor Transit Co., 65 Cal.App. 402, 411, 224 P. 143. The reasonableness of his effort to avoid the injury after discovery of the danger is a question of fact for the jury, to be determined by them in view of all the circumstances. Hoff v. Los Angeles Pac. Co., 158 Cal. 596, 601, 112 P. 53; Kearney v. Castellotti, 55 Cal.App. 541, 544, 203 P. 1029.

"The quoted portion of the instruction complained of informed the jury, in effect, that plaintiff could not be found guilty of contributory negligence even though in his effort to extricate himself from an apparent danger by driving ahead he had failed to act in such manner as a careful and prudent person would have acted under similar circumstances. This is obviously a misstatement of the law as to the care required of one confronted with a situation of imminent peril and, in addition, withdrew from the jury the issue as to the propriety and reasonableness of plaintiff's conduct under the circumstances."

[9, 10] Appellant's instruction as proposed was properly refused; and as modified and given by the court was not erroneous in directing that if a party in imminent danger has not the time to consider and determine which is the better or safer course to pursue and which is the unsafe course, his choosing the unwise or unsafe way is not *necessarily* negligence. Whether the course pursued by plaintiff was or was not that of a reasonably prudent man under the circumstances was thus left to the jury, and properly so. Jesse v. Giguiere, 24 Cal.App.2d 160, 165, 74 P.2d 310; County of Alameda v. Tieslau, 44 Cal.App. 332, 336, 337, 186 P. 398; Drury v. Los Angeles Ry. Corp., 102 Cal.App. 58, 65, 282 P. 525.

The judgment is affirmed.

PEEK and THOMPSON, JJ., concurred.



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EGGERT et al. v. PACIFIC STATES SAVINGS & LOAN CO. (HISE, Building and Loan Com'r, Intervenor).
Civ. 13706.

District Court of Appeal, Second District, Division 2, California.
Feb. 23, 1943.

1. Trusts ⇐25(1)

Agreement of parties to an instrument that it shall constitute a present sale and not be construed as a transfer of property in trust, cannot change true character of agreement of parties as disclosed by instrument which evidences the transaction.

2. Contracts ⇐170(1)

Generally, where uncertainty arises concerning provisions of an agreement, court will make inquiry regarding how parties themselves understood language, and, when they have acted upon that understanding, finding that agreement should be construed as acted upon will not be disturbed by reviewing tribunal.

3. Sales ⇐1(1)

To constitute a "sale of goods" within meaning of statute defining such sale as an agreement whereby seller transfers property in goods to buyer for a consideration called the price as distinguished from other agreements or transfers relative to property, it is essential that in addition to other elements absolute or general property in thing sold be transferred from seller to buyer. Civ.Code, § 1721.

See Words and Phrases, Permanent Edition, for all other definitions of "Sale of Goods".

4. Trusts ⇐1

A "trust" is any arrangement whereby property is transferred with intention that it be administered by trustee for another's benefit.

See Words and Phrases, Permanent Edition, for all other definitions of "Trust".

5. Appeal and error ⇐989

On appeal from judgment on ground of insufficiency of evidence to support findings, power of appellate court begins and ends with determination as to whether there is any substantial evidence contradicted or uncontradicted which will support findings of fact.

6. Trusts ⇐25(1)

Where agreement for transfer of assets from one building and loan association to another provided series of restrictions on power of vendee to sell assets it had acquired and required quarterly statement to vendor, under definition of "trust" as any arrangement which exists whereby property is transferred with intention that it be administered by trustee for benefit of another, statement in agreement that agreement and conveyance was intended by parties as a present sale was not conclusive upon parties.

7. Evidence ⇐450(5)

Where agreement for transfer of assets from one building and loan association to another declared it was intention of parties that title to all assets of vendor be transferred to and vested in vendee as a present sale, and further declared that sales of such property by vendee for a specified time should not be made without approval of vendor as to price and terms, an ambiguity was disclosed and trial court properly received evidence as to what parties themselves understood agreement to mean.

8. Trusts ⇐44(1)

In representative action to impress a trust upon building and loan association assets which had been transferred to another association under written agreement restricting vendee's power over such assets, evidence sustained finding that agreement under which assets were transferred constituted a "trust" notwithstanding provision therein that parties intended a sale.

9. Building and loan associations ⇐42(6)

Where State Building and Loan Commissioner did not exercise his power to take over liquidation of a building and loan association, his assent to agreement by which such association transferred its assets to another association in trust for liquidation was not an unlawful "delegation of power" by Commissioner. St.1911, p. 607, as amended.

See Words and Phrases, Permanent Edition, for all other definitions of "Delegation of Power".

10. Building and loan associations ⇐42(1)

Contract by which one building and loan association transferred its assets to another in trust for purpose of liquidation was lawful. St.1911, p. 607, as amended.

11. Building and loan associations ⇐24

Building and Loan Commission Act does not prohibit one building and loan association from transferring its assets to another for a proper consideration. St. 1911, p. 607, as amended.

12. Limitation of actions ⇐103(3)

In representative suit to impress a trust upon assets of one building and loan association transferred to defendant association under contract for liquidation thereof, where trial court found on sufficient evidence that under contract transferee was a voluntary trustee of such assets as distinguished from an involuntary or constructive trustee, applicable statutes of limitation did not commence to run until agreement between parties had been completed and final account rendered, so that where such agreement had not been completed at time of trial, action was not barred. Code Civ.Proc. §§ 318, 343.

13. Appeal and error ⇐1170(10)

Where it appeared that court at request of defendant in suit to impress a trust upon assets of building and loan association taken over by defendant under a liquidation agreement had found that as of final payment date of agreement there were over $7,500,000 outstanding in nominal face amount of participating certificates, which finding was supported by defendant's records, and court also found that at date of judgment there were less than $5,000,000 in such certificates outstanding, which later finding applied only to those who were to participate in judgment, and defendant had disclaimed right to partici-

pate, defendant was not prejudiced by any conflict in findings. Const. art. 6, § 4½.

14. Amicus curiae ⇐3

District Court of Appeal would not consider propositions urged by amicus curiae which were not presented by either appellant or respondent since amicus curiae must accept issues properly raised by appealing parties.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Representative suit by John Eggert and others against Pacific States Savings & Loan Company to impress a trust upon certain assets or their derivatives alleged to have been transferred by Fidelity Savings & Loan Association to defendant, wherein Harley Hise, as Building and Loan Commissioner, intervened. From a judgment for plaintiff, defendant appeals.

Affirmed.

See, also, 53 Cal.App.2d 554, 127 P.2d 999; 20 Cal.2d 199, 124 P.2d 815.

O'Melveny & Myers, Pierce Works, W. B. Carman, Jr., and Sidney H. Wall, all of Los Angeles, for appellant.

Hugo H. Harris, David E. Field, R. W. Katerndahl, Wood, Crump & Rogers, and Guy Richards Crump, all of Los Angeles, for respondents.

McCOMB, Justice.

Plaintiffs brought the present action in a representative capacity for the purpose of impressing a trust upon assets or their derivatives alleged to have been transferred May 23, 1931,[1] by Fidelity Savings and Loan Association (hereinafter referred to as Fidelity) to defendant, Pacific States Savings and Loan Association (hereinafter referred to as Pacific States or defendant).

Defendant appeals from the judgment in favor of the plaintiff insofar as it (a) holds that the transfer of property from Fidelity to Pacific States pursuant to the agreement of May 23, 1931, constituted a transfer in trust as distinguished from an absolute sale of the assets of Fidelity to Pacific States, (b) awards judgment on the accounting to holders of Pacific States Issued Fidelity participating certificates in the sum of $1,363,251.40, (c) impresses a lien upon the Fidelity transferred realty or realty derivatives within the State of California as security for the payment of the sum awarded, and (d) orders the appointment of a receiver in aid of the judgment in favor of the participating certificate holders.

The main issue raised by the pleadings in the present action was: Did the transfer of assets from Fidelity to Pacific States by the agreement of May 23, 1931, mentioned supra, constitute an outright sale of the assets of Fidelity to Pacific States or a transfer in trust for the benefit of Fidelity, its creditors, and certificate holders?

The trial court held in favor of plaintiff's contention that the agreement constituted a transfer in trust for the benefit of Fidelity, its creditors, and certificate holders.

Defendant urges four propositions as reasons for the reversal of the judgment of the trial court. These propositions will be stated and answered hereunder seriatim.

First: There was no substantial evidence to sustain the trial court's finding that the transfer of property from Fidelity to Pacific States pursuant to the agreement of May 23, 1931, constituted a transfer in trust as distinguished from an absolute sale of such property.

This proposition is untenable and is governed by the facts hereinafter set forth and these pertinent rules of law:

[1] (1) The agreement of the parties to an instrument that it shall constitute a present sale and not be construed as a transfer of property in trust cannot change the true character of the agreement of the parties as disclosed by the instrument which evidences the transaction. (See Mahoney v. San Francisco, 201 Cal. 248, 258, 257 P. 49; Stockton Savings & Loan Society v. Purvis, 112 Cal. 236, 239, 44 P. 561, 53 Am.St.Rep. 210; San Joaquin L. & P. Corp. v. Costaloupes, 96 Cal.App. 322, 332, 274 P. 84; also 1 Scott on Trusts (1939) 37, sec. 2.8.)

[2] (2) Whenever uncertainty arises concerning the meaning of a written agreement, the trial court will receive evidence as to what the parties themselves understood the agreement to mean and when they have acted upon that understanding and the trial court has made a finding that the agreement should be construed as acted

[1] The agreement is set out following the opinion.

upon by the parties, such finding will not be disturbed upon appeal (Thew v. Thew, 35 Cal.App.2d 691, 695, 96 P.2d 826).

[3] (3) To constitute a sale of property as distinguished from other agreements or transfers relative to property it is essential that in addition to other elements the absolute or general property in the thing sold be transferred from the vendor to the vendee (Christensen v. Cram, 156 Cal. 633, 635, 105 P. 950; Van Allen v. Francis, 123 Cal. 474, 479, 56 P. 339; sec. 1721 Civ.Code[2]).

[4] (4) A trust is any arrangement which exists whereby property is transferred with an intention that it be held and administered by the transferee (trustee) for the benefit of another (In re Estate of Shaw, 198 Cal. 352, 360, 246 P. 48; Raffo v. Foltz, 106 Cal.App. 51, 55, 288 P. 884; 4 Am.Jur. (1936) 357, section 39; 2 Ruling Case Law, 1929, p. 664, § 20).

[5] (5) The power of an appellate court in reviewing the evidence on appeal from a judgment on the ground of insufficiency of the evidence to support findings of fact *begins* and *ends* with a determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the questioned finding of fact (Raggio v. Mallory, 10 Cal.2d 723, 725, 76 P.2d 660; In re Estate of Winzeler, 42 Cal.App.2d 246, 248, 108 P.2d 720).

The agreement of May 23, 1931, between the parties contained the following relevant provisions:

"Fifth: It is the intention of the parties hereto that title to all of said assets referred to the assets of Fidelity shall be, and the same is hereby, transferred to and vested in Pacific States, for and in consideration of the purchase price and other considerations hereinafter mentioned."

"Twelfth: A. Pacific States (subject to the provisions of Paragraph Twentieth hereof) shall have charge of the sale of all Real Property (as hereinafter defined) and all other assets acquired by it from Fidelity and may sell the same at such prices and on such terms and conditions as in its sole discretion it may determine without any approval from Fidelity; provided, that without the approval as to price and terms of sale of a representative of Fidelity appointed for the purpose, Pacific States will not (a) sell any notes or street improvement bonds acquired from Fidelity for a period of four (4) years from date hereof, (b) sell any Real Property (as hereinafter defined) for a period of four (4) years from the date hereof unless the annual quota of sales hereinafter set forth shall not be met, or (c) sell any other assets acquired from Fidelity hereunder for a period of two (2) years from the date hereof."

"Nineteenth: 1. Pacific States hereby further agrees:

"(a) To furnish to Fidelity, at least quarterly, full, true and correct statements showing in detail, and in form satisfactory to Fidelity, the status of all assets transferred to Pacific States hereunder, together with such other statements and/or information as Fidelity may require in order to maintain its books of account, to determine the status of the *liquidation* of said assets, and generally to inform itself as to matters involving its rights under the terms of this agreement. * * * (Italics added.)

"5. The within agreement and conveyance is intended by the parties hereto as a present sale and transfer of the above described properties by Fidelity to Pacific States, in consideration of the payment of the purchase price therefor hereinabove mentioned, and neither the Pacific States nor the State Guaranty assumes hereby any trust obligation to the Fidelity or its creditors or any obligations other than those herein expressly assumed. It is, moreover, specifically understood and agreed that neither Pacific States nor State Guaranty assumes hereby any obligation to distribute said purchase price or other funds to or for the benefit of creditors or stockholders of Fidelity or otherwise."

[6, 7] It is evident that under rule 1, supra, the statement in paragraph Nineteenth, subdivision 5, was not conclusive upon the parties. It is likewise apparent

[2] The cited section on May 23, 1931, read thus:

"Sale is a contract by which, for a pecuniary consideration, called a price, one transfers to another an interest in property."

This section was repealed by the Legislature by the Statutes of 1931, p. 2234, and the present Civil Code section 1721 added by statutes of 1931, page 2235, subsection 2 thereof, reads as follows:

"A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price."

from an examination of the statement in paragraph Fifth of the agreement that it was the intention of the parties that title to all of the assets of Fidelity should be transferred to and vested in Pacific States. This statement creates an ambiguity in the agreement when read in connection with the statement in paragraph Twelfth to the effect that sales of property of Fidelity for the period of four years should not be made without obtaining first the approval of Fidelity as to the price and terms of the proposed sale. This ambiguity is further emphasized by the reference in paragraph Nineteenth to the transaction as "the liquidation of said assets." To resolve this ambiguity the trial court under rule 2, supra, properly received evidence as to what the parties themselves understood the agreement to mean. A portion of such evidence was as follows:

Mr. Robert S. Odell, President of Pacific States, testified in part thus:

"Nothing was said in that conversation (referring to negotiations preliminary to the agreement) about what Pacific States would get for making this liquidation, other than what I said, that we would be entitled to at least $500,000 a year gross profit, plus a reasonable allowance for additional operating costs. I don't recall that when the contract was finally written we were to get far beyond that. Eventually the auditors prepared what has been termed a formula, but that was to produce the 7.2% guaranteed yield. There was provided in that formula $500,000, as a gross differential. There was $100,000 for additional expense on license fees and taxes and all those things. As I recall it there was $500,000 going to be the gross with an allowance of $100,000 additional expenses that we would entail by bringing all those assets into Pacific States."

Further, on September 15, 1934, Mr. Odell sent a letter to the investors of Pacific States reading in part as follows:

"Fidelity Liquidation: Under the contract whereby this institution took over for liquidation the assets of Fidelity Savings & Loan Association in the year 1931, there were reissued in exchange for Fidelity certificates two new certificates, the first being an Investment Certificate of Pacific States Savings Guaranteeing 75% of the face value of the investment, and the other a certificate for 25% of the face value and which calls for a participation in whatever is yielded through the liquidation over and above the 75% guaranteed.

"Accordingly, a reserve equivalent to the capital liability plus 25% of the Fidelity Investment certificate liability at the time of the take-over was set up on our books and it is against this reserve that losses are being written down as we liquidate Fidelity assets."

Mr. Earl M. Leafe, a director and vice-president of Fidelity, testified as follows:

"I don't recall that we discussed the question of sale. We spoke of it as a take-over. I don't recall that anybody defined what they meant by the word take-over. There was no discussion of the price of any sale. The only discussion that involved amounts of money related to the compensation which Mr. Odell said Pacific States would have to have as a condition of the deal. This was in the very first stages of the negotiations. There wasn't any definition of the deal. It was simply that Pacific States would take over Fidelity on some sort of terms to be agreed upon. Mr. Odell said that he had reconsidered his previous decision not to try to work out a deal and that he was willing to undertake negotiations to see whether a deal could be worked out. He said that he wanted it clearly understood that as a condition of any deal Pacific States would have to receive as compensation for its services, the sum of $500,000 a year and an additional amount of $100,000 a year to cover the prorata of the general overhead which he felt would be applicable to the administration of Fidelity assets.

"I had many conversations with Mr. Grow and Mr. Wilke and other directors of Fidelity about this matter. The purpose of this agreement generally revolved about the orderly liquidation of Fidelity assets, the protection of the Fidelity certificate holders and the making of an arrangement to secure as large an amount of recovery to the Fidelity certificate holders as would be possible and to avoid liquidation by the Building and Loan Commissioner or by other public agency.

"There were discussions of forms of compensation or profit to Pacific States by reason of the take-over other than the payment of fees and charges for liquidation. There was discussion of the payment of the $500,000 item of profit. I suppose you would call that a fee for liquidation. It was a charge that was included in the contract."

Mr. A. E. Grow, executive vice-president and director of Fidelity, testified as follows:

"I don't recall that any reference was made to a sale of the assets of Fidelity in that conversation. No reference was made to the purchase of Fidelity assets by Pacific States. That was the beginning of the negotiations which consummated in the contract of May 23, 1931, between Fidelity and Pacific States. We told Odell that owing to the depression and the failure of the Guarantee Building & Loan we were having very heavy withdrawals in Fidelity and were getting into a rather precarious position and we wanted, if possible, to work out some plan whereby Pacific States would take over the assets of Fidelity and liquidate them, thereby affecting a tremendous saving in the overhead cost of handling the business. Nothing definite was consummated at that conference."

May 23, 1931, Mr. George L. Eastman, then president of Fidelity, sent a circular letter to the certificate holders of Fidelity, which contained this statement:

"That the fundamental values behind Fidelity assets are more than sufficient for every investor in this association to receive 100% on his investment plus his interest at 6% at the time of payment. * * * There will be very substantial assets available to the stockholders. * * * This has been accomplished under the present arrangement and at the same time has not taken from Fidelity any of the assets which secured its certificate holders."

From the foregoing evidence it is apparent that responsible executive officers of both Fidelity and Pacific States considered the agreement as evidencing a transaction whereby the Pacific States was to liquidate pursuant to the terms of the agreement of May 23, 1931, the assets of Fidelity for the benefit of those beneficially interested in Fidelity.

It is conceded that the assets of Fidelity were assigned on the books of the Pacific States a number with "F" preceding it to distinguish such assets from the other assets owned by Pacific States and that prior to 1936 the earnings from the assets of Fidelity were not taken into account as ordinary earnings of the Pacific States nor returned by Pacific States as part of its federal income tax; also Fidelity's income tax return for the year 1931 bears the following notation:

"The assets of this corporation were sold to Pacific States Savings and Loan Company on a liquidation basis under an agreement dated May 23, 1931, whereby we received the income on the assets and paid various expenses and charges for the handling of the liquidation."

Subsequently the same notation was made on Fidelity's income tax returns for the year 1937-1938.

The foregoing evidence constitutes substantial evidence to sustain the trial court's finding that it was in fact the intention of the parties that the assets of Fidelity be transferred to Pacific States in trust for the purpose of liquidation. Since, therefore, it was not an absolute transfer of the assets of Fidelity to Pacific States, it was not a sale under rule 3, supra, but the transaction constituted a transfer in trust pursuant to the requirements of rule 4, above.

[8] In view of the requirements as set forth in the provisions of rule 5, supra, further discussion of the evidence would not serve any useful purpose.

The following cases presented by defendant are factually distinguishable from the instant case:

In Broderick v. Betco Corp., 149 Misc. 245, 267 N.Y.S. 139, the sole question before the court was whether the superintendent of banks was entitled to maintain an action for an assessment against a stockholder of a trust company which the superintendent of banks had taken over for the purpose of liquidation. The court held that even though the contract was one of sale the superintendent of banks had authority to institute the action.

In Bassett v. City Bank & Tr. Co., 116 Conn. 617, 165 A. 557, absolute title to the property in question was transferred without any reservation or right of the transferor to the management or disposition of the transferred property.

In First National Bank v. Harris, 8 Cir., 27 F.2d 117, there was no provision in the agreement for the return of any of the assets to the transferor.

In Sturdivant Bank v. Houck, Mo.App., 47 S.W.2d 135, the property transferred was without restriction or any control being reserved in the transferor. A similar situation prevailed in the cases of Gockstetter v. Williams, 9 Cir., 9 F.2d 354, and Keiler v. Tutt, 31 Mo. 301.

St. Helens Quarry Co. v. F. T. Crowe & Co., 90 Or. 284, 176 P. 427, is based on the proposition that the parties by their conduct were estopped from treating the contract in question as one other than an outright sale.

In re Fidelity Savings & Loan Ass'n, D. C., 53 F.2d 241, which was a proceedings to have Fidelity declared an involuntary bankrupt is not binding upon this court. An examination of that case discloses that the question there presented was whether or not the court should permit the petitioning creditors in bankruptcy to file an amended petition, it being conceded that the one then before the court was defective. The court declined to permit the filing of the amended petition, indicating that in its opinion a better result would be obtained for all parties concerned if Fidelity were not adjudicated a bankrupt. The discussion in the opinion relative to the character of the agreement between Fidelity and Pacific States was obiter dictum and not pertinent to the question there presented for decision.

Second: If the agreement of May 23, 1931, between Fidelity and Pacific States be held to be a transfer in trust for the purpose of liquidating the assets of Fidelity and not a sale, then, since the State Building and Loan Commissioner approved the agreement, it constituted an unlawful delegation of power by the State Building and Loan Commissioner to Pacific States, and, therefore, the agreement was void.

[9] This proposition is likewise untenable. It is to be noted that the then State Building and Loan Commissioner, Mr. H. L. Carnahan, testified that he did not want to take over Fidelity for the purpose of liquidation but believed that, if someone else with the financial ability, integrity, and reputation took over the Fidelity assets for liquidation, a better result would ensue. The record discloses that in fact the State Building and Loan Commissioner did not exercise his power, assuming he could have done so, to take over the liquidation of Fidelity. Therefore, it is obvious that his assent to the agreement between Fidelity and Pacific States could not have constituted a delegation of his powers and duties to liquidate Fidelity.

[10, 11] The contract between Fidelity and Pacific States, whereby the one transferred to the other its assets for the purpose of liquidation was perfectly legal, there being no provision in the Building and Loan Commission Act of 1911 (Stats. 1911, p. 607 as amended, Deering's Gen. Laws, 1923, 1925–27, 1929, Act 982), which was in effect May 23, 1931, or any other provision of law which made it illegal for one building and loan association to transfer to another for a proper consideration its funds and/or property.

Jackson v. McIntosh, 5 Cir., 12 F.2d 676, Mobley v. Marlin, 166 Ga. 820, 144 S.E. 747, and Stogner v. Brooks, 40 Ga.App. 598, 151 S.E. 48, are not here in point, for the reason that in each of the cases cited the assets of the bank involved in each case had been taken over and were in the actual legal possession and control of the authorized statutory officer for purposes of liquidation. In each instance such officer had attempted to assign his duties of liquidation to another, which attempt was held in each case to be unlawful and nugatory. As heretofore pointed out in the instant case, the Building and Loan Commissioner had not exercised any power or right for the purpose of liquidating Fidelity.

Third: The statute of limitations, sections 318 and 343 of the Code of Civil Procedure, constituted a bar to plaintiffs' cause of action.

[12] This proposition is also untenable. Defendant's argument and authorities are predicated upon the theory that Pacific States became an involuntary or constructive trustee of the assets of Fidelity. However, the trial court found, supported by substantial evidence, as indicated above, that defendant was not an involuntary or constructive trustee of the assets of Fidelity but was a voluntary trustee of such assets. Therefore, the statute of limitations did not commence to run until the agreement between the parties had been completed and a final account rendered. (See Lezinsky v. Mason Malt, etc., Co., 185 Cal. 240, 244, 196 P. 884, and Leviston v. Tonningsen, 212 Cal. 656, 299 P. 724.) It is an undisputed fact in the present case that the agreement had not been completed and no final account had been rendered.

Fourth: The trial court's findings are inconsistent in that upon the same evidence it found that:

(1) As of the final payment date of the agreement of May 23, 1931, as amended, there were $7,554,251.25 outstanding in nominal face amount of participating certificates, and

(2) as of the date of judgment there were $4,899,790.62 in nominal face amount of participating certificates outstanding.

[13] This proposition may not be urged by defendant, for the reasons that:

(1) its own records disclosed, and it asked the trial court to make the finding that there were $7,554,251.25 outstanding in nominal face amount of participating certificates as of the final payment date of the agreement, and

(2) it is not prejudiced by the finding that as of the date of judgment there were $4,899,790.62 in nominal face amount of participating certificates outstanding, because such finding applies only to those who are to participate in the judgment, and by defendant's express disclaimer at the trial it waived any right to participate in the judgment.

Therefore, under the mandate of article VI, section 4½ of the Constitution of the State of California, we are bound to disregard any conflict that might exist between the findings, since defendant could not be prejudiced thereby.

Contentions of Amicus Curiae

[14] After the present action was commenced Ralph W. Evans, then Building and Loan Commissioner for the State of California, intervened in the action. Subsequently he resigned and Harley Hise was duly appointed and qualified in his place and stead as Building and Loan Commissioner, and by appropriate proceedings was substituted as intervenor in the present action. However, the intervenor did not appeal from the present judgment, but after the appeal had been taken to this court, by stipulation of the parties, was permitted to file a brief as amicus curiae. By this brief he urges various propositions for the modification of the judgment which are not presented by either plaintiffs (respondents) or defendant (appellant). These questions will not be considered by us for the reason that the rule is universally recognized that an appellate court will consider only those questions properly raised by the appealing parties. Amicus curiae must accept the issues made and propositions urged by the appealing parties, and any additional questions presented in a brief filed by an amicus curiae will not be considered (Davis v. McCasland, 182 Okl. 49, 75 P.2d 1118, 1119; Samuel Hertzig Corp. v. Gibbs, 295 Mass. 229, 3 N.E.2d 831, 833; Dinet v. Orleans Dredging Co., La.App., 149 So. 126, 129; Corning v. Patton, 236 Ala. 354, 182 So. 39, 42; City of Phœnix v. Drinkwater, 46 Ariz. 470, 52 P.2d 1175, 1176; 3 C.J.S. (1936) p. 1052, Amicus Curiæ, § 3(9)aa; see, also, Estate of Pina, 112 Cal. 14, 16, 44 P. 332).

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.

The following is the agreement referred to on page 824.

SUPPLEMENT

AGREEMENT
FOR TRANSFER OF ASSETS
FROM
FIDELITY SAVINGS
AND LOAN ASSOCIATION
TO
PACIFIC STATES SAVINGS
AND LOAN COMPANY
DATED MAY 23, 1931

AGREEMENT
FOR TRANSFER OF ASSETS
FROM
FIDELITY SAVINGS
AND LOAN ASSOCIATION
TO
PACIFIC STATES SAVINGS
AND LOAN COMPANY

THIS AGREEMENT AND CONVEYANCE, made and executed this 23rd day of May, 1931, by and between FIDELITY SAVINGS AND LOAN ASSOCIATION, a building and loan association organized under the laws of the State of California, party of the first part (hereinafter called "Fidelity"), PACIFIC STATES SAVINGS AND LOAN COMPANY, a building and loan association organized under the laws of the State of California, party of the second part (hereinafter called "Pacific States"), and STATE GUARANTY CORPORATION, a Delaware corporation which is the owner of all of the outstanding Guarantee Capital Stock (except Directors' qualifying shares) of the Pacific States Savings and Loan Company, party of the third part (hereinafter called "State Guaranty"),

WITNESSETH:

First: Fidelity, for and in consideration of the sum of Ten Dollars ($10.00) and other valuable considerations hereinafter mentioned, hereby grants, sells, transfers and conveys to Pacific States all of the lands, promissory notes, mortgages, deeds of trust, contracts, leases, securities, bonds, stocks, choses in action, cash on hand and in banks, accounts receivable, furniture, fixtures, equipment, business, good will, and all other property and interests in property, both real and personal, owned by Fidelity at the date hereof (all of said property being sometimes hereinafter referred to as the "assets").

Second: Fidelity hereby covenants, represents and warrants that it is the owner free and clear, except as shown on the Memorandum dated March 31, 1931, signed by Fidelity and on file in the office of the Building and Loan Commissioner of California (hereinafter referred to as the "Memorandum"), of all liens and encumbrances, except current taxes not delinquent and liens and encumbrances securing liabilities expressly assumed by Pacific States hereunder, of all of the assets shown on said "Memorandum," and that it is duly authorized and empowered to transfer the same as herein provided, and also that from said date to and including the date hereof, it has not done any of the following things, viz.:

(a) Disposed of any of said assets shown in said "Memorandum," excepting only cash in the payment of its debts and normal operating expenses and in the payment of dividends and of principal and interest and on its investment certificates and also that it has not paid, since the close of business on May 14, 1931, any amounts to any one holder of investment certificates of Fidelity in excess of $500.00;

(b) Paid any extra salaries, bonuses or other distributions to any of its officers or employees other than normal salaries in accordance with the past salary scale;

(c) Entered into any contracts or leases except contracts for the sale of real property made prior to May 15, 1931; or

(d) Created any lien on any of its properties without the consent of Pacific States, except liens to secure payment of liabilities expressly assumed by Pacific States hereunder.

Third: Fidelity hereby further covenants, represents and warrants that said "Memorandum" contains a full, true and correct statement of all its liabilities of every kind and nature, contingent or otherwise, as of the 31st day of March, 1931, and that all of the schedules numbered one (1) to twelve (12) in said "Memorandum" are full, true and correct, and fully, truly and correctly show all of the facts and items they purport to show. That from said date to and including the date hereof it has not incurred any liabilities in addition to those shown in said "Memorandum," except in the normal course of business, and has in no event entered into any contracts except contracts for the sale of real property made prior to May 15, 1931.

Fourth: Fidelity hereby further covenants, represents and warrants that prior to the date hereof it has caused to be cancelled and set aside all contracts of sale of real property wherein it is the seller and Fidelity Auxiliary, Ltd., is the purchaser. Fidelity further covenants, represents and warrants that in the case of all property covered by any such contracts of sale which shall have been heretofore re-sold by Fidelity Auxiliary, Ltd., Fidelity Auxiliary, Ltd., has heretofore assigned to Fidelity such contract or contracts of resale. Fidelity further covenants, represents and warrants that no consideration has been paid by Fidelity to Fidelity Auxiliary, Ltd., for the cancellation or assignment of any such contracts, other than the release by Fidelity of its rights and claims against said Fidelity Auxiliary, Ltd., under such contracts.

Fidelity further covenants, represents and warrants that Schedule 12 in said "Memorandum" set forth is a full, true and correct list showing all outstanding contracts of sale of real property from Fidelity Auxiliary, Ltd., to third persons.

Fifth: It is the intention of the parties hereto that title to all of said assets shall be, and the same is hereby, transferred to and vested in Pacific States, for and in consideration of the purchase price and other considerations hereinafter mentioned. Fidelity further agrees to execute and deliver to Pacific States all such further deeds and other instruments of transfer and conveyance of the property hereinabove referred to (all of which shall be satisfactory in form to Pacific States) as Pacific States may from time to time request Fidelity to execute and deliver to it. Fidelity further agrees forthwith to duly execute and deliver or cause to be duly executed and delivered, to Pacific States all such consents, authorizations, endorsements, resolutions and other instruments, as may be deemed necessary by counsel for Pacific States to the legal and effective assignment and transfer to Pacific States of all of said funds and property. Fidelity further agrees forthwith to endorse (without recourse) to Pacific States, all of the notes receivable of Fidelity (it being understood that the forms of such endorsements shall not limit or affect the warranties or other terms of this agreement).

Sixth: Fidelity agrees that after the date hereof it will not:

(a) Engage in the Building and Loan business within the County of Los Angeles (which is the principal place of business of Fidelity), State of California, so long as Pacific States, its successors or assigns, shall carry on a building and loan business within said County; or

(b) Engage in the Building and Loan business in the County of San Bernardino or the County of Orange, in which counties Fidelity has places of business, or in any other County in the State of California in which Fidelity has heretofore or is now transacting a building and loan business, so long as Pacific States, its successors or assigns, shall transact a building and loan business therein.

Fidelity further agrees that it will not at any time hereafter sell or transfer to any person, firm or corporation other than Pacific States and/or State Guaranty, its name or the right to use its name or any other name so

similar thereto as to be likely to deceive, and also that it will not hereafter use such name except for the purpose of winding up and liquidating its affairs. Fidelity further agrees that if it shall desire hereafter to sell or transfer its name it shall offer the same to Pacific States, and Pacific States agrees in such case to pay Fidelity therefor the sum of One Thousand Dollars ($1000.00) in cash.

Seventh: The purchase price to be paid to Fidelity in consideration of said sale, transfer and conveyance shall be:

(a) The assumption (subject to the provisions of Paragraph Seventeenth thereof) by Pacific States as of the date hereof, of all of the liabilities of Fidelity shown on said "Memorandum" (it being understood that the items or accounts designated as "Capital" and "Surplus" shall not be deemed to be liabilities within the meaning of this agreement), including all liabilities of Fidelity under the contracts and leases shown in said "Memorandum," and also all other liabilities incurred by Fidelity between March 31, 1931, and the date hereof in the normal course of business; except that Pacific States does not, and shall not, assume

(aa) Any of the outstanding investment certificates of Fidelity (as hereinafter defined) or any of its membership shares or any liabilities of Fidelity whatsoever under or in connection with said investment certificates or membership shares; nor

(bb) Any liabilities of Fidelity which have arisen since March 31, 1931, which Fidelity has herein covenanted that it has not incurred;

(b) The issuance (subject to the provisions of said Paragraph Seventeenth) by Pacific States on October 2, 1931, of its Investment Certificates and Fidelity Participating Certificates referred to in Paragraph Fourteenth hereof; and

(c) The payment (subject to the provisions of said Paragraph Seventeenth) by State Guaranty to Fidelity at the "final payment date" (as hereinafter defined) of an amount in cash and/or property as hereinafter set forth equal to the excess, if any of the amounts credited to "net proceeds" (as hereinafter defined) over and above the amounts debited to said "net proceeds," pursuant to the provisions of this agreement.

Eighth: There shall be credited to "net proceeds" the following:

(a) An amount equal to the face amount of all cash transferred by Fidelity to Pacific States, which credit shall be made as of the date hereof;

(b) Amounts equal to all "valuation payments," (as hereinafter defined) received by Pacific States on any of said assets acquired by it from Fidelity, said credits to be made as and when said "valuation payments" are received;

(c) The amount at which any note acquired from Fidelity, on which no foreclosure or other legal action to collect the same shall be commenced by Pacific States prior to the expiration of four (4) years from the date hereof, shall be "valued" as provided in subdivision (b) of Paragraph Tenth hereof, such credit to be made at the expiration of four (4) years from the date hereof;

(d) The amount at which any parcel of Real Property (as hereinafter defined) which shall be sold on time payments, the sales price of which shall not have been received in full, shall be deemed to be "valued" pursuant to the provisions of subdivision (c) of Paragraph Tenth hereof, such credit to be made if, as and when such parcel shall be deemed to be "valued" pursuant to the provisions of said subdivision (c) of Paragraph Tenth;

(e) The amount at which any furniture, fixtures and equipment acquired from Fidelity, which shall be used by Pacific States, shall, with the approval of Fidelity, be deemed to be "valued," pursuant to the provisions of subdivision (f) of Paragraph Tenth hereof, such credit to be made if, as and when such approval shall be received from Fidelity;

(f) All interest, rentals and dividends actually received in cash by Pacific States from any asset acquired from Fidelity up to and including the date on which said asset shall be "valued," said credits to be made as and when the said interest, rentals and dividends shall be received by Pacific States;

(g) All amounts received by Pacific States as the proceeds of any insurance policies on any Real Property or Personal Property (as hereinafter defined) prior to the time such Real or Personal Property shall be "valued," said credits to be made as and when said insurance shall be received;

(h) Seventy-five per cent (75%) of any commissions received by Pacific States Auxiliary Corporation and/or by any other of its affiliated corporations on insurance Pacific States may cause to be written on any Real or Personal Property (as hereinafter defined), or on any property which is security for any note receivable transferred hereunder, prior to the time such Real or Personal Property or such note shall be "valued," said credits to be made as and when said commissions are received by Pacific States; and

(i) Any other amounts provided to be credited to "net proceeds" under any of the provisions of this agreement.

Ninth: There shall be debited to "net proceeds" the following:

(a) The aggregate amount of all liabilities of Fidelity (other than undetermined liabilities which are dealt with in subdivision (b) of this Paragraph Ninth) assumed by Pacific States under any of the provisions of this agreement, including the aggregate amount of liabilities to become payable in the future under all contracts, loan commitments, and leases of Fidelity. The debits provided by this subdivision (a) shall be made as of the date hereof. If after any amount shall be debited to "net proceeds" representing a liability to become payable in the future under any lease running to Fidelity as lessee or under any loan commitment made by Fidelity or under any contract, said liability shall be canceled in whole or in part, there shall be credited to "net proceeds" an amount equal to the portion of any such liability so cancelled.

If the liability of Pacific States on any lease running to Fidelity shall not have been cancelled prior to a date which is thirty days before the "final payment date," there shall be credited to net proceeds an amount equal to the rental value of the premises for the unexpired term of said lease, which shall be determined by arbitration pursuant to the provisions of paragraph XXII hereof, if the parties hereto are unable to agree thereon.

(b) When any liability which is now undetermined shall become fixed the amount thereof shall be debited to "net proceeds," provided, however, that at the expiration of three (3) years, and eleven (11) months from the date hereof, Pacific States may debit to "net proceeds" an amount equal to the maximum liability, as estimated by Pacific States, which may accrue in the future under any litigation then pending, of the nature of the litigation described in subdivision (i) of this Paragraph Ninth, and the maximum amount as estimated by Pacific States of the liability which may accrue in the future under any guarantees given by Fidelity, or other contingent liabilities of Fidelity, and when the actual amount payable by reason of any such litigation, or payable under any such guarantees, or other contingent liabilities, shall be determined, and adjustment shall be made by the appropriate debit or credit to "net proceeds."

(c) Any interest paid by Pacific States on any liability of Fidelity paid or assumed by Pacific States, such debit to be made as and when such interest is paid; and also all other liabilities of Fidelity paid by Pacific States, whether or not expressly assumed under the terms of this agreement (it being understood that Pacific States may, at its option, pay any liabilities of Fidelity not expressly assumed under this agreement which may come to the knowledge of Pacific States), said debits to be made as and when said liabilities are paid.

(d) An amount equal to the aggregate principal amount of Fidelity investment certificates and membership shares outstanding at the close of business on the date hereof, it being understood that for all the purposes of this agreement the stock shown on said Financial Statement in the "Memorandum" as Guarantee Capital Stock shall in no event be treated as membership shares regardless of the fact that said stock may actually be membership shares; the debits referred to in this subdivision (d) to be made as of the date hereof. Fidelity warrants and represents that it has not issued any Investment Certificates or membership shares or any stock since the close of business on May 14, 1931. The principal amount of any investment certificate or membership shares of Fidelity shall, for all the purposes of this agreement, be deemed to be the amount which Fidelity would have to pay on the principal thereof upon withdrawal thereof.

(e) Interest and dividends accrued and unpaid up to the date hereof on the principal amount of Fidelity Investment Certificates and membership shares, respectively, outstanding as of the close of business on the date hereof; the debits referred to in this subdivision (e) to be made as of the date hereof.

(f) All amounts paid by Pacific States, or its affiliated corporation, Pacific States Auxiliary Corporation, or any other affiliated or subsidiary corporation of Pacific States (any and all said affiliated or subsidiary companies being hereinafter sometimes for convenience referred to as "affiliated real estate companies"), representing taxes, assessments and insurance premiums, and for the maintenance and/or improvement of Real Property (as hereinafter defined), and all other similar expenses of Pacific States, or any of said affiliated real estate companies in connection with said Real Property. Neither Pacific States nor any of said affiliated real estate companies shall have any authority to make any expenditures for the maintenance or improvement of said Real Property, or any parcel thereof, or similar expenses in connection therewith, for a period of four (4) years from the date hereof without the written approval of the representative who may be designated from time to time by Fidelity to approve such expenditures.

(g) A monthly charge until the "final payment date" hereinabove mentioned, equal to one-eighth of one per cent (⅛ of 1%) of the "book value" (as hereinafter defined) of unsold "Real Property" (ex-

cluding the property situate at the corner of Ninth and Hill Streets, and the so-called "Cecil Hotel" property in Los Angeles, California), held by Pacific States or any affiliated real estate company at the beginning of each month, said charge being estimated to be the approximate cost to said affiliated real estate companies of keeping accounts and inspecting and superintending the management of real estate, which services Pacific States agrees that one or more of said affiliated real estate companies will perform with respect to said Real Property.

In lieu of the charge mentioned in this paragraph (g), the charge shall, at the option of Fidelity (which option may be exercised each month), be a pro rata of the actual expenses (including rent, light, heat, water, salaries and all overhead expenses) incurred and paid each month by said affiliated real estate companies, in connection with keeping accounts, inspecting, and superintending the management of all real estate held and administered by them, including all real estate acquired by Pacific States and any of said affiliated real estate companies from a source or sources other than Fidelity, such pro rata being the proportionate amount of such expenses, based upon the aggregate "book value" of said Real Property (as hereinafter defined), at the beginning of each month as compared with the total aggregate book value of all real estate held by said affiliated real estate companies at the beginning of said month. The debits provided by this subdivision (g) shall be made monthly as of the end of each month.

(h) All expenses of sale of any Real Property (as hereinafter defined), including advertising and brokers' commissions, and in addition thereto an amount equal to two per cent (2%) of the sales price of each parcel of said Real Property which may be sold, representing the charge of said affiliated real estate companies (except that no such charge shall be paid on the sale of property situated at Ninth and Hill Streets, or on the sale of the so-called "Cecil Hotel" property in Los Angeles), for preparing documents, listing the property and handling the closing of the sale; provided that for a period of four (4) years from the date hereof, the amount of all brokers' commissions and expenses for specific advertising shall first be approved by a representative of Fidelity designated for that purpose, except that no such approval shall be required with respect to brokers' commissions or advertising in connection with sales of Real Property by Pacific States or any of said affiliated real estate companies to make up the annual quota of sales hereinafter mentioned, the prices and terms of which sales need not be approved by Fidelity. The debits for the two per cent (2%) charge mentioned in this subparagraph (h) shall be entered as and when the sales for which such charges are made shall be completed. The other debits provided by this subparagraph (h) shall be made as and when the expenses herein mentioned are paid or incurred.

(i) All expenses of any litigation involving any Real Property (as hereinafter defined) and any other assets acquired by Pacific States from Fidelity and/or the title of Pacific States to said assets, and all expenses of any litigation involving this agreement (provided that if Pacific States shall initiate any such litigation and the same shall be finally determined adversely to it, its attorneys' fees therein shall not be chargeable as a debit to "net proceeds"), including all amounts paid in satisfaction of any judgment in any such litigation, and all reasonable attorneys' fees therein, and all costs, expenses and reasonable attorneys' fees involved in the foreclosure of any mortgage or deed of trust acquired by Pacific States from Fidelity or any mortgage or deed of trust covering any Real Property (as hereinafter defined), provided that if the Trustee under any such deed of trust shall not require any attorney or shall include its attorneys' fee in its Trustee's fee, there shall not be an additional charge for attorneys' fee; and all such expenses involved in the cancellation of any contracts of sale acquired by Pacific States from Fidelity and in the cancellation of any contracts hereafter made by Pacific States for the sale of Real Property.

(j) Expenses of appraising any Real Property (as hereinafter defined) and of the audit provided for in Paragraph Fifteenth hereof, and of securing title and tax reports and policies, it being understood that, in addition to the appraisals herein provided for, Pacific States may, upon the acquisition of any Real Property by foreclosure, cause the same to be appraised at a cost of not to exceed Fifteen Dollars ($15.00) per day for appraiser's fee (unless a higher per diem shall be approved in writing by the representative of Fidelity), plus travelling expenses of the appraiser.

(k) A monthly charge equal to five hundred ninety-nine one thousandths ($^{599}/_{1000}$) of one per cent (1%) of an amount to be determined at the beginning of each month until the "final payment date" by taking the sum of $37,549,000.00 (which is approximately equal to the aggregate "book value" as hereinafter defined, at the date hereof, of all assets of Fidelity on accrual basis), and adding thereto a sum equal to all amounts hereafter advanced by Pacif-

ic States on loan commitments made by Fidelity which, at the date hereof, are not carried on Fidelity's balance sheet as a liability, and subtracting therefrom an amount equal to all amounts credited to "net proceeds" pursuant to the provisions of subdivisions (a), (b), (c), (d), (e) and (g) of Paragraph Eighth hereof prior to the first day of such month. The debits provided for by this subdivision (k) shall be made monthly as of the beginning of each month.

(l) An amount sufficient to cover the actual and reasonable operating expenses, including salaries and other expenses of Fidelity until November 1, 1931; thereafter and until the "final payment date," an amount not to exceed Twenty-five Hundred Dollars ($2500.00) per month to cover the necessary and reasonable current operating expenses of Fidelity, including employees' salaries, and in addition thereto any and all cost, expenses and reasonable attorneys' fees incurred by Fidelity in any suit, proceeding or litigation arising under, involving or growing out of this agreement or the transfer of assets from Fidelity to Pacific States pursuant hereto, provided that any attorneys' fees so incurred by Fidelity shall be approved as to the amount thereof by the Building and Loan Commissioner of the State of California, all of which amounts will be paid by Pacific States to Fidelity monthly on receipt of a statement of such expenses. The debits provided to be made by this subdivision (l) shall be made monthly as of the end of each month.

(m) All expenses or amounts which Pacific States may pay to prove or quiet its title to any of the assets transferred to it by Fidelity and/or to remove any liens or encumbrances therefrom; it being understood that Pacific States may purchase any bonds or notes secured by a lien on any Real Property (as hereinafter defined) or secured by a lien which is prior to the lien of any mortgage or deed of trust acquired from Fidelity, and debit the cost of the purchase of such bonds or notes to "net proceeds."

(n) Commissions paid to brokers and expenses of sale of any asset (other than the Real Property which is covered in Section "f") acquired from Fidelity; provided that for a period of two (2) years from the date hereof all such commissions shall first be approved by a representative of Fidelity designated for that purpose.

(o) Any amount paid by Pacific States to obtain the cancellation of any leases under which Fidelity is the lessee which may be transferred to Pacific States hereunder. After two (2) years from the date hereof Pacific States may pay such amounts as in its sole discretion it may determine in order to procure the cancellation of any of such leases.

(p) Any expenses and brokers' commissions paid by Pacific States for the leasing of any Real Property (as hereinafter defined) or for the subleasing of any property which is now covered by a lease under which Fidelity is the lessee, provided that for a period of two (2) years from the date hereof all such commissions shall first be approved by a representative of Fidelity designated for that purpose.

(q) Any amount paid by Pacific States to cancel any contracts and contingent or other liabilities of Fidelity and/or claims against Fidelity, it being understood that Pacific States is authorized to pay such amounts as in its sole discretion it may determine in order to procure the cancellation of any such contracts, liabilities and/or claims.

(r) The cost of all examinations conducted by the Building and Loan Commissioner of the State of California relative to the sale, disposal and management of said assets acquired by Pacific States from Fidelity.

(s) Any other amounts provided to be debited to "net proceeds" under any of the provisions of this agreement.

(t) Any other deductions and expenses of Pacific States in connection with the assets acquired from the Fidelity and/or the management thereof which may be approved by a representative of Fidelity designated for the purpose of giving such approval.

The debits provided for by subdivision (f) (i), (j) and (m) to (t), (both inclusive), shall be made as and when the amounts referred to in said subdivisions are paid by Pacific States or, at the option of Pacific States: when the liability to pay the same shall be incurred.

Tenth: For the purposes of this agreement said assets transferred by Fidelity to Pacific States hereunder shall be deemed to be "valued" at the following times, upon the following conditions and at the following amounts, viz.:

(a) Cash shall be deemed to be "valued" at its face amount at the date hereof;

(b) In the case of a Note, payments of principal thereon received by Pacific States after the date hereof shall be deemed to be "valuation" payments thereon and the same shall be deemed to be "valued," if and when the principal and all accrued interest thereon shall have been paid in full, provided that if no foreclosure or other legal action to collect any such note shall be commenced by Pacific States prior to the expiration of four (4) years from the date hereof, the same shall be deemed to be "valued" at the expiration of four (4) years from the date hereof, at the then unpaid principal amount thereof, plus accrued and unpaid interest thereon. If any

such note not previously "valued" shall be sold by Pacific States, the same shall be deemed "valued" at the time of such sale and the amount of the consideration received by Pacific States for the unpaid principal of said note shall be deemed to be a "valuation payment" thereon.

(c) In the case of each parcel of Real Property (as hereinafter defined), payments on the principal of the sales price thereof received by Pacific States after the date hereof shall be deemed to be "valuation payments" on such parcel and the same shall be deemed to be "valued" if and when the sales price and all accrued interest thereon shall be paid in full; provided, that if such parcel shall be sold on time payments, it shall be deemed to be "valued" at an amount equal to the unpaid principal of the sales price thereof plus accrued and unpaid interest on said sales prices if and when the balance of the principal of the sales price is not greater than seventy per cent (70%) of the amount at which such property shall be appraised as of the date of sale thereof by an appraiser employed by Pacific States.

(d) In the case of bonds, investment certificates issued by other Building and Loan Associations, judgments in favor of Fidelity, and accounts receivable, payments on the face value or principal amount thereof shall be deemed to be "valuation payments" on such bonds, investment certificates, judgments, or accounts receivable, as the case may be, and the same shall be deemed to have been "valued" if and when paid in full; provided that if any of said bonds, investment certificates, judgments, or accounts receivable shall be sold by Pacific States, the same shall be deemed "valued" at the time of sale and the amount of the principal of the sale price thereof shall be deemed to be a "valuation payment" thereon.

(e) In the case of stock now owned by Fidelity in other corporations, payments on the principal of the sales price thereof or liquidating dividends on such stock shall be deemed to be "valuation payments" on such stock, and the same shall be deemed to have been "valued" when the sales price thereof or final liquidating dividend thereon shall have been paid in full.

(f) In the case of furniture, fixtures, equipment and any other tangible assets acquired by Pacific States from Fidelity, the same shall be deemed to be "valued" when the sales price thereof shall have been received by Pacific States in cash and any payments on said sales price shall be deemed to be "valuation payments" thereon. Pacific States shall not use any of said furniture, fixtures, or equipment unless it shall fix an amount with the approval of Fidelity at which the same shall be deemed to be "valued."

(g) For all the purposes of this agreement, and regardless of any actual value thereof, good will, business and other similar intangible assets and all assets which are or shall be unsaleable or shall be lost, stolen or destroyed, are and shall be deemed to be "valued" at nothing.

(h) For the purpose of subdivisions (b), (c) and (d) of this Paragraph Tenth, if Pacific States shall accept any amount less than the unpaid principal of any note, contract of sale, bond, investment certificate, judgment or account receivable, as payment in full thereof, the same shall be deemed to be "valued" at the time of the acceptance of such amount by Pacific States.

Eleventh: Pacific States shall have the right to defend any litigation now or hereafter pending against Fidelity and to debit its costs (including reasonable attorney's fees) of defending such litigation to "net proceeds" and (subject to the provisions of Paragraph Twentieth hereof) shall have absolute, unrestricted control of the collections of all contracts of sale of Real Property (as hereinafter defined) and of all notes, mortgages, trust deeds, securities, accounts receivable, insurance claims and other claims transferred to it hereunder by Fidelity or otherwise owing to it, with the right to cancel, compromise, compound or foreclose the same and/or take such action, if any, in respect thereto as in its sole discretion it may determine, when and as in its judgment it considers it to be for its best interest so to do; provided that for a period of four (4) years from the date hereof, no such compromise shall be made without the approval of the representative of Fidelity appointed for that purpose. If any of the notes transferred by Fidelity to Pacific States hereunder shall be secured by one or more Fidelity investment certificates, Pacific States may, upon any default in payment of the principal or interest on said note, exercise all rights of Fidelity to enforce payments and in addition do either of the following, viz.:

(a) Sell said Fidelity investment certificate or certificates and apply the cash proceeds of sale upon said note, or

(b) Charge to "net proceeds," immediately prior to the "final payment date," the excess, if any, of the unpaid principal amount of said note, over the amount which Pacific States estimates will be payable on the Definite Term Investment Certificates and Fidelity Participating Certificates which the holder of the Fidelity investment certificates or certificates securing said note will be entitled to receive in exchange for said Fidelity investment certificate or certificates under the provisions of Paragraph Fourteenth hereof.

Twelfth: A. Pacific States (subject to the provisions of Paragraph Twentieth hereof) shall have charge of the sale of all Real Property (as hereinafter defined) and all other assets acquired by it from Fidelity and may sell the same at such prices and on such terms and conditions as in its sole discretion it may determine without any approval from Fidelity; provided, that without the approval as to price and terms of sale of a representative of Fidelity appointed for the purpose, Pacific States will not (a) sell any notes or street improvement bonds acquired from Fidelity for a period of four (4) years from date hereof, (b) sell any Real Property (as hereinafter defined) for a period of four (4) years from the date hereof unless the annual quota of sales hereinafter set forth shall not be met, or (c) sell any other assets acquired from Fidelity hereunder for a period of two (2) years from the date hereof. Fidelity covenants that such approval will not be unreasonably delayed or withheld in any case. Pacific States covenants that it will not unreasonably withhold from sale any parcel of Real Property (as hereinafter defined) a purchaser for which is produced by Fidelity, if such purchaser is willing to buy such parcel at a price not less than ninety per cent (90%) of the "book value" (as hereinafter defined) of such parcel on terms at least as favorable to Pacific States as the terms set forth in subdivision (D) of this Paragraph Twelfth, and if the monthly payments on principal offered to be made by such purchaser are sufficient so that at the expiration of five (5) years from the date hereof, the unpaid balance of the principal of the sales price of such parcel will not be greater than seventy per cent (70%) of the value of such parcel as appraised as of the date of sale thereof by an appraiser appointed by Pacific States, provided that Pacific States will in no event require interest at a rate greater than seven per cent (7%) per annum on the unpaid balance of the purchase price of any such Real Property without the approval of said Building and Loan Commissioner or of Fidelity.

B. The annual quota of sales of Real Property hereinabove referred to is as follows:

(a) During the first year after the date hereof, an amount aggregating not less than ten per cent (10%) of the aggregate book value of said Real Property held by Pacific States at the beginning of said year;

(b) During the second year after the date hereof, an amount aggregating not less than twenty per cent (20%) of the aggregate book value of said Real Property held by Pacific States at the beginning of said year;

(c) During the third year after the date hereof, an amount aggregating not less than fifty per cent (50%) of the aggregate book value of said Real Property held by Pacific States at the beginning of said year; and

(d) During the fourth year after the date hereof, the remainder of said Real Property.

If said annual quota of sales is not met in any year, Pacific States may, in its sole discretion, and without obtaining the approval of Fidelity, sell, at such price and on such terms as it may determine, a sufficient amount of Real Property to make up the deficit between the actual sales and the quota, it being understood that the right of Pacific States to sell Real Property to make up said quota shall be absolute and unconditional and shall not be affected by any claim (justified or unjustified) that the failure to meet said quota was due to the fault of Pacific States.

C. Until the "final payment date" Fidelity shall have the right to designate the manager and any other necessary operating personnel of any parcel of unsold Real Property; provided, however, that the salaries of such manager and personnel shall be mutually agreed upon between Pacific States and Fidelity.

D. Unless otherwise approved by Pacific States, all Real Property shall be sold with a down payment of not less than ten per cent (10%) of the sales price thereof with the balance payable in equal monthly installments over a period of not to exceed ten (10) years, bearing interest at the rate of seven per cent (7%) per annum; and the form of any contract or other instrument executed in connection with such sale shall be satisfactory to and approved by Pacific States.

E. After the expiration of four (4) years from the date hereof, Pacific States may sell any and all notes and improvement bonds acquired from Fidelity hereunder, and any and all Real Property at such price and on such terms and conditions and either at public auction or otherwise as it shall, in its sole discretion, determine without the approval by Fidelity. After the expiration of two (2) years from the date hereof Pacific States may sell any and all other assets acquired from Fidelity at such price and on such terms and conditions at public auction or otherwise as it shall, in its sole discretion, determine, without the approval of Fidelity.

Thirteenth: The "final payment date" shall be five (5) years from the date hereof unless postponed in the manner hereinafter set forth; provided, however, that if at any time more than thirty (30) days prior to the date fixed (whether five (5) years or longer from the date hereof) for the final payment "date," all of said assets transferred hereunder shall be "valued," the "final payment date" shall be a date which is thirty (30) days after the time when all of said assets shall be "valued"; and provided further, that if at any time before all of said assets shall be "valued," the credits to "net proceeds" shall exceed the debits to "net proceeds," the "final payment date" shall be

the time when said credits shall first exceed said debits.

If, ninety (90) days prior to the "final payment date," the total credits to "net proceeds" shall not exceed the total debits to "net proceeds," and if at such time any of said assets are not "valued," Pacific States shall hold an auction sale prior to the "final payment date" at some place in the City of Los Angeles selected by it, at which auction sale it may sell all of said assets not "valued" prior to such sale.

Pacific States shall give notice of said auction sale by publishing notice thereof once a week for three (3) successive weeks (three (3) publications in all) in a newspaper of general circulation in the City of Los Angeles, which notice shall set forth the time and place and terms of sale (which may be for cash), and shall either give a description of the property to be sold or shall state that the description may be examined at the Los Angeles Office of the Building and Loan Commissioner or at some other specified public place in the City of Los Angeles during the usual business hours. No other notice of said auction sale need be given but Pacific States may give additional notice thereof if it desires to do so. Either State Guaranty or any subsidiary of State Guaranty or any corporation affiliated with Pacific States may be the purchaser at such sale. If, at such "final payment date" the total credits to "net proceeds" shall exceed the total debits to "net proceeds," State Guaranty shall pay the excess to Fidelity, and if at such time there are any other assets acquired by Pacific States from Fidelity which shall not have been "valued" as hereinabove provided, State Guaranty shall acquire said assets from Pacific States and shall convey and deliver the same to Fidelity, subject to the right of Fidelity, as set forth in Paragraph Sixteenth hereof, to have one of said affiliated real estate companies continue for a period of not in excess of two (2) years the management of any Real Property not theretofore sold.

Notwithstanding anything to the contrary herein contained, said "final payment date" and the maturity of the Fidelity Participating Certificates may at any time or times hereafter be postponed, either by Fidelity or by Pacific States, to any date not more than seven (7) years from the date hereof; provided, however, that notwithstanding any said postponements, the "final payment date" shall be thirty (30) days after the time when credits to "net proceeds" shall first exceed debits to "net proceeds," and provided further, that such extension shall be approved in writing either

(a) By the Holders of Fidelity Participating Certificates representing at least seventy-five per cent (75%) in amount of all such Certificates then outstanding; or

(b) By the Building and Loan Commissioner of the State of California.

Upon such approval being obtained, the party or parties which shall have procured such approval shall file in the office of the Building and Loan Commissioner a certificate stating that said "final payment date" and the maturity of the Fidelity Participating Certificates has been postponed to a date (specifying the same) and that such postponement has been approved as in this paragraph above provided; and upon the filing of such certificate in the office of said Building and Loan Commissioner said "final payment date" and the maturity of said Fidelity Participating Certificates shall be deemed for all purposes of this agreement to have been postponed as therein provided. The postponement of the maturity of said Fidelity Participating Certificates shall not effect the right of Pacific States to redeem the same prior to the postponed maturity date.

Fourteenth: The aggregate principal amount of said investment certificates to be issued by Pacific States, as provided in subparagraph (b) of Paragraph Seventh hereof, shall be equal to seventy-five per cent (75%) of the total of:

(a) The aggregate principal amount of investment certificates of Fidelity outstanding at the close of business on the date hereof; and

(b) The aggregate principal amount of membership shares of Fidelity (it being understood that all Class "E" and all stock shown on said financial statement as guarantee capital stock is deemed not to be membership shares) outstanding at the close of business on the date hereof.

Said investment certificates shall be Definite Term Investment Certificates issued under the terms of the Building and Loan Association Act enacted in 1931, shall be payable five (5) years after the date hereof, and shall bear interest at the rate of six per cent (6%) per annum, payable semi-annually, and be subject to redemption at the principal amount thereof and accrued and unpaid interest to the date of redemption.

The aggregate nominal face amount of said Fidelity Participating Certificates, to be issued as provided in sub-paragraph (b) of Paragraph Seventh hereof, shall be a sum equal to the remaining twenty-five per cent (25%) of the total of the aggregate principal amount of said investment certificates and membership shares of Fidelity referred to in the foregoing subparagraphs (a) and (b) of this paragraph. By the terms of said Fidelity Participating Certificates, the Pacific States shall be obligated to pay to the payees therein named a sum equal to the nominal face amount thereof, subject, however, to the deductions, limitations and conditions hereinafter provided for. Said Fidelity Participating Certificates shall bear interest on the nominal face amount thereof at the rate of six per cent (6%) per annum payable semi-annually.

Unless, pursuant to the provisions of Paragraph Seventeenth hereof the obligation of Pacific States to issue said Definite Term Investment Certificates and Fidelity Participating Certificates shall be cancelled or become void, or the time for the issuance of said certificates shall be postponed to a later date as in said paragraph provided, said certificates shall be issued and delivered by Pacific States to Fidelity on October 2, 1931. (The actual date when Pacific States shall be required (if it shall be so required) to issue said certificates is hereinafter referred to as the "certificate delivery date".)

The amounts payable by Pacific States under the terms of said Fidelity Participating Certificates shall be payable five (5) years after the date hereof, unless such time shall be extended in the manner provided in Paragraph Thirteenth hereof, for an additional period not to exceed two (2) years. Pacific States may, however, at its option, upon thirty (30) days' written notice to any holder of said Fidelity Participating Certificate delivered or mailed to his address as shown on the books of Pacific States, redeem such certificates at any time by payment of the amount due thereon determined as hereinafter provided. Interest on said Fidelity Participating Certificates shall cease at the date of redemption fixed in such notice.

The principal amounts of said Definite Term Investment Certificates and the nominal face amounts of said Fidelity Participating Certificates shall (so far as practicable) be so fixed that for each investment certificate and membership share of Fidelity outstanding at the close of business at the date hereof there will be

(a) A corresponding Definite Term Investment Certificate having a principal amount equal to seventy-five per cent (75%) of the principal amount of such Fidelity Investment Certificate; and

(b) A corresponding Fidelity Participating Certificate having a nominal face amount equal to twenty-five per cent (25%) of the principal amount of such Fidelity Investment Certificate;

provided that all installment membership shares having the same interest payment dates may be treated as one membership share for the purpose of determining the principal amount of the corresponding Definite Term Investment Certificates and Fidelity Participating Certificates.

The first interest payment on each of said Definite Term Investment Certificates and Fidelity Participating Certificates shall be six (6) months after the last interest payment date of the corresponding Fidelity investment certificate or membership share preceding the "certificate delivery date," and Pacific States agrees that the first interest payment after the "certificate delivery date" on each of said Definite Term Investment Certificates and Fidelity Participating Certificates shall be a full six (6) months' interest payment, regardless of the fact that the first interest payment date on said Definite Term Investment Certificates and Fidelity Participating Certificates may be less than six (6) months after the "certificate delivery date"; it being the intention of the parties that interest shall commence to accrue on said Definite Term Investment Certificates and Fidelity Participating Certificates to be issued by Pacific States as of a date six months prior to the first interest payment date specified therein after the "certificate delivery date." Subject to the provisions of Paragraph Seventeenth hereof, Pacific States agrees to pay to Fidelity from time to time (on or prior to the date when said amounts are payable by Fidelity) amounts equal to any interest at rates not exceeding six per cent (6%) per annum which may become due between the date hereof and the "certificate delivery date," on the Fidelity investment certificates outstanding at the close of business on the date hereof, and Fidelity agrees to use the amounts so paid to it to pay the interest which shall become due on its said investment certificates prior to the "certificate delivery date." Subject to the provisions of said Paragraph Seventeenth, Pacific States further agrees to pay to Fidelity from time to time (on or prior to the date when said amounts are payable by Fidelity) amounts equal to any dividends at rates not exceeding six per cent (6%) per annum which may become due between the date hereof and the "certificate delivery date" on any membership shares of Fidelity outstanding at the close of business on the date hereof.

All of said certificates, both investment and participating, to be issued by Pacific States, shall be non-negotiable, and shall be in form satisfactory to the Building and Loan Commissioner of the State of California and to the Pacific States; provided, that all of said Definite Term Investment Certificates shall, at the option of Pacific States, contain any provision (not inconsistent herewith) desired by Pacific States and authorized by the Building and Loan Association Act enacted in 1931 and the Fidelity Participating Certificates shall contain such statements as Pacific States shall deem advisable indicating that the face amount thereof is payable subject to the deductions, limitations and conditions herein provided.

Notwithstanding anything to the contrary herein contained, the aggregate face amount of the Definite Term Investment Certificates and Fidelity Participating Certificates to be issued by Pacific States pursuant to this Paragraph Fourteenth shall be reduced by an amount equal to the principal amount of any investment certificates of Fidelity which Pacific States shall deliver to Fidelity for cancellation on the "certificate delivery date"; said reduction in aggregate face amount to be in ratio of seventy-five per cent (75%) in

Definite Term Investment Certificates and twenty-five per cent (25%) in Fidelity Participating Certificates.

Notwithstanding anything to the contrary herein contained, the maturity date on any Definite Term Investment Certificate to be delivered by Pacific States to Fidelity pursuant to the provisions of this paragraph, may, at the option of Pacific States, be less than five (5) years from the date hereof.

Fidelity agrees that, from time to time upon the delivery to it by Pacific States at any time after the "certificate delivery date," of an investment certificate of Fidelity, properly endorsed for withdrawal or for cancellation, together with all unmatured interest coupons (if any) appertaining thereto, Fidelity will surrender to Pacific States for cancellation, Definite Term Investment Certificates of Pacific States equal in principal amount to Seventy-five per cent (75%) and Fidelity Participating Certificates equal in nominal face amount to twenty-five per cent (25%) of the principal amount of the Fidelity Investment certificate so delivered to it for cancellation and having interest payment dates which fall on interest payment dates of the Fidelity investment certificate so delivered for cancellation, and the maturity date or dates on said Definite Term Investment Certificates so surrendered to Pacific States for cancellation shall be such as may be specified by Pacific States if Definite Term Investment Certificates of such maturities are then held by Fidelity.

All certificates of Fidelity which shall be delivered to it for cancellation or withdrawal, either on the "certificate delivery date" or thereafter, shall be cancelled at the time of the delivery thereof to Fidelity and shall be of no further force or effect.

At any time after the "certificate delivery date," upon surrender to Fidelity for cancellation of any Fidelity investment certificate by the holder thereof (duly indorsed, for cancellation or withdrawal), together with all unmatured interest coupons (if any) appertaining thereto, Fidelity shall (subject to the provisions of Paragraph Seventeenth hereof) assign and deliver to such holder Definite Term Investment Certificates of Pacific States having a principal amount equal to seventy-five per cent (75%) and Fidelity Participating Certificates having a nominal face amount equal to twenty-five per cent (25%) of the principal amount of the Fidelity investment certificate so surrendered by such holder for cancellation, and having interest payment dates which fall on interest payment dates of the certificate surrendered for cancellation; and the maturities of the Definite Term Investment Certificates to be so assigned and delivered by Fidelity shall be such as may be specified by Pacific States in case Definite Term Investment Certificates of such maturities shall be then held by Fidelity.

Any interest received by Fidelity after the certificate delivery date on the Definite Term Investment Certificates and Fidelity Participating Certificates held by it shall be used by Fidelity in payment of the interest on its own outstanding investment certificates which are now and shall at the time of the receipt of such interest be outstanding.

At the time that the amount, if any, which may become due as principal on the Fidelity Participating Certificates becomes payable (whether at the original maturity date, the postponed maturity date, or upon the redemption thereof),

(a) If the total credits to "net proceeds" shall be equal to or greater than the total debits to "net proceeds," the amount payable on the Fidelity Participating Certificates shall be equal to the nominal face amount thereof, or

(b) if the total debits to "net proceeds" shall exceed the total credits to "net proceeds," then the amount payable on the Fidelity Participating Certificates shall be the nominal face amount thereof, reduced by the difference between said total debits and total credits to "net proceeds," said reduction to be made pro rata on all of the Fidelity Participating Certificates then outstanding, it being understood that if the total debits to "net proceeds" shall exceed the total credits to "net proceeds" by an amount equal to or greater than the nominal face amount of all of the Fidelity Participating Certificates then outstanding, nothing shall be payable upon the Fidelity Participating Certificates.

If the amount payable on the Fidelity Participating Certificates at the maturity or redemption thereof shall, under the terms of this Paragraph Fourteenth, be less than the nominal face amount thereof, the amount payable on said Fidelity Participating Certificates shall, pursuant to the provisions of Paragraph Fifteenth hereof, be increased to the extent provided in said Paragraph Fifteenth.

Fidelity covenants and warrants that the aggregate principal amount of all of said "investment certificates" of "Fidelity" outstanding at the date hereof does not exceed Thirty Million, Six Hundred Sixty-seven Thousand One Hundred Seventy-two and 91/100 Dollars ($30,667,172.91), and that the aggregate principal amount of the membership shares of the Fidelity outstanding at the close of business at the date hereof does not exceed the sum of One Hundred Thirty-six Thousand Five Hundred Forty-two and 48/100 Dollars ($136,542.48), (making a total of Thirty Million, Eight Hundred Three Thousand Seven Hundred Fifteen and 39/100 Dollars ($30,803,715.39) principal amount of outstanding investment certificates and membership shares); and notwithstanding anything to the contrary herein contained, the aggregate principal amount of Definite Term

Investment Certificates, if any, which Pacific States shall be required to issue pursuant to Paragraphs Seventh and Fourteenth hereof shall not exceed seventy-five per cent (75%) of said last mentioned sum, and the aggregate nominal face amount of Fidelity Participating Certificates which Pacific States shall be required to issue pursuant to said Paragraphs Seventh and Fourteenth hereof shall not exceed twenty-five per cent (25%) of said last mentioned sum.

Notwithstanding anything to the contrary herein contained, Pacific States may, at the "certificate delivery date," issue to Fidelity one Definite Term Investment Certificate (hereinafter called the "temporary investment certificate"), having a principal amount equal to the aggregate principal amount of Definite Term Investment Certificates which it may be required to issue to Fidelity under the terms of this Paragraph Fourteenth, which temporary investment certificate shall, upon surrender thereof for cancellation by Fidelity, be exchanged by Pacific States for Definite Term Investment Certificates in a like aggregate principal amount, including a new temporary investment certificate and such Definite Term Investment Certificates of the denominations specified in this Paragraph Fourteenth as shall be required at the time by Fidelity to make the exchanges specified in this Paragraph Fourteenth with the holders of its own investment certificates; and thereafter, Fidelity may from time to time make similar exchanges of temporary investment certificates for additional temporary investment certificates and Definite Term Investment Certificates in like principal amount; and Pacific States will make such exchanges without charge or delay. And notwithstanding anything to the contrary herein contained, Pacific States may, at the "certificate delivery date," issue to Fidelity one Fidelity Participating Certificate (hereinafter called the "temporary participating certificate"), having a principal amount equal to the aggregate principal amount of Fidelity Participating Certificates which it may be required to issue to Fidelity under the terms of this Paragraph Fourteenth, which temporary participating certificate shall, upon surrender thereof for cancellation by Fidelity, be exchanged by Pacific States for Fidelity Participating Certificates in a like aggregate principal amount, including a new temporary participating certificate and such Fidelity Participating Certificates of the denominations specified in this Paragraph Fourteenth as shall be required at the time by Fidelity to make the exchanges specified in this Paragraph Fourteenth with the holders of its own investment certificates; and thereafter Fidelity may from time to time make similar exchanges of temporary participating certificates for additional temporary participating certificates and Fidelity Participating Certificates in like principal amount; and Pacific States will make such exchanges without charge or delay.

Fifteenth: As additional consideration for the transfer of said assets over and above the purchase price set forth in Paragraph Seventh, Pacific States agrees (subject to the provisions of Paragraph Seventeenth hereof) to pay the sum of One Million Dollars ($1,000,000.00) on the terms and conditions hereinafter set forth, payable at the following times, viz: One Hundred Thousand ($100,000.00) on October 2, 1931, and Sixteen Thousand Six Hundred Sixty-six and 67/100 Dollars ($16,666.67) on November 1, 1931, and a like amount of Sixteen Thousand Six Hundred Sixty-six and 67/100 Dollars ($16,666.67) on the first day of each month thereafter until the total of One Million Dollars ($1,000,000.00) shall have been paid. Said payment of One Hundred Thousand Dollars ($100,000.00) and monthly payments of Sixteen Thousand Six Hundred Sixty-six and 67/100 Dollars ($16,666.67) shall all be deposited by Pacific States in Wells Fargo Bank and Union Trust Co. of San Francisco (hereinafter called Wells Fargo Bank). Said deposits, together with such interest as may be credited thereon from time to time by Wells Fargo Bank, shall be held by said Bank as a trust, subject to the terms and conditions hereinafter set forth.

Prior to the maturity (original or postponed) of said Fidelity Participating Certificates an audit shall be made by a Certified Public Accountant (who shall be appointed by Pacific States, approved by Fidelity, and shall be satisfactory to the Building and Loan Commissioner of the State of California) to determine the amount (if any) payable by Pacific States on said Fidelity Participating Certificates under the provisions of Paragraph Fourteenth hereof. The result of said audit shall be certified in writing to said Building and Loan Commissioner and to the parties hereto. If said audit shall show that the amount payable by Pacific States on said Fidelity Participating Certificates under the provisions of Paragraph Fourteenth hereof is less than the nominal face amount thereof, said Wells Fargo Bank shall deliver to Pacific States such part of said trust deposit as shall be necessary to make up the difference between the amount payable by Pacific States on said Fidelity Participating Certificates under the provisions of Paragraph Fourteenth hereof, and the face amount of said Fidelity Participating Certificates, and the amount payable on said Fidelity Participating Certificates shall in such case be increased by the portion of said trust deposit delivered to Pacific States by said Bank as aforesaid; and the portion of said trust deposit so delivered to Pacific States shall be held by Pacific States as a trust fund for this purpose and paid by it to the holders of the Fidelity Participating Certificates pro rata at the maturity hereof; and the balance, if any, of said trust deposit shall be delivered by said Wells Fargo Bank to Fidelity. If said audit shall show that Pacific States is required to pay the full nominal

face amount of said Fidelity Participating Certificates under the provisions of Paragraph Fourteenth hereof, said bank shall deliver said entire trust deposit to Fidelity. Said Certified Public Accountant shall make and sign a certificate showing the portion (if any) of said trust deposit deliverable to Pacific States and the portion thereof (if any) deliverable to Fidelity, and shall deliver executed copies of said certificate to said Building and Loan Commissioner, said bank, and to each of the parties hereto. Upon the receipt by said bank of such certificate, together with evidence satisfactory to said bank that said accountant has been appointed by the Pacific States and approved by Fidelity and the Building and Loan Commissioner, said Wells Fargo Bank shall, without further authorization, pay out said trust deposit in accordance therewith.

Notwithstanding anything to the contrary herein contained, Pacific States and Fidelity may agree without any such audit as to the amount of said trust deposit payable to each, and said Wells Fargo Bank shall thereupon pay out said deposit, in accordance with directions in writing executed on behalf of each of said parties by their respective Presidents and Secretaries.

The parties hereto may at any time, by mutual agreement, change the bank in which said deposits shall be made, and any bank holding said deposits shall hold the same subject to all the terms and conditions of this agreement.

The bank holding such deposit shall at all times while it is holding the same pay thereon the highest rate of interest paid by it at the time being on savings accounts.

Notwithstanding anything to the contrary herein contained, if the "final payment date" is more than ninety (90) days prior to the maturity of said Fidelity Participating Certificates, the audits and certificates provided for in this Paragraph Fifteenth shall be made at the time of said "final payment date" and said Wells Fargo Bank shall pay out said trust deposit upon receipt of the certificate of said audit as hereinabove provided, and thereupon Pacific States shall, at the request of the Building and Loan Commissioner, redeem the Fidelity Participating Certificates by thirty (30) days' written notice to the holders thereof at their addresses as shown on the books of Pacific States and on the date of redemption fixed in said notice, Pacific States shall pay to said holders upon presentation of the Fidelity Participating Certificates held for cancellation, the amount payable thereon as determined by said audit plus accrued interest to the date of redemption, and interest shall cease on said Fidelity Participating Certificates at the date so fixed for redemption thereof.

The audits provided to be made by this Paragraph Fifteenth shall be conclusive and binding on the parties hereto and on the holders of Fidelity Participating Certificates as to the principal amount due thereon.

The bank holding said trust deposit may, prior to paying the same to the parties hereto, deduct therefrom his fees (if any) in connection with the trust provided for in this Paragraph Fifteenth.

It is further agreed that instructions, signed by both of the parties hereto, providing for the distribution of said trust deposit and embodying the terms of this Paragraph Fifteenth and Paragraph Seventeenth hereof and such other terms and provisions as may be appropriate or required by said Bank, shall be delivered to said Bank.

Sixteenth: In the event (a) that at the "final payment date" there shall be any unsold Real Property (as hereinafter defined) held by Pacific States and (b) that Fidelity shall notify Pacific States in writing that it desires to have Pacific States continue keeping accounts in connection with, and inspecting, and superintending the management and sale of said unsold Real Property through one of its affiliated real estate companies, then, in lieu of said Real property being conveyed to Fidelity by State Guaranty, as hereinabove provided, Pacific States shall cause one of its said affiliated real estate companies to continue, for such period as Fidelity may determine (not in excess, however, of two years), the keeping of accounts in connection with the inspecting and superintending, the management and sale of said Real Property. Such company shall receive the fees therefor provided in Paragraph Ninth hereof.

In the event of the exercise of this option by Fidelity, all expenditures in connection with the maintenance, repair and/or improvement of said Real Property must first be approved by a representative of Fidelity designated by it for the purpose of approving said expenditures.

Seventeenth: A. Notwithstanding anything to the contrary contained in this agreement, it is understood and agreed that in the event that

(i) On or prior to September 30, 1931, any order, judgment, or decree adjudging the Fidelity to be a bankrupt or insolvent, or setting aside or declaring invalid the conveyance and transfers, or any thereof, made hereby or hereunder, or depriving or purporting to deprive Pacific States of the benefits, or any thereof, of this agreement, or sequestrating any of the funds or property transferred by Fidelity to Pacific States hereby or hereunder or appointing a receiver or custodian for any such funds or property shall be rendered, and such order, judgment or decree shall not be finally set aside and vacated on or prior to September 30, 1931; or

(ii) On September 30, 1931, there shall be pending any suit, proceeding or litigation for the purpose of obtaining any such order, judgment or decree,

the Pacific States shall be entitled, at its option, by a notice in writing delivered or mailed

by it to Fidelity not later than October 1, 1931, to cancel this agreement as of the close of business on September 30, 1931.

(B) By mutual consent of all of the parties hereto, however, (to be expressed in a writing or writings signed by them) this agreement may, in either of the cases specified in the foregoing subdivisions (i) and (ii) of sub-paragraph (A) of this Paragraph Seventeenth, be continued in force for any period or periods after September 30, 1931, agreed upon from time to time by said parties; but in such case, until all orders, judgments and decrees (if any there be) referred to in said subdivision (i) shall have been set aside and vacated by final orders, judgments or decrees, and all suits, proceedings and litigation referred to in said subdivision (ii) have been finally dismissed, withdrawn, discontinued or determined by final judgment, and at least ten (10) days shall have elapsed after written notice (specifying titles of courts and causes) of the setting aside and vacating of such orders, judgments and decrees and of the dismissal, withdrawal, discontinuance and determination of said suits, proceedings and litigation shall have been given by Fidelity to Pacific States and to State Guaranty, the obligation of Pacific States to perform any of the following, to-wit:

(a) To deliver to Fidelity said Definite Term Investment Certificates and said Fidelity Participating Certificates as provided in Paragraph Fourteenth hereof; and

(b) To make any of the payments provided by Paragraph Fifteenth hereof;

shall be suspended and inoperative. (The period during which such obligations shall be so suspended and inoperative is hereinafter referred to as the "period of suspension".)

Any of the parties hereto may at any time during the "period of suspension" cancel this agreement by giving to each of the other parties hereto at least five (5) days' written notice of such cancellation; provided, however, that if Fidelity shall give such notice, and if prior to the expiration of the period of five (5) days after the receipt thereof by Pacific States, Pacific States shall notify Fidelity in writing that it does not desire this agreement cancelled and is willing to, and will, perform the obligations referred to in the foregoing subdivisions (a) and (b) of this sub-paragraph B, this agreement shall continue in full force and effect without the suspension of the obligations of Pacific States referred to in said subdivisions (a) and (b).

If this agreement shall not have been cancelled prior to the termination of said "period of suspension" pursuant to the foregoing provision of this subparagraph B, then upon the termination of said "period of suspension," the obligations of Pacific States in respect to said matters mentioned in said subdivisions (a) and (b) of this sub-paragraph B shall be revived and be again binding upon it.

(C) In the event that this agreement shall be cancelled pursuant to the provisions either of sub-paragraph (A) or sub-paragraph (B) of this Paragraph Seventeenth, neither the Pacific States nor the State Guaranty shall be obligated to issue or deliver the Definite Term Investment Certificates or Fidelity Participating Certificates, or any thereof, mentioned in sub-division (a) of this sub-paragraph (B) and/or in Paragraph Seventh and/or Fourteenth hereof, or to make any of the payments referred to in sub-division (b) of this sub-paragraph (B) and/or in Paragraphs Seventh and/or Fifteenth hereof, or to pay any further amounts to Fidelity representing interest and/or dividends on the outstanding investment certificates and/or membership shares of Fidelity, as provided in Paragraph Fourteenth hereof, or to pay any further amounts on any liabilities of Fidelity assumed by Pacific States under the terms of this agreement, or to pay any further amounts pursuant to sub-division (1) of Paragraph Ninth hereof, or to pay the amount provided to be paid by sub-division (c) of Paragraph Seventh hereof, nor shall Pacific States and State Guaranty, or either of them, be otherwise obligated in respect hereof, and this agreement shall be of no further force or effect, except that the Pacific States shall, in such case, forthwith reconvey and retransfer to Fidelity all of the engagements, funds and property transferred and conveyed by Fidelity to it hereby or hereunder, together with all net income and collections received by it prior to the date of such retransfer and reconveyance, and all other accessions thereto, less, however, all expenses, interest, and other charges paid or incurred in connection therewith, including all amounts debited to "net proceeds" pursuant to sub-divisions (f) to (j), both inclusive, and (l) to (t), both inclusive, of Paragraph Ninth hereof, and also including (but not in duplication of the amounts covered by any of the subdivisions last mentioned) a fair and proper amount for all book-keeping, management and overhead expenses of Pacific States incurred in the operation of said properties, and also, including all reasonable expenses of Pacific States for attorney's fees in connection with this agreement and such retransfer, and also including all amounts paid by Pacific States on any and all of the liabilities of Fidelity assumed by Pacific States (together with any interest thereon paid by Pacific States), and also including the amounts theretofore paid by Pacific States to Fidelity representing interest on the outstanding investment certificates and dividends on the outstanding membership shares of Fidelity, it being understood that such properties so to be reconveyed and retransferred to Fidelity shall be subject to any contracts of sale entered into by Pacific States prior to such reconveyance or retransfer and any other action taken by Pacific States in respect thereto pursuant to this agreement, prior to the can-

cellation thereof, and that in case of the sale or other disposition of any of said properties, the net consideration received by Pacific States therefor shall be assigned and transferred to Fidelity in lieu of the property so sold or disposed of.

It is further agreed that in the event of such cancellation Pacific States shall be entitled to reasonable compensation for its services theretofore rendered in connection with said property and to all of its expenses paid or incurred in connection with the management thereof, the amount of said compensation, if the parties shall be unable to agree thereon, to be determined by arbitration in the manner hereinafter provided.

Notwithstanding anything to the contrary herein contained, it is further agreed that in the event of any such cancellation Pacific States shall be entitled to be indemnified against any and all claims against it based upon or arising out of its assumption hereunder of any liabilities of Fidelity, and to that end Pacific States shall be entitled to a first lien and charge upon, and the right to retain possession of, sufficient of said assets to fully protect it against any and all such claims until such time as the same shall have been extinguished or determined by final judgment of a court of competent jurisdiction not to be binding upon Pacific States; and Pacific States, in the event of any such cancellation, shall also be entitled to a first lien and charge upon, and the right to retain possession of, sufficient of said assets to provide for the reimbursement and payment to it of all expenses, interest, compensation and other charges and deductions to which it shall be entitled as in this agreement provided, until all such expenses, interest, compensation, charges and deductions have been paid or extinguished. The Pacific States shall also be entitled to apply any cash which would otherwise be retransferable to Fidelity upon any such cancellation, to the payment of any such expenses, interest, compensation, charges and deductions.

(D) In the event that at any time before the "final payment date" any order, judgment or decree setting aside or declaring invalid the conveyance and transfers, or any thereof, made by or pursuant to this agreement, or depriving or purporting to deprive Pacific States of the benefits, or any thereof, of this agreement, or sequestrating any of the funds or property transferred by Fidelity to Pacific States hereby or hereunder, or appointing a receiver or custodian for any of such funds or property, shall be made or rendered, then and in either of said events Pacific States shall forthwith be entitled, if it shall elect so to do, to have returned to it by said Wells Fargo Bank all amounts theretofore paid by Pacific States to said Bank pursuant to the provisions of Paragraph Fifteenth hereof, together with all interest which shall have accrued thereon, and said Wells Fargo Bank shall, if requested so to do by Pacific States, forthwith return to Pacific States all of said amounts, together with the accrued interest thereon as aforesaid; provided, however, that if on said "final payment date" such order, judgment or decree shall not have become final, the time herein provided for the return to Pacific States by said Wells Fargo Bank of said amounts hereinabove referred to shall be postponed until such order, judgment or decree shall have become final.

Eighteenth: Neither of the parties hereto shall be liable for failure to perform any term or provisions of this agreement if such performance shall be prevented by Act of God, earthquake, riot, civil commotion, orders, judgments, decrees and processes of courts, and other causes beyond the reasonable control of such party; and in the event that any of said parties shall be prevented by any of the causes hereinabove mentioned from performing any term or provision of this agreement, the time for the performance thereof herein prescribed shall, at the option of such party, be extended for a period equal to the period during which such performance shall have been prevented by such cause.

Nineteenth: 1. Pacific States hereby further agrees:

(a) To furnish to Fidelity, at least quarterly, full, true and correct statements showing in detail, and in form satisfactory to Fidelity, the status of all assets transferred to Pacific States hereunder, together with such other statements and/or information as Fidelity may require in order to maintain its books of account, to determine the status of the liquidation of said assets, and generally to inform itself as to matters involving its rights under the terms of this agreement;

(b) To permit the representatives, agents and servants of Fidelity to have access, during business hours, to any and all of the books and records of Pacific States which pertain to the assets transferred hereunder, or which pertain to any matter involving the rights of Fidelity under the terms of this agreement, such access to be for the purpose of making audits, gathering information or verifying statements furnished to Fidelity as herein required.

2. State Guaranty hereby agrees to furnish to Fidelity, at least quarterly, full, true and correct statements of its assets and liabilities, and to permit any certified public accountant appointed by Fidelity and satisfactory to State Guaranty, to examine its books and records for the purpose of verifying any such statement or to determine whether any of the stock of Pacific States owned by it shall have been pledged.

3. The Fidelity shall be conclusively deemed to have assented to and approved any act done by Pacific States in connection with the matters herein referred to, or any thereof, unless it shall have objected thereto in writing

within ninety (90) days after receiving knowledge thereof.

4. Neither the Pacific States nor the State Guaranty shall be deemed to have warranted the title, execution, validity, collectibility or value of any property or rights or any note, mortgage or deed of trust assigned or transferred by them, or either of them, pursuant to the provisions of this agreement.

5. The within agreement and conveyance is intended by the parties hereto as a present sale and transfer of the above described properties by Fidelity to Pacific States, in consideration of the payment of the purchase price therefor hereinabove mentioned, and neither the Pacific States nor the State Guaranty assumes hereby any trust obligation to the Fidelity or its creditors or any obligations other than those herein expressly assumed. It is, moreover, specifically understood and agreed that neither Pacific States nor State Guaranty assumes hereby any obligation to distribute said purchase price or other funds to or for the benefit of creditors or stockholders of Fidelity or otherwise.

6. Each of the parties hereto, said Building and Loan Commissioner, and any bank holding the trust deposit mentioned in Paragraph Fifteenth hereof, shall be entitled to rely upon any written order, direction, certificate, appointment, designation or approval signed on behalf of any of the parties hereto by the President or any Vice-President, together with the Secretary or any Assistant Secretary of such party without the necessity of a resolution of directors approving such order, direction, certificate, appointment, designation or approval.

7. If in any case in which Pacific States is required or permitted to obtain the consent, approval or directions of any representative of Fidelity, and Fidelity shall fail or neglect to appoint such representative, or such representative (if appointed) shall not be available in San Francisco or Los Angeles for the purpose of giving such consent, approval or directions, or shall unreasonably delay, withhold, or fail to give any such consent, approval, or directions, the same may be given by the Building and Loan Commissioner of the State of California with the same force and effect as if given by such representative.

8. Whenever in this agreement the consent or approval of the Building and Loan Commissioner shall be required or permitted to be given, such consent or approval may be given by any person appointed or designated by said Commissioner, with the same force and effect as if given by said Commissioner personally.

9. It is understood and agreed that the inclusion of any item in said "Memorandum" as the liability of Fidelity shall not be deemed an admission by Pacific States or by Fidelity that such item is in fact a liability of Fidelity, nor shall the debit of such item, or any part thereof, by Pacific States to "net proceeds" be deemed an admission by Pacific States that such item is in fact a liability of Fidelity, and nothing herein contained shall prevent Pacific States and/or Fidelity from contesting or refusing to recognize any such item as a liability of Fidelity, if they, or either of them, shall deem that such item is not in fact a liability of Fidelity; but such contest shall not affect the right of Pacific States to debit the amount of any such liability to "net proceeds."

10. The approval by Fidelity or any representative of Fidelity of any act performed by Pacific States shall have the same force and effect if given after the performance of such act as if given before the performance of such act.

11. If, despite any provision herein contained to the effect that Pacific States shall not perform any act without the approval of Fidelity, or a representative of Fidelity, Pacific States shall perform any such act, such act shall nevertheless be valid, but the amount to be debited or credited to "net proceeds" as a result of the performance of such act shall, if the parties hereto shall be unable to agree thereon, be submitted to arbitration as provided in Paragraph Twenty-second.

Twentieth: It is agreed that the only expenses which Pacific States may charge to "net proceeds" are those which it is provided in this agreement may be so charged, and the Building and Loan Commissioner of the State of California shall have full power at all times until the "final payment date" to make such examinations and to issue and enforce such orders as he shall deem advisable, to the end that no other charges for overhead, keeping of accounts, clerical work, administration, management, or otherwise, shall be made. Said Commissioner shall also have power to disapprove any or all brokers' commissions and expenses for advertising which may be incurred, or proposed to be incurred, by Pacific States in connection with the sale of any of said Real Property, which are in excess of the customary rates and charges therefor or in excess of the rates and charges usually paid by Pacific States in connection with the sale and/or advertising of the sale of other real property belonging to it.

Said Commissioner shall also have power from time to time to make and enforce such reasonable orders as he shall deem necessary for the purpose of facilitating the prompt sale and disposal of said properties acquired by Pacific States from Fidelity.

Pacific States agrees that the prices at which it shall sell any parcel or parcels of Real Property shall be subject to the approval or disapproval of said Commissioner, as hereinafter in this Paragraph Twentieth provided. Such approval may be given either before or after the sale of such Real Property. In the event that Pacific States shall notify said Commissioner in writing of the price at which it proposes to sell any parcel of Real Property

and said Commissioner shall not disapprove such price within three (3) days after the receipt by him of such notice, such price shall be deemed to have received his approval, but approval by said Commissioner of the sales price of any Real Property may be given in any other manner. The Commissioner, if he shall deem it unnecessary that such approval be required to be given at any specified time, or during any specified period or periods, or in reference to any particular property or properties or class of properties, may waive for such period or periods as he deems advisable and/or as to any such property or properties, or class of properties, his right to approve or disapprove the prices at which the same may be sold.

Notwithstanding anything to the contrary in this Paragraph Twentieth contained, no such approval shall be required in the case of sale of any property at auction or in the case of the sale of any such property the fair cash value of which (as appraised by any licensed real estate broker in good standing) does not exceed the sum of Five Thousand Dollars ($5,000.00).

The Commissioner may from time to time designate one or more persons to exercise the powers hereby vested in him with respect to the approval of such prices, and in such case the prices approved by the person or persons so designated shall be deemed to have been approved by said Commissioner.

Inasmuch, however, as it is essential that the sale and disposition of all such Real Property be completed prior to the expiration of five (5) years from the date hereof in order that amounts payable upon said Fidelity Participating Certificates may be ascertained prior to their maturity date, it is understood and agreed that the restrictions in this Paragraph Twentieth contained relating to the approval of prices at which sales of said properties may be made and the amounts which may be expended or incurred for brokers' commissions and advertising shall not be applicable in the cases of sales made after July 1, 1935.

It is further agreed that nothing herein contained is intended to limit or have the effect of limiting any right of control over said assets hereby transferred and conveyed by Fidelity to Pacific States, which said Commissioner has or may have under any present or future law of the State of California over other properties of building and loan associations; nor shall anything contained herein preclude said Commissioner from assuming and taking charge of the affairs and business of Fidelity and possession and control of all of its property and assets (other than the property and assets hereby transferred and conveyed to Pacific States hereunder), if he shall hereafter deem such action necessary or advisable.

Said Commissioner may from time to time conduct examinations relative to the sale, disposal and management of the properties acquired by Pacific States from Fidelity, and the costs of all such examinations shall be paid by Pacific States and debited to "net proceeds."

Twenty-First: Any notice herein required or permitted to be given to Fidelity may be given to it by a writing addressed to it at No. 558 South Spring Street, Los Angeles, California, and delivered to said address or mailed, either in San Francisco or Los Angeles, to it, with the postage thereon fully prepaid. Any notice herein required or permitted to be given to Pacific States may be given to it by a writing addressed to it at No. 745 Market Street, San Francisco, California, and delivered to said address or mailed, either in San Francisco or Los Angeles, to it, with the postage thereon fully prepaid. Any notice herein required or permitted to be given to State Guaranty may be given to it by writing addressed to it at No. 745 Market Street, San Francisco, California, and delivered to said address or mailed, either in San Francisco or Los Angeles, to it, with the postage thereon fully prepaid. Any party hereto may, however, by written notice to the other parties, change its said address for the purpose of receiving such notice. Nothing contained in this Paragraph Twenty-first shall preclude any party hereto from giving notice to any other party hereto in any other manner permitted by law.

Twenty-Second: In the event that any question or controversy shall arise between the parties hereto relating to the interpretation of this agreement or relating to the rights and/or liabilities of any of the parties hereunder, whether such question or controversy shall arise before or after any termination of this agreement, such question or controversy shall, at the election of either of the parties hereto, be determined by arbitration in the manner following, to-wit:

> The party electing to submit such matter to arbitration shall serve written notice to that effect upon the other party and within ten (10) days thereafter each party shall select an arbitrator and give notice of such selection to the other party, and said two arbitrators shall, within ten (10) days after their appointment, select a third arbitrator; said board of three arbitrators shall render its decision upon the question or controversy submitted to them within thirty (30) days after the appointment of said third arbitrator, and the decision of any two of said three (3) arbitrators as to such question or controversy shall be final and binding upon the parties hereto. If, for any reason, said two (2) arbitrators first appointed shall fail to select a third arbitrator within ten (10) days' period, any party to this agreement may apply to the presiding judge of the Superior Court of the State of California in and for the County of Los Angeles for the appointment of said third arbitrator and the person appointed

by such judge shall act as the third arbitrator with the same powers as if selected by the first two arbitrators.

Each of the parties hereto shall in good faith perform all acts necessary to be performed by it in order that such question or controversy shall be determined as in this paragraph provided; and no suit or action to enforce any right under this agreement shall be brought or maintained by either of the parties hereto unless such party shall have fully performed all of the agreements in this paragraph agreed to be performed by it.

Nothing herein contained shall require any of the parties to submit to arbitration the price at which sales of Real Property or other assets will be made by Pacific States after the termination of the four-year period after the date hereof or to make up the quota of sales set forth in Paragraph Twelfth.

Twenty-Third: State Guaranty hereby agrees that it will, at all times until said "final payment date" retain the sole ownership of not less than ninety per cent (90%) of the Guarantee Capital Stock of Pacific States, and in addition thereto, that it will own and hold a sufficient number of shares of any other class or classes of stock which may hereafter be issued by Pacific States, so that at all times until said "final payment date" State Guaranty shall own and/or control the voting power of not less than sixty-six and two-thirds per cent (66⅔%) of the aggregate outstanding number of shares of all classes of stock of Pacific States.

If at any time State Guaranty shall fail to comply with the foregoing requirement, State Guaranty shall immediately deposit with a Bank or Trust Company satisfactory to Fidelity, an amount of aggregate market value in United States Government bonds or other securities satisfactory to Fidelity, equal to the total amount payable to Fidelity by State Guaranty under the terms of Paragraph Seventh, such amount to be determined by an appraisal which must be commenced immediately upon receipt by State Guaranty of a notice from Fidelity and must be completed within sixty (60) days after such notice. Such bonds or other securities shall be deposited with such Bank or Trust Company under written instructions, authorizing, empowering and directing such Bank or Trust Company to deliver to Fidelity at the "final payment date" an aggregate amount in market value, of such bonds and securities, equal to the amount which Fidelity will be entitled to receive under the terms of Paragraph Seventh above and to return the excess (if any) to State Guaranty; provided, however, that if, for any reason, Fidelity shall be entitled under the provisions of Paragraph Seventh hereof, to an amount in excess of the market value of said bonds so deposited, then State Guaranty Corporation shall pay such excess to Fidelity in lawful money of the United States at said "final payment date."

Notwithstanding anything to the contrary herein contained, if State Guaranty shall at any time own all of the outstanding Guarantee Capital Stock of Pacific States except Directors' qualifying shares, it may pledge an aggregate number of shares of said stock, the book value of which shall not, at the time of such pledge, exceed Two Million Two Hundred Fifty Thousand Dollars ($2,250,000.00), as security for a loan or loans not to exceed One Million Five Hundred Thousand ($1,500,000.00); provided, however, that, concurrently with the making of any such pledge, State Guaranty shall deposit all the remaining Guarantee Capital Stock of Pacific States owned by it with Wells Fargo Bank & Union Trust Co., as pledgeholder to secure the obligation of State Guaranty to Fidelity under the terms of this agreement. The book value of any such share of Guarantee Capital Stock at any specific time is defined, for the purpose of this agreement, as the sum of the then paid-in capital and paid-in surplus of Pacific States divided by the total number of shares of its Guarantee Capital Stock outstanding at the time. If, at any time thereafter, all of the shares of Pacific States pledged by State Guaranty to secure loans to it are released from pledge and are held by State Guaranty free of any such pledge, the shares to be deposited with Wells Fargo Bank & Union Trust Co., as security for the obligations to Fidelity shall likewise be released by it to State Guaranty, free and clear of any pledge thereof, to secure State Guaranty's obligations to Fidelity. If, at any time while any shares of Pacific States owned by State Guaranty shall be held by Wells Fargo Bank & Union Trust Co., pursuant to the terms hereof, as security for the obligations of said State Guaranty to Fidelity, State Guaranty shall default in the performance of its said obligations and such default shall continue for thirty (30) days after notice, mailed to State Guaranty and said Bank, or if at any such time any other shares of Pacific States pledged by State Guaranty to secure any indebtedness shall be sold pursuant to the agreement under which they may be pledged, said Wells Fargo Bank & Union Trust Co. shall forthwith, on demand by Fidelity and without further authorization from or notice to State Guaranty, sell the shares of Pacific States held by it as security for the obligations to Fidelity, at public or private sale, without demand, advertisement or notice, and at such price and upon such terms and conditions as it shall in its uncontrolled discretion determine, it being understood that Fidelity and/or Fidelity Investors, Inc., may become the purchaser of said stock at such sale, free and clear of any claims on the part of State Guaranty.

Twenty-Fourth: Certain words and terms used in this agreement are hereby defined as follows:

(a) The term "sale" as applied to sales made by Pacific States of any Real Prop-

erty as hereinafter defined or any other asset acquired from Fidelity shall not include a sale made to Pacific States Auxiliary Corporation or any affiliated company of Pacific States, and, despite any such sale to any such affiliated company, the Real Property covered thereby shall be deemed to be still owned by Pacific States.

Payments of principal or interest received by Pacific States from any sale to Pacific States Auxiliary Corporation or any affiliated company of Pacific States shall not be "valuation payments" and none of said payments shall be credited to "net proceeds." If any of said assets acquired from Fidelity are sold by Pacific States to Pacific States Auxiliary Corporation or any affiliated company of Pacific States, any sale thereof by said Pacific States Auxiliary Corporation or any such affiliated company to third persons who are not parties to this agreement shall be deemed to be a sale by Pacific States and the amounts of principal or interest paid by such third persons on the sales price to Pacific States Auxiliary Corporation or any such affiliated company shall be deemed, for the purposes of this agreement, to have been paid to Pacific States.

(b) The purchase at foreclosure sale by Pacific States or Pacific States Auxiliary Corporation or any affiliated company of Pacific States of any property covered by any mortgage or deed of trust which is security for any note transferred hereunder, or any property covered by any bond transferred hereunder, and the consequent application of the amount bid at any such sale or such note or bond, shall not be treated as a sale of, or the payment of such note or bond and such note or bond shall be deemed, for the purposes of this agreement, to be thereupon "valued" at nothing, but the property acquired at such foreclosure sale, and any judgment claim or right of action for any deficiency under and after foreclosure, shall be treated, for all purposes of this agreement, as if the same had been acquired by Pacific States from Fidelity by this conveyance and agreement.

(c) A sale by Pacific States or Pacific States Auxiliary Corporation, or any affiliated company of Pacific States, of any Real Property as hereinafter defined, under the terms of which a part of the consideration is evidenced by a note of the purchaser secured by mortgage or deed of trust on such Real Property shall, for the purpose of determining when and whether such Real Property shall be deemed to be "valued," be treated in the same manner as a sale of such Real Property under contract wherein title is retained by Pacific States or any affiliated company of Pacific States selling such Real Property.

(d) If prior to the time any Real Property or any other asset acquired from Fidelity shall be "valued," the Real Property or asset shall be transferred by Pacific States to a person, firm or corporation other than Pacific States Auxiliary Corporation or any affiliated company of Pacific States in exchange for other property (and not by way of sale), the asset so transferred shall thereupon be deemed to be "valued" at nothing but the property acquired upon such exchange shall be treated for all purposes of this agreement as if the same had been acquired by Pacific States from Fidelity pursuant to this agreement.

(e) The term "Real Property" shall be deemed to include all Real Property owned by Fidelity as of the date of this agreement and also any real estate acquired by Pacific States or any affiliated company of Pacific States prior to the "final payment date" by purchase at foreclosure sale under any mortgage, deed of trust, or bond transferred hereunder held prior to the time that such bond or the note secured by such mortgage or deed of trust shall be deemed to be "valued," and shall also include any Real Property acquired in exchange for other Real Property or assets transferred hereunder.

(f) The "book value" of any asset of Fidelity as of the date hereof shall be deemed to be the amount at which said asset was carried upon the books of Fidelity as shown by said "Memorandum," subject to any changes in said book value made in the normal course of business between March 31, 1931, and the date hereof; provided, that the book value of any Real Property under contract of sale to Fidelity Auxiliary, Ltd., as of March 31, 1931, shall be deemed to be the amount at which said contract of sale was carried on the books of Fidelity on March 31, 1931 (as shown by said "Memorandum"), subject to any changes in such amount made in the normal course of business between March 31, 1931, and the date hereof.

(ff) Any note received by Pacific States after the date hereof, representing funds advanced by Pacific States pursuant to a loan commitment of Fidelity assumed by Pacific States, shall be treated for the purposes of this agreement as an asset acquired by Pacific States from Fidelity.

(g) The term "book value" as applied to Real Property acquired after the date hereof by foreclosure shall be the unpaid balance of the note or bond foreclosed plus accrued interest thereon to the date of acquisition of such Real Property, plus costs and expenses of foreclosure, including attorneys' fees and court costs, and the "book value" of Real Property acquired by exchange shall be the "book value" of the assets exchanged for such Real Property plus, in the case of both acquisition by foreclosure and exchange, all advances made by Pacific States for the care.

maintenance and/or improvement of any of such Real Property and the payment of taxes, assessments and insurance thereon and all other expenses in connection therewith.

(h) The term "foreclosure" as used herein shall be deemed to include the foreclosure of a mortgage or the sale of property by the Trustee under the powers granted in a deed of trust given as security for the payment of a note, and also a sale for the purpose of realizing on the security for any bond, and also the cancellation of any agreement for the sale of Real Property; and in the case of a note secured by a trust deed the filing of a notice of default and election to sell shall be deemed the equivalent of commencing foreclosure proceedings.

(i) The term "Personal Property" shall be deemed to include all furniture, fixtures, equipment and other tangible personal property transferred by Fidelity hereunder to Pacific States, or acquired by Pacific States by foreclosure of any mortgage or deed of trust securing any note transferred to Pacific States hereunder.

(j) The term "investment certificates of Fidelity" shall include not only investment certificates issued by Fidelity but also investment certificates outstanding at the date hereof which were issued by other associations and heretofore assumed by Fidelity in connection with the consolidation or merger of any such other association with Fidelity or the transfer of the assets of any such other association to Fidelity.

IN WITNESS WHEREOF, the parties hereunto have executed this instrument the day and year first above written.

FIDELITY SAVINGS AND LOAN ASSOCIATION
By Geo. L. Eastman, President
By M. T. Williams, Secretary
(SEAL) Party of the First Part.

PACIFIC STATES SAVINGS AND LOAN COMPANY
By E. O. Allison, Vice-President
By John C. Campbell, Asst. Secy.
(SEAL) Party of the Second Part.

STATE GUARANTY CORPORATION
By G. W. Van Brunt, Vice-Pres.
(SEAL) Party of the Third Part.

The foregoing agreement and conveyance dated May 23, 1931, by and between Fidelity Savings and Loan Association, Pacific States Savings and Loan Company and State Guaranty Corporation, and the transfers from said Fidelity Savings and Loan Association to said Pacific States Savings and Loan Company made thereby or pursuant thereto, are hereby approved.

DATED: May 23, 1931. H. L. Carnahan
Building and Loan Commissioner
of the State of California

SUPPLEMENTAL AGREEMENT

Amending
Agreement dated May 23, 1931, for
Transfer of Assets from
FIDELITY SAVINGS AND LOAN ASSOCIATION
To
PACIFIC STATES SAVINGS AND LOAN COMPANY

THIS SUPPLEMENTAL AGREEMENT made as of the 1st day of January, 1936, by and between the BUILDING AND LOAN COMMISSIONER OF THE STATE OF CALIFORNIA (hereinafter called the "Commissioner"), as statutory liquidator of Fidelity Savings and Loan Association (hereinafter called "Fidelity"), a corporation organized under the laws of the State of California, which corporation formerly transacted a building and loan association business in said State but is now in possession of the Commissioner and in the process of liquidation, party of the first part, and PACIFIC STATES SAVINGS AND LOAN COMPANY, a building and loan association organized under the laws of the State of California, party of the second part (hereinafter called "Pacific States"),

WHEREAS, under date of May 23, 1931, Fidelity, as party of the first part, Pacific States, as party of the second part, and State Guaranty Corporation, a Delaware corporation, as party of the third part, entered into an agreement and conveyance (hereinafter for convenience referred to as the "Original Fidelity Agreement") whereby, among other things, Fidelity granted, sold, transferred, and conveyed to Pacific States, all the lands, promissory notes, mortgages, deeds of trust, contracts, leases, securities, bonds, stocks, choses in action, cash on hand and in banks, accounts receivable, furniture, fixtures, equipment, business, good will, and all other property and interests in property, both real and personal, owned by Fidelity at the date of said Original Fidelity Agreement, and Pacific States agreed to issue to Fidelity or its investors (a) definite-term investment certificates payable five (5) years after date of an aggregate principal amount equal to seventy-five (75) per cent of the total principal amount of investment-certificate and membership-share liability of Fidelity as of the date of the Original Fidelity Agreement, and (b) Fidelity participating certificates of the nature and character described in said Original Fidelity Agreement, having an aggregate nominal face amount equal to the remaining twenty-five (25) per cent of the total investment-certificate and membership-share liability of Fidelity; and

WHEREAS, said Original Fidelity Agreement provides, among other things, that: (a) the amount payable on said Fidelity participating certificates shall be determined, in the manner provided in said Agreement, by the amount at which the properties acquired by Pacific States from Fidelity are valued; (b) the method of valuation of real estate and certain other prop-

erties shall be by the sale thereof; (c) the maturity of said participating certificates is May 23, 1936; and (d) an auction sale shall be held prior to the maturity of said participating certificates at which all real estate and other unvalued property is to be sold; and

WHEREAS, after the date of said Original Fidelity Agreement, and on or about the 17th day of June, 1931, the Commissioner, pursuant to the power and authority conferred upon him by the Building and Loan Association Act of the State of California, took possession of the property, business, and assets of Fidelity, and ever since has retained and still retains such possession of Fidelity, and is now in process of liquidating Fidelity pursuant to the applicable statutory provisions of the State of California; and

WHEREAS, as of December 31, 1935, there were issued and outstanding, pursuant to the terms of the Original Fidelity Agreement, $15,672,865.87 aggregate principal amount of definite-term investment certificates and $87,970.50 aggregate principal amount of Pacific States pass-book certificates into which Fidelity definite-term investment certificates have been converted, and $7,554,635.50 aggregate nominal face amount of Fidelity participating certificates of which $860,875.61 principal amount of definite-term investment certificates, and $286,966.82 nominal face amount of Fidelity participating certificates were held by the Commissioner as statutory liquidator, and the remaining $14,811,990.26 principal amount of definite-term investment certificates, and $7,267,668.68 nominal face amount of Fidelity participating certificates and all of said $87,970.50 principal amount of pass-book certificates were held by various persons, firms, and corporations who (or the predecessors of whom) were formerly Fidelity investors and exchanged their Fidelity investment certificates and membership shares for, and converted the same into, such definite-term investment certificates (or said pass-book certificates) and Fidelity participating certificates; and

WHEREAS, by reason of the long continuing and still existing economic depression, a majority in principal amount of the loans which were transferred by Fidelity to Pacific States under the terms of the Original Fidelity Agreement have gone into default and it has been necessary to foreclose the same and convert them into real estate; and

WHEREAS, an appraisal of the unvalued properties acquired by Pacific States from Fidelity clearly indicates that if such unvalued properties were sold at present market prices there would be nothing payable on the participating certificates at the present maturity thereof (other than the so-called million-dollar guarantee fund provided for in paragraph Fifteenth of said Original Fidelity Agreement); and

WHEREAS, the great majority of said remaining Fidelity properties consist of foreclosed real estate, street improvement and assessment bonds, and other properties which it would be impossible to sell under present market conditions without undue sacrifice; and

WHEREAS, it is believed that the holding, prior to May 23, 1936, of an auction sale of such unvalued properties (which total many millions of dollars) would result in injury to all parties concerned and to the general real estate market and the general public as well; and

WHEREAS, in view of the prospects of a generally improved real estate market, the possibility of inflation, and the prospect of discovery of oil on some of said Fidelity properties, it is deemed advisable to extend the period of valuation and the maturity of said participating certificates for a period of two years, in the expectation and hope that the holders of said participating certificates may be entitled at that time to some recovery thereon; and

WHEREAS, any extension of the maturity of said participating certificates which provided for the payment of interest thereon would be inequitable and unjustified in view of the value of the Fidelity properties; and

WHEREAS, Pacific States is willing to agree to adjust its fees and charges under the Original Fidelity Agreement and to agree to such extension on the terms and conditions hereinafter set forth;

NOW THEREFORE, in consideration of the premises, it is mutually agreed by and between the parties hereto as follows:

1. The maturity of all outstanding Fidelity definite-term investment certificates and Fidelity participating certificates is hereby extended to May 23, 1938, and the "final payment date" specified in the Original Fidelity Agreement is hereby fixed at May 23, 1938; provided, however, that the holder of any outstanding Fidelity definite-term investment certificate may, at his option, at any time hereafter before the final payment date (as hereby extended), exchange his Fidelity definite-term investment certificate for, and convert the same into, a regular full-paid or pass-book investment certificate of Pacific States, of equal value and similar in all other terms to other investment certificates then being issued by Pacific States.

2. The Fidelity definite-term investment certificates shall bear interest until paid at the rate of four (4) per cent per annum (the reduction of said rate on interest payments heretofore or hereafter made being hereby agreed to). The reduction to said rate of 4% per annum on interest payments heretofore made on said Fidelity participating certificates is hereby agreed to, and each of said outstanding participating certificates shall continue to bear interest at said rate of 4% per annum until such time as there shall have been paid thereon the pro rata share of said million-dollar guarantee fund payable on such participating certificate, after which time all interest on said participating certificates shall cease; provided, however, that in no event shall any such Fidelity participating certificate bear any interest from and after May 23,

1936. Notwithstanding anything to the contrary herein contained, no payment or distribution of any kind shall be made to Fidelity under the terms and provisions of subparagraph (c) of Paragraph Seventh of said Original Fidelity Agreement, unless and until there shall have first been paid to the holders of all outstanding participating certificates, interest at the rate of four (4) per cent per annum on the nominal face value of their participating certificates remaining unpaid, from the date on which said participating certificates cease to bear interest as hereinbefore provided, until the date of payment of the remainder of the nominal face value of said participating certificates, or May 23, 1938, whichever date is earlier.

3. Between May 23, 1936, and May 23, 1938, any asset not "valued" under the Original Fidelity Agreement may be "valued" at any amount agreed upon between Pacific States and the representative originally appointed by Fidelity under the Original Fidelity Agreement; provided, however, that, within ten days after such "valuation" shall have been so agreed upon, Pacific States and the representative of Fidelity shall give notice thereof in writing to the Commissioner and the Commissioner shall have the power to disprove any such "valuation"; provided, further, that if the Commissioner shall not disapprove such "valuation" agreement within fifteen days after the receipt by him of such notice, such "valuation" shall be deemed to have received his approval. If, at any time during said period, there be no Fidelity representative then appointed and capable of acting, any asset not theretofore "valued" under the Original Fidelity Agreement or under the terms of this supplemental agreement, may be "valued" at any amount agreed upon between Pacific States and the Commissioner.

4. Pacific States agrees, within ten (10) days after the date this supplemental agreement becomes effective, to anticipate and prepay the remaining installments required to be paid into the million-dollar guarantee fund provided for in paragraph Fifteenth of the Original Fidelity Agreement; and all such amounts shall be debited to "net proceeds" when paid by Pacific States. Said million-dollar fund (together with the interest credited thereto) shall be paid pro rata to the respective holders of all outstanding Fidelity participating certificates as a payment on the nominal face amount of their respective participating certificates, each such holder to be paid his pro rata share of said fund forthwith (and without awaiting the final payment date) upon execution by him of a consent to this agreement and presentation of his participating certificate for endorsement of such payment thereon. Such payment shall be evidenced on each such participating certificate by stamping on the face thereof a legend as follows:

"See endorsement on the reverse of this certificate"

and by stamping on the reverse of each such participating certificate an endorsement as follows:

"The nominal face amount of the within participating certificate has been reduced by the amount of $....., by the payment in cash of such amount to the holder of the within participating certificate on the date of this endorsement (being the pro rata share of the million-dollar guarantee fund provided for in paragraph Fifteenth of the within-mentioned Agreement payable in respect of such participating certificate), and in consideration of such payment such holder of this participating certificate has agreed and hereby agrees (for himself, his successors and assigns): that all interest on said participating certificate has been paid in full to the date of this endorsement; that said participating certificate shall cease to bear interest from and after the date of this endorsement, or from and after May 23, 1936, whichever date shall be earlier; and that the maturity of said participating certificate has been extended to May 23, 1938.

Dated:"

5. If any asset acquired from Fidelity and not heretofore "valued" is hereafter exchanged for one or more Fidelity definite-term investment certificates, or for Pacific States investment certificates into which Fidelity definite-term investment certificates have been converted, such asset shall be "valued" at the principal amount of the investment certificates for which it has been exchanged.

6. Said Original Fidelity Agreement shall be amended as of January 1, 1936, as follows, to wit:

(a) Subdivision (f) of paragraph Eighth is hereby amended to read as follows:

"(f) All interest, rentals, dividends and other income actually received in cash by Pacific States from any asset acquired from Fidelity up to and including the date on which said asset shall be 'valued'; said credits to be made as and when the said interest, rentals, dividends and other income shall be received by Pacific States; provided, however, that in respect of assets not 'valued' prior to December 31, 1935, the interest, rentals, dividends and other income received therefrom which shall have accrued after December 31, 1935, or shall be applicable to the period after December 31, 1935, shall not be credited to 'net proceeds'."

(b) Subdivision (h) of paragraph Eighth is stricken from said agreement.

(c) Subdivision (f) of paragraph Ninth is amended to read as follows:

"(f) All amounts paid by Pacific States representing assessments on and/or improvements to Real Property normally chargeable to capital in accordance with Pacific States' usual practice, and all other

expenditures in connection with any asset acquired from Fidelity which, in accordance with Pacific States' usual practice, would be chargeable to capital."

(d) Subdivision (g) of paragraph Ninth is stricken from said Agreement.

(e) Subdivision (h) of paragraph Ninth is amended to read as follows:

"(h) All expenses of sale of any real property or other assets acquired from Fidelity, including advertising and brokerage commissions, said debits to be made as and when the expenses are paid or incurred."

(f) Subdivision (i) of paragraph Ninth is amended by adding thereto the following: "provided, however, that there shall not be charged as a debit to 'net proceeds' attorneys' fees which would normally be considered as operating expenses in accordance with Pacific States' usual practice, and which are paid in respect of normal and usual operating problems."

(g) Subdivision (j) of paragraph Ninth is amended to read as follows:

"(j) Expenses of securing title and tax reports and policies in respect of any Real Property."

(h) Subdivisions (k) and (p) of paragraph Ninth are stricken from said Agreement.

(i) A new subdivision (u) is added to paragraph Ninth reading as follows:

"(u) An amount equal to all enforceable claims (not paid prior to July 1, 1936) for interest accrued up to December 31, 1935 on said Fidelity definite-term investment certificates and/or Fidelity participating certificates. Said debit shall be made immediately prior to the final payment date as extended."

The foregoing changes in said Fidelity Agreement shall not affect debits or credits made under the amended or stricken paragraphs prior to January 1, 1936, and the foregoing substituted and new paragraphs shall be effective from and after January 1, 1936, as a part of said Original Fidelity Agreement.

Notwithstanding anything to the contrary herein contained, all losses, taxes, expenses and other amounts accrued up to December 31, 1935, or applicable to the period prior to December 31, 1935, chargeable to net proceeds under the terms of the Original Fidelity Agreement shall, despite the terms of this supplemental agreement, be charged to net proceeds even though paid after December 31, 1935.

7. The remaining book value of the "unvalued" assets acquired from Fidelity as of January 1, 1936, after deducting therefrom all "valuation payments" made thereon, is hereby fixed at $18,396,862.96. The book value of the "unvalued" assets acquired from Fidelity shall, on any particular date, be the result obtained by adding to the said book value on January 1, 1936, all debits to "net proceeds" which would normally be considered as capital expenditures in accordance with Pacific States' usual practice, and subtracting therefrom all credits to "net proceeds" pursuant to subdivisions (b), (d), (e) and (g) of paragraph Eighth of said Original Fidelity Agreement, and the amount at which any asset is "valued" pursuant to paragraphs 3 or 5 of this supplemental agreement. The average book value of "unvalued" assets acquired from Fidelity for the period from January 1, 1936, to May 23, 1938, shall be computed by taking the book value determined as above set forth of said assets on the first day of each month from and including January 1, 1936, to May 1, 1938, and averaging said book values.

If, immediately prior to the final payment date (as extended), the total credits to "net proceeds" equal or exceed the total debits to "net proceeds," or if the total debits to "net proceeds" do not exceed the total credits to "net proceeds" by the then aggregate nominal face amount of all then outstanding Fidelity participating certificates, Pacific States shall make the following two computations: (a) it shall determine the average book value over the period from January 1, 1936, to May 23, 1938, of the "unvalued" assets acquired from Fidelity in the manner above set forth in this paragraph, and shall determine the amount which would have been obtained if net income of 7.2% per annum on said average book value had been received for the entire period from January 1, 1936, to May 23, 1938; (b) it shall determine the total actual net income (as said term "net income" is hereinafter defined), received between said dates on "unvalued" assets acquired from Fidelity, and if the result obtained by computation (a) exceeds the result obtained by computation (b), Pacific States is authorized to debit an amount equal to such excess to "net proceeds" as of a time immediately prior to the final payment date as extended; but if the result obtained by computation (b) exceeds the result obtained by computation (a), Pacific States shall credit an amount equal to such excess to "net proceeds" as of a time immediately prior to the final payment date as extended. As used in this paragraph, "gross income" includes all income of every kind or nature from said assets, excluding, however, profits on sales or exchanges and certificate and other capital transactions, but including (without limiting the generality of the foregoing) interest, rentals, royalties, dividends and insurance commissions (said commissions, however, being limited to commissions on insurance which Pacific States may cause to be written on any Real or Personal Property as defined in the Original Fidelity Agreement, or any property which is security for any note receivable transferred under the Original Fidelity Agreement prior to the time such Real or Personal Property, or such note, shall be "valued"). As used in this paragraph, "net income" means gross income less all operating expenses of every kind and nature in connection with assets acquired from

Fidelity, including the expense items which would have been debited to "net proceeds" were it not for this supplemental agreement, but excluding (a) losses on sales or exchanges and certificate and other capital transactions; (b) interest on Fidelity definite-term investment certificates and Fidelity participating certificates, and on Pacific States certificates, into which any Fidelity definite-term investment certificates may be converted; (c) amounts debited to "net proceeds"; (d) taxes based on or measured by income; (e) overhead expenses of Pacific States; and (f) depreciation and depletion.

For the purpose of determining gross and net income under this paragraph, dividends on the stock of Cortaro Farms Company and Marana Irrigation Company, as well as interest on the notes of said companies, shall be excluded, and the income and expenses of said companies shall be treated as though their properties were directly owned by Pacific States as an asset acquired from Fidelity.

8. Except as hereinafter provided, all charges of Pacific States made up to the date hereof under the provisions of the Original Fidelity Agreement, and all debits to "net proceeds" made to January 1, 1936, are hereby ratified, confirmed and approved; and it is hereby agreed that up to January 1, 1936, Pacific States has made all the credits to "net proceeds" required to be made under said Original Fidelity Agreement; provided, however, that the following matter shall be left open for future determination and settlement without prejudice either to Pacific States or to Fidelity, viz.: by reason of the reduction of interest rates paid on Fidelity definite-term investment certificates and Fidelity participating certificates from 6% to 4% since March 10, 1933, as provided by the so-called Emergency Building and Loan Association Act (and amendments thereto), Fidelity claims that it is entitled to a greater reduction than that already credited by Pacific States to the debits provided to be made to "net proceeds" by subparagraph (k) of paragraph Ninth of said Original Fidelity Agreement; while on the other hand Pacific States claims that there should be no such reduction in said debits and that the credits heretofore made in that respect should be reversed.

9. In all respects, except as herein expressly or necessarily modified, said Original Fidelity Agreement shall remain in full force and effect and is hereby ratified and confirmed.

10. This agreement shall not become effective unless and until it shall have been (a) approved by the Superior Court of the State of California, in and for the County of Los Angeles, and (b) approved in writing by the holders of seventy-five (75) per cent of the aggregate nominal face amount of all outstanding Fidelity participating certificates, and by the holders of 75% of the aggregate face amount of all outstanding Fidelity definite-term investment certificates, on or before March 20th, 1936 (or within such later extended time as may be stipulated by Pacific States by written notice to the Commissioner); provided, however, that by written notice to the Commissioner Pacific States may cause this agreement to become effective at any time without approval of the holders of said certificates. Regardless of the actual date on which this agreement becomes effective, as aforesaid, it shall for all purposes hereof take effect as of January 1, 1936.

IN WITNESS WHEREOF, the parties hereto have executed this agreement as of the day and year first above written.

Louis C. Drapeau
Building and Loan Commissioner of the State of California
Party of the first part.

[Seal] PACIFIC STATES SAVINGS AND LOAN COMPANY,
By Robert S. Odell
President
By H. K. Ouimet
Asst. Secretary

Party of the second part.

State Guaranty Corporation, a party to said Original Fidelity Agreement, hereby ratifies and approves the foregoing supplemental agreement.

[Seal] STATE GUARANTY CORPORATION,
By A. E. Falch
President
By Burt Winslow
Secretary

58 Cal.App.2d 528

METROPOLITAN LIFE INS. CO. v. SAN FRANCISCO BANK et al.

Civ. 12260.

District Court of Appeal, First District, Division 2, California.

May 6, 1943.

Hearing Denied July 1, 1943.

1. Bills and notes ⇐296

Endorsement of collecting bank guaranteeing all prior endorsements on check was addressed to drawee bank and subsequent holders in due course rather than to drawer, so that no contractual obligation between collecting bank and drawer could be predicated thereon. Civ.Code, § 3090, subd. (3); Pen.Code, § 470.

2. Banks and banking ⇐174

Drawer of check, made payable to fictitious and nonexisting person and cashed on forged endorsement, could not recover amount thereof from collecting bank which had cashed check and endorsed the same guaranteeing all prior endorsements and collected amount thereof from drawee bank. Civ.Code, § 3090, subd. (3); Pen.Code, § 470.

3. Banks and banking ⇐174

Where check is made payable to fictitious and nonexisting person, no contractual obligation arises in favor of drawer on guarantee of collecting bank of validity of forged endorsement of the signature of fictitious payee. Civ.Code, § 3090, subd. (3); Pen.Code, § 470.

4. Banks and banking ⇐174

Where checks were made payable to fictitious and nonexistent person, the checks were not "negotiable instruments" and could not become of value to any one and therefore could not be made basis of drawer's action for conversion against collecting bank which cashed checks on forged endorsements. Civ.Code, § 3090, subd. (3); Pen.Code, § 470.

See Words and Phrases, Permanent Edition, for all other definitions of "Negotiable Instrument".

5. Trover and conversion ⇐2

An action for conversion cannot be maintained unless it appears that the personal property involved was of some value.

6. Banks and banking ⇐129

Where "debtor and creditor relationship" existed between bank and depositor, title to money deposited in bank passed immediately to the bank.

See Words and Phrases, Permanent Edition, for all other definitions of "Debtor and Creditor Relationship".

7. Banks and banking ⇐174

Where check made payable to fictitious and nonexisting person was cashed on forged endorsement and collecting bank which had cashed check collected amount thereof from drawee bank, drawer could not, on theory that there had been a "conversion" of drawer's money, recover amount of check from collecting bank. Civ.Code, § 3090, subd. (3); Pen.Code, § 470.

See Words and Phrases, Permanent Edition, for all other definitions of "Conversion".

8. Banks and banking ⇐175(2)

Where check made payable to fictitious and nonexisting person was cashed on forged endorsement and collecting bank, which had cashed check, endorsed check guaranteeing prior endorsements and collected amount thereof from drawee bank, in action by drawer to recover amount of checks from collecting bank, amended complaint failed to state a cause of action. Civ.Code, § 3090, subd. (3); Pen.Code, § 470.

Appeal from Superior Court, San Francisco County; George W. Schonfeld, Judge.

Action by the Metropolitan Life Insurance Company against the San Francisco Bank and the Bank of California. From a judgment of dismissal in favor of the San Francisco Bank, the plaintiff appeals.

Affirmed.

Knight, Boland & Riordan and F. Eldred Boland, all of San Francisco, for appellant.

Thomas E. Davis, of San Francisco, for respondents.

SPENCE, Justice.

Plaintiff brought two actions seeking to recover from certain banks the sums debited to plaintiff's bank account in the Bank of California upon a series of checks of the plaintiff. The two actions involved sixty-seven checks signed by plaintiff over a period commencing on July 9, 1937 and ending on March 21, 1941, which checks

were made payable to fictitious persons. The amended complaint in the action out of which this appeal arose contained thirty-one counts which were based respectively upon thirty-one of said checks bearing dates from October 26, 1939 to March 21, 1941. The prayer was for the total sum of $3,019.94. The defendants in said action were the Bank of California and the San Francisco Bank. Said defendants interposed demurrers upon the ground that the amended complaint failed to state a cause of action and upon the further ground that the alleged causes of action set forth in the first fifteen counts were barred by subd. 3 of sec. 340 of the Code of Civil Procedure. The demurrer of the Bank of California was sustained as to the first fifteen counts without leave to amend and was overruled as to the remaining counts. The demurrer of the San Francisco Bank was sustained as to all counts without leave to amend. Judgment of dismissal was entered accordingly and plaintiff appeals from the judgment in favor of the San Francisco Bank.

In the amended complaint plaintiff alleged that it had been induced through the fraud, trick and device of its employee William H. Miguel, who had no authority himself to issue checks on plaintiff's bank account, to draw and issue checks upon its bank account in the Bank of California at various times and in various amounts payable to various "fictitious persons not known to plaintiff to be fictitious persons and having no interest whatsoever in or to any part of the proceeds of said checks"; that Miguel, by trick and device, secured possession of said checks and endorsed each of said checks by placing upon the reverse side the name of the fictitious payee; that Miguel presented said checks, so endorsed, to the San Francisco Bank, which paid to Miguel on each of said checks the amount stated on the face thereof; that the San Francisco Bank endorsed each of said checks "Pay to the order of any Bank, Banker or Trust Co. All prior endorsements guaranteed (date) The San Francisco Bank, San Francisco"; and that the San Francisco Bank presented each of said checks to the Bank of California, which paid each check and in turn debited the amount thereof to the bank account of plaintiff.

It is apparently conceded that the allegations of plaintiff's amended complaint were sufficient to show that the checks were not payable to bearer under subd. 3 of sec. 3090 of the Civil Code and that the checks were not payable to any existing persons under the so-called impostor rule as enunciated in Schweitzer v. Bank of America Nat. Trust & Savings Ass'n, 42 Cal.App.2d 536, 109 P.2d 441, and the cases cited therein. It is apparently further conceded that the alleged acts of Miguel in endorsing the names of the fictitious payees constituted forgery (Penal Code, sec. 470) and that this action, in so far as it concerned the Bank of California, was an action by plaintiff, as a depositor, against said bank for the payment of checks that bore forged endorsements within the meaning of subd. 3 of sec. 340 of the Code of Civil Procedure limiting the time for the bringing of such action to one year. The trial court no doubt sustained the demurrer of the Bank of California to the first fifteen counts upon the ground that said counts were barred by the last-mentioned section. No appeal was taken by plaintiff from the judgment of dismissal in favor of the Bank of California with respect to said fifteen counts. This appeal was taken solely from the judgment of dismissal in favor of the San Francisco Bank, which judgment was entered after its demurrer was sustained as to all counts.

Plaintiff contends that the trial court erred in sustaining the demurrer of the San Francisco Bank and entering the judgment of dismissal in its favor. Plaintiff has been unable, however, to cite any authority to sustain the position that the drawer of a check, made payable to a fictitious and nonexisting person and cashed upon a forged endorsement, may recover the amount thereof from a collecting bank which has cashed such check, endorsed the same in the manner alleged and collected the amount thereof from the drawee bank. Practically all of the authorities cited by the parties involved forged endorsements of checks made payable to existing rather than fictitious or nonexisting payees. Such authorities are not in point and they furnish but little assistance here, more particularly as they are in hopeless conflict.

Plaintiff relies strongly upon Mills v. Barney, 22 Cal. 240, and Walsh v. American Trust Co., 7 Cal.App.2d 654, 47 P.2d 323, but these cases are clearly distinguishable. Each involved an instrument payable to an existing payee. Furthermore, in the Mills case, the instrument was a certificate of deposit and plaintiffs were the

drawees as well as the drawers of the instrument; while in the Walsh case, the instrument was a check and the plaintiff was the trustee in bankruptcy for the payee.

A reading of plaintiff's briefs indicates that plaintiff itself is somewhat uncertain as to the theory upon which it believes that plaintiff, as the drawer of the check, should be entitled to recover against the collecting bank. Plaintiff suggests a contractual theory and also a conversion theory.

[1] The suggested contractual theory is based upon the allegations that the San Francisco Bank endorsed said checks "Pay to the order of any Bank, Banker or Trust Co. All prior endorsements guaranteed (date) The San Francisco Bank, San Francisco". But this endorsement and guarantee was obviously addressed to the drawee bank and subsequent holders in due course (see Bank of America Nat. Trust & Savings Ass'n v. Security-First Nat. Bank, 32 Cal.App.2d 647, 90 P.2d 335) rather than to the drawer and we are of the opinion that no contractual obligation between the San Francisco Bank, as endorser, and plaintiff, as drawer, may be predicated thereon under the circumstances before us.

[2] It may be assumed for the purposes of this discussion that plaintiff, as drawer, was entitled to recover against the Bank of California, as drawee, upon the general contractual obligation of the latter to plaintiff as its depositor, provided an action was brought within the one year period prescribed in subd. 3 of sec. 340 of the Code of Civil Procedure. Los Angeles Inv. Co. v. Home Savings Bank, 180 Cal. 601, 182 P. 293, 5 A.L.R. 1193. It may be also assumed that in the event that plaintiff, as drawer, had recovered against the Bank of California, as drawee, the latter would have been entitled to recover against the San Francisco Bank, as the collecting bank, upon the written guarantee of the prior endorsement, provided the action was brought within the four year period prescribed by subd. 1 of sec. 337 of the Code of Civil Procedure. Bank of America Nat. Trust & Savings Ass'n v. Security-First Nat. Bank, 32 Cal.App.2d 647, 90 P.2d 335. We find no authority in this state, however, for permitting the plaintiff, as drawer, to recover directly against the San Francisco Bank, as the collecting bank upon any theory, contractual or otherwise. While not actually decided therein, it was apparently assumed by all concerned in Union Tool Co. v. Farmers', etc., National Bank, 192 Cal. 40, 218 P. 424, 28 A.L.R. 1417, that no such recovery could be had even upon a check made payable to an existing payee, for in that case, with all parties before the court the plaintiff, as drawer, was given judgment against the drawee bank but not against the collecting bank and, in turn, the drawee bank was given judgment against the collecting bank. And there is respectable authority in other jurisdictions indicating that the drawer may not recover directly from the collecting bank under such circumstances. Land-Title & Trust Co. v. Northwestern Nat. Bank, 196 Pa. 230, 46 A. 420, 50 L.R.A. 75, 79 Am.St.Rep. 717; General Fire Assur. Co. v. State Bank, 177 App.Div. 745, 164 N.Y.S. 871; Fidelity & Guaranty Fire Corporation v. Marine Midland Trust Co., 162 Misc. 12, 293 N.Y.S. 519. In the Land-Title case [196 Pa. 230, 46 A. 422], it was said, "Between the bank and the trust company, as the drawer of the check, no relation, contractual or otherwise, existed. The drawer of a check cannot maintain an action against one who collects it on a forged endorsement from the bank on which it was drawn, although the bank paying the check may. The remedy of the drawer is against the bank which pays his check, and the bank's remedy is against the person to whom it paid. The liability of the party collecting the check arises from his implied warranty of the endorsement. This liability is founded on contract, and not on negligence, and it exists, if at all, whether there was negligence or not."

[3] But we are not called upon here to determine the rights and remedies of the parties in a case where a check is made payable to an existing payee. Suffice it to state that we are of the opinion that where, as here, a check is made payable to a fictitious and nonexisting person, no contractual obligation arises in favor of the drawer upon the guarantee of the collecting bank of the validity of the forged endorsement of the signature of the fictitious payee for the reason that the very act of the drawer, in signing a check made payable to a fictitious payee under the circumstances alleged, makes impossible any valid endorsement of such check.

[4-7] Plaintiff further suggests the theory of conversion and states that the San Francisco Bank "converted the checks to its use * * * and now has converted plaintiff's money to its own use." Plain-

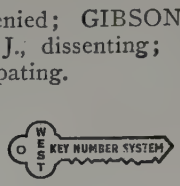
tiff cites general definitions and general statements to the effect that checks may be the subject of conversion (65 C.J. 18) and relies upon Swim v. Wilson, 90 Cal. 126, 27 P. 33, 13 L.R.A. 605, 25 Am.St.Rep. 110, which involved the theft of certificates of stock properly indorsed by the owner. We are of the opinion that plaintiff's amended complaint was insufficient to show either a conversion of the checks or a conversion of plaintiff's money. As to the suggested conversion of the checks, it is a sufficient answer to point out that the allegations of the amended complaint were insufficient to show that the checks, as such, had any value whatever. On the contrary, the allegations showed that said checks were not payable to any one and that they were not negotiable instruments. They therefore were not and could not become of any value to any one. It is settled that an action for conversion cannot be maintained unless it appears that the personal property involved was of some value. Bentley v. Mountain, 51 Cal.App. 2d 95, 124 P.2d 91; 65 C.J. 28. As to the suggested conversion of "plaintiff's money", the allegations of the amended complaint showed that the relationship between the Bank of California and plaintiff was the ordinary relationship of a bank to its depositor. Said relationship was that of debtor and creditor and the title to the money deposited by plaintiff in the Bank of California passed immediately to said bank. Arnold v. San Ramon Valley Bank, 184 Cal. 632, 194 P. 1012, 13 A.L.R. 320; Glassell Dev. Co. v. Citizens' National Bank, 191 Cal. 375, 216 P. 1012, 28 A.L.R. 1427; Union Tool Co. v. Farmers', etc., Nat. Bank, 192 Cal. 40, 218 P. 424, 28 A.L.R. 1417. Plaintiff, after depositing its money with the Bank of California, was no longer the owner or entitled to the possession of any specific money which was the subject of conversion and when the Bank of California paid the amount appearing on the face of the checks to the San Francisco Bank, it paid out its own money and not that of plaintiff. 9 C.J.S., Banks and Banking, § 356, p. 735. The suggested theory that the San Francisco Bank converted "plaintiff's money" violates "the elemental principle that a depositor has no claim to any specific assets in his bank * * *." 36 Har.L.R. 879.

[8] We therefore conclude that plaintiff's amended complaint failed to state a cause of action against defendant the San Francisco Bank and that the trial court properly sustained said defendant's demurrer without leave to amend and entered judgment of dismissal in said defendant's favor.

The judgment appealed from is affirmed.

NOURSE, P. J., and DOOLING, J., pro tem., concur.

Hearing denied; GIBSON, C. J., and TRAYNOR, J., dissenting; EDMONDS, J., not participating.



58 Cal.App.2d 897

METROPOLITAN LIFE INS. CO. v. SAN FRANCISCO BANK et al.

Civ. 12261.

District Court of Appeal, First District, Division 2, California.

May 6, 1943.

Hearing Denied July 1, 1943.

1. Appeal and error ⇐768

Where plaintiff's brief designated one defendant as sole respondent and did not question correctness of judgment as to other defendants, plaintiff was deemed to have "abandoned" its appeal with respect to portions of judgment in favor of other defendants.

See Words and Phrases, Permanent Edition, for all other definitions of "Abandoned".

2. Trover and conversion ⇐2

An action for conversion cannot be maintained unless it appears that the personalty involved was of some value.

3. Banks and banking ⇐174

Where check made payable to fictitious and non-existing person was cashed on forged endorsement and collecting bank received amount thereof from drawee bank, the rule that action for conversion cannot be maintained unless it appears that personalty involved was of some value precluded drawer from recovering from collecting bank on theory of "conversion".

See Words and Phrases, Permanent Edition, for all other definitions of "Conversion".

Appeal from Superior Court, San Francisco, County; Geo. W. Schonfeld, Judge.

Action by the Metropolitan Life Insurance Company against the San Francisco Bank and others. From a judgment dismissing the action, the plaintiff appeals.

Affirmed.

F. Eldred Boland and Knight, Boland & Riordan, all of San Francisco, for appellant.

Thomas E. Davis, of San Francisco, for respondent.

SPENCE, Justice.

This is a companion case to Metropolitan Life Insurance Co. v. San Francisco Bank, 136 P.2d 853, the opinion in which last-mentioned case has been this day filed.

The complaint in this action contained thirty-six counts which were based respectively upon thirty-six checks bearing dates from January 9, 1937 to October 13, 1939. The prayer was for the total sum of $3,275.44. The allegations of the complaint herein were quite similar to the allegations in the amended complaint in the other action but certain differences in the pleadings should be noted. In the complaint herein, there was no allegation that the endorsements of the checks contained any written guarantee of prior endorsements. It was also alleged that the San Francisco Bank cleared the checks here involved through the Anglo-California National Bank instead of presenting them directly to the Bank of California for payment. Plaintiff included the Anglo-California National Bank among the defendants. The three defendants in this action interposed demurrers upon the ground that the complaint failed to state a cause of action and upon the further ground that the alleged causes of action were barred by subd. 3 of sec. 340, subd. 1 of sec. 337, subd. 4 of sec. 338 and subd. 1 of sec. 339 of the Code of Civil Procedure. The demurrers of the three defendants were sustained without leave to amend and a judgment of dismissal was entered in favor of said defendants. Plaintiff appeals from said judgment.

[1] In its brief plaintiff designates the San Francisco Bank as the sole respondent and does not question the correctness of the trial court's rulings and judgment as to the other defendants. Plaintiff must therefore be deemed to have abandoned its appeal with respect to those portions of the judgment in favor of the other defendants.

[2, 3] Plaintiff contends that the trial court erred in sustaining the demurrer of the San Francisco Bank and in entering the judgment of dismissal in its favor. This contention is based here solely upon the claim that the San Francisco Bank converted the checks. In the opinion this day filed in the other case, we held that the allegations were insufficient to show that the checks, as such, had any value whatever but on the contrary showed that said checks were valueless. The decision in the other case was based in part upon the rule that an action for conversion cannot be maintained unless it appears that the personal property involved was of some value. Bentley v. Mountain, 51 Cal.App.2d 95, 124 P.2d 91; 65 C.J. 28. The same rule is applicable here and is determinative of this appeal.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., pro tem., concur.

Hearing denied; GIBSON, C. J., and TRAYNOR, J., dissenting; EDMONDS, J., not participating.

WEST KEY NUMBER SYSTEM

58 Cal.App.2d 517

SNYDER v. CITY OF ALAMEDA et al.

No. 12271.

District Court of Appeal, First District, Division 1, California.

May 6, 1943.

Rehearing Denied June 5, 1943.

Hearing Denied July 1, 1943.

1. Municipal corporations ⇐220(9)

Pension ordinances are sustained as valid on ground that they are in nature of "compensation" for services rendered, especially where monthly deductions are made from the employee's salary which go into the pension fund.

See Words and Phrases, Permanent Edition, for all other definitions of "Compensation".

2. Municipal corporations ⇐200

A pension ordinance of city which was in force at time fireman became a member of fire department became a part of the contemplated "compensation" for services

to be rendered, and of the "contract" of employment.

See Words and Phrases, Permanent Edition, for all other definitions of "Contract".

3. Municipal corporations ⇐220(9)

Pension laws are to be liberally construed, and any doubt regarding proper construction of pension statute must be resolved in favor of person claiming right to pension.

4. Statutes ⇐181(2), 207

An awkwardly and loosely-drawn statute should be construed so as to remove its inconsistencies and give to it the most reasonable solution permissible, even though such construction is not entirely satisfactory.

5. Statutes ⇐200

In construing a statute, punctuation is never a controlling factor, and it may be entirely disregarded when necessary to ascertain true intent and meaning.

6. Statutes ⇐189

In construing statutes, grammatical construction may be disregarded if necessary to ascertain and give effect to the true intent and meaning.

7. Municipal corporations ⇐187, 200

An ordinance providing for pensions for members of fire and police departments of city was construable as entitling members who have served ten years or more to pension on voluntary resignation which is accepted.

8. Statutes ⇐181(2)

Where language of statute is susceptible of two constructions, one of which in its application will render it reasonable, fair, and harmonious with manifest purpose, and another which would be productive of absurd consequences, the former construction will be adopted.

9. Municipal corporations ⇐218(1)

A city is not required to accept resignation of its employee and may refuse to do so prior to filing of charges against the employee or thereafter, and, if those charges are afterwards filed, it may dismiss the employee notwithstanding he has attempted to resign.

10. Municipal corporations ⇐200

Under pension ordinance which was construable as entitling members of fire department having at least 10 years' service to pension on voluntary resignation, fireman, who had necessary service and whose resignation, tendered after he had been suspended for intoxication and charged with violation of certain rules, was accepted, was entitled to pension.

11. Appeal and error ⇐179(1)

Where question concerning contemporaneous administrative construction of pension ordinance of city was not presented by pleading or evidence, the question was not an issue for the reviewing court.

WARD, J., dissenting.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Mandamus proceeding by John B. Snyder against the City of Alameda and others to compel Milton Godfrey and others, members of the Pension Board of the city, to grant the petitioner a pension. From an adverse judgment, petitioner appeals.

Reversed.

J. W. O'Neill, of Oakland, for appellant.

H. Albert George, City Atty., of Alameda, for respondent.

KNIGHT, Justice.

This is an appeal on the judgment roll from a judgment denying petitioner a writ of mandate whereby he sought to compel the Pension Board of the city of Alameda to grant him a pension to which he claimed he was entitled under section 5 of an ordinance of said city (No. 276, N.S.) "providing for relief, health, life insurance and pension fund for members of the fire and police departments of the city of Alameda." The cause was tried on the pleadings and stipulations of counsel, and the sole question presented by the appeal is one of statutory construction.

The pension fund created by the ordinance is built up of fines collected, by contributions of certain amounts by the city, and deductions from the monthly salaries of each member of the police and fire departments; and the ordinance provides for the granting of several separate and distinct pensions, three of which are as follows: Section 2 provides that after a person has served a period of 25 years or more, the Pension Board either of its own motion or on application of the employee shall retire the employee from active serv-

ice on a monthly pension equal to one-half of the salary paid to members of his rank. Section 3 provides for retirement at half salary at any time for disability; and section 5, which is the particular section in question here, reads as follows: "Any person having served ten (10) years or more as a member of the regularly constituted Fire or Police Department shall, if he be removed from said Fire or Police Department for any cause other than conviction of a felony; notorious or consecutive insubordination or neglect of duty; or in case of voluntary or involuntary resignation, be entitled to all the provisions of Section 2 of this ordinance, in the proportion that the number of years he has served in either of said departments bears to twenty-five (25) years."

Appellant entered the employ of the city of Alameda as a fireman on February 1, 1930, and he continued to serve as such up to December 8, 1941, covering a period of 11 years and 10 months. On that date he presented his resignation and it was accepted. But the board refused to allow him the pension provided for by section 5 of the ordinance. It is appellant's contention that construed by itself and in the light of the other provisions of the ordinance, the clear import and intent of said section 5 is that if after having served ten years a member of either of the departments mentioned therein resigns, voluntarily or involuntarily, and his resignation is accepted, he is entitled as a matter of right to the reduced amount of pension provided for therein. The position taken by the respondents is that the terms "conviction of a felony; notorious or consecutive insubordination or neglect of duty; or in case of voluntary or involuntary resignation" must be read together, and are definitive of the instances in which a person who has served 10 years or more will not be entitled to a pension; that therefore, since appellant voluntarily resigned, he forfeited his right to the pension.

[1-3] The decisions hold uniformly that laws and ordinances providing for the payment of pensions after specified years of service are sustained as valid and constitutional on the ground that they are in the nature of compensation for services rendered (Douglas v. Pension Board, 75 Cal.App. 335, 242 P. 756; O'Dea v. Cook, 176 Cal. 659, 169 P. 366), and that this is especially true where as here monthly deductions are made from the employee's salary which go into the pension fund. The ordinance here involved was in force at the time appellant became a member of the department; and as said in O'Dea v. Cook, supra, pension provisions become a part of the contemplated compensation for services to be rendered and in a sense form a part of the contract of employment. Mainly for the reasons stated the courts have repeatedly declared that pension laws are to be liberally construed and if any doubt remains in regard to the proper construction of a pension statute, that doubt must be resolved in favor of the person claiming the right to the pension. O'Dea v. Cook, supra; Aitken v. Roche, 48 Cal. App. 753, 192 P. 464; Casserly v. City of Oakland, 215 Cal. 600, 12 P.2d 425; Dillard v. City of Los Angeles, 20 Cal.2d 599, 127 P.2d 917, 128 P.2d. 537.

[4-6] Both parties to this proceeding state that said section 5 is awkwardly drawn, and apparently the dispute over its meaning is brought about largely by the punctuation employed in framing the section; that is, by the presence of the semicolons after the words "felony" and "duty". However, in this connection the courts have held that an awkwardly and loosely drawn statute should be so construed as to remove its inconsistencies and to give to it the most reasonable solution permissible, even though such construction is not entirely satisfactory; and that in arriving at a solution, punctuation is never a controlling factor; that it may be entirely disregarded when necessary to ascertain the true intent and meaning. 23 Cal.Jur. pp. 734, 735. Moreover, it is held that in construing statutes courts are not always bound by the grammar, and that grammatical construction may be disregarded if necessary to ascertain and give effect to the true intent and meaning. 23 Cal.Jur. 734.

[7] Considered in the light of the foregoing legal doctrines and the other provisions of the ordinance, it is our opinion that the construction of said section 5 contended for by appellant must be sustained. As will be noted, the section deals with two distinct methods of termination of employment after service of ten years; the first is by removal, which of course means the discharge of the employee for cause, and this is accomplished by the act of the employer; the second is by way of resignation, voluntary or involuntary, which is brought about by the act of the employee. It will be seen, therefore, that

the words "removed" and "resignation" as there used convey opposite meanings; and that the two methods of termination of employment therein set forth are not only separated by a semi-colon after the word duty, but the resignation clause is preceded by the words "or in case of"; thus emphasizing the two separate and distinct thoughts. Then again it is significant that the portion of the section dealing with removal starts out with the words "if he be removed"; whereas that portion relating to resignation starts with different words, to-wit, "or in case of," indicating an intention to separate the two ideas.

[8] Moreover, it is a well established rule of statutory construction that where the language of a statute is susceptible of two constructions, one of which in its application will render it reasonable, fair and harmonious with its manifest purpose, and another which would be productive of absurd consequences, the former construction will be adopted. 23 Cal.Jur. p. 766; Spier v. Peck, 36 Cal.App. 4, 171 P. 115; Goldsmith v. Board of Education, 66 Cal. App. 157, 225 P. 783; Aggeler v. Dominguez, 217 Cal. 429, 19 P.2d 241; Reuter v. Board of Supervisors, 220 Cal. 314, 30 P.2d 417.

Assuming, therefore, that by reason of the incorrect punctuation or erroneous grammatical construction, the provisions of said section 5 are open to two constructions, it is manifest that if respondents' construction be adopted and the resignation clause be read into and made part of the exclusionary removal clauses which operate to deprive an employee of his right to any pension, it would result in bringing about not only an unfair and unreasonable result, but an apparently ridiculous situation. For example, it will be noted, under the provisions of said section 5 it is not in all cases of removal that an employee is deprived of the pensions provided for therein. It is only in cases where the removal is for conviction of a felony, notorious or consecutive insubordination or neglect of duty. In all other cases of removal, regardless of the cause, he is entitled as a matter of right to receive the pension. Those causes may be drunkenness, the commission of any sort of a misdemeanor, offenses involving moral turpitude (if they do not amount to a felony), or as held in Daly v. Otis, 92 Cal.App. 242, 267 P. 921, 922, wherein this same section of the ordinance was under review, "absence without leave." But, adopting respondents' construction, if an employee with ten years of clean record and honest and faithful service chose to resign, he would not be allowed to stand on an equal footing with those who are removed for drunkenness, commission of misdemeanors, etc., and as in those cases, be allowed a pension, but would be placed in the classification of those removed for felony, notorious or consecutive insubordination or neglect of duty, and thus deprived not only of the right to a pension, but to a return of any part of the money deducted from his monthly salary for the pension fund during the preceding ten years. Such construction, in our opinion, would not only be illogical, unreasonable and unfair, but would be contrary to the intention of the voters by whom the ordinance was adopted.

[9] Respondents do not contend that the provisions of said section 5 will not support the construction contended for by appellant; but they urge that such construction would be unreasonable. In this regard they argue that thereunder an employee facing charges of conviction of a felony, notorious or consecutive insubordination or neglect of duty, could circumvent the ordinance by resigning before the charges were heard and determined. But that is not true, for as held in the case of Curtin v. Board of Police Commissioners, 74 Cal.App. 77, 239 P. 355, the board is not bound to accept the resignation of the employee. It may refuse to do so prior to the filing of the charges or thereafter, and if those charges are afterwards filed it may dismiss him notwithstanding he has attempted to resign.

[10] In the present case it appears that at the hearing before the Pension Board on January 7, 1942, the city introduced in evidence a document addressed to the City Manager by the Chief of the Fire Department from which document it appears that on Saturday, December 6, 1941, appellant had been suspended from duty for intoxication, and he was therein charged with a violation of certain departmental rules and his dismissal from the department was requested. The following Monday appellant resigned. It is apparent that when this document was filed with the City Manager two courses were open to the city. It could have charged appellant before the proper board with drunkenness, and had him removed on that ground, in which event he would have received the

pension; or it could have charged him with notorious or consecutive insubordination or neglect of duty, and if removed on that ground he would have been deprived of the pension. But neither of those courses was followed. His resignation was accepted; consequently, under section 5 of the ordinance, if it has been here correctly construed, he was entitled to the pension.

Respondents further contend that the obvious intent of the ordinance, when read as a whole, is that an employee "should serve the city for at least 25 years before he has the option, on his own initiative, to demand a pension as a matter of right." But under the construction here given section 5 he would not be entitled to a pension as a matter of right prior to 25 years service, for, as already pointed out, it is within the power of the board at all times to refuse to accept his resignation; and if after it has declined to do so, the employee nevertheless refuses to perform his duties, he may be charged, under the rule of the Curtin case, with notorious or consecutive insubordination or neglect of duty, and, if removed, thus deprived of any pension rights. Here, however, appellant's resignation was accepted.

Another argument advanced by respondents is that the actuarial set-up of the pension system in the ordinance indicates that there was no intention to provide a pension for an employee whose resignation is accepted after only ten years of service. However, no evidence whatever was introduced on that subject, and in the absence of any facts, it is not a matter that can be intelligently considered.

[11] Nor was any pleading filed or evidence offered raising the question of contemporaneous administrative construction, so that such issue is not here involved. Whatever remaining points are urged by respondents in support of their position are, in our opinion, without merit.

The judgment is reversed.

PETERS, P. J., concurs.

WARD, Justice (dissenting).

I dissent.

The dispute here involves the interpretation to be given a pension ordinance. The facts are set forth in the majority opinion, including reference to two letters introduced by respondents for the limited purpose of showing the circumstances under which appellant proffered his resignation, namely, that he, a member of the Fire Department, was at the time "on the carpet" for having reported for duty several times in an intoxicated condition. The fact is not denied that at the time of his resignation charges for dismissal on the ground that for the third time he had reported for duty in such condition were pending. He had been theretofore charged with violations of the rules of the department and, as stated in the majority opinion, had on one occasion been suspended. Under the circumstances, his resignation could have been refused and he could possibly have been declared guilty of "consecutive" neglect of duty, and suspended or dismissed. His resignation was accepted. It further appears that at the time of his proffered resignation, two days before its actual presentation and acceptance (at which time he was unable to write because of intoxication), he demanded the return of money imposed on two occasions as a fine. To my mind it is inconceivable that in accepting the resignation any one in authority thus exercising leniency toward appellant ever imagined that he would thereafter apply for a pension.

The majority opinion admits that two interpretations of section 5 of the ordinance are reasonably possible, but holds that the one adopted in favor of appellant, permitting him to resign and obtain a pension, is the more reasonable.

Section 5 contemplates that if an employee is dismissed for a trivial offense, not a felony and not a notorious and consecutive dereliction of duty, he may be entitled to a pension. Daly v. Otis, 92 Cal. App.2d 242, 267 P. 921, 922. In the Daly case, so strongly relied upon in the majority opinion, it does not appear that the appellant resigned. The question of resignation played no part in the decision, the appellant having neither "voluntarily or involuntarily resigned."

Where the language of a pension ordinance is susceptible of more than one interpretation, it should be construed liberally in favor of the person claiming the pension unless such construction would produce unfair, unreasonable and impractical consequences. In ascertaining the meaning of the loosely drawn ordinance herein, grammatical construction and punctuation should not be given controlling weight, particularly when the provision whose meaning is sought is, as admitted in the

majority opinion, ambiguous, and it appears from other provisions or from the entire ordinance that a reasonable and practical construction may be given by avoiding niceties of punctuation which may lead to a conclusion inconsistent with the purpose of the ordinance. Under such reasonable construction, the questioned terms in section 5 appear to be and are exclusionary and definitive of the instances in which an employee, who has served for ten and less than twenty-five years, is not entitled to a pension.

Under the provisions of the ordinance three methods of discontinuance of service (eliminating death) are contemplated: 1. Retirement. 2. Removal. 3. Resignation by (a) operation of law, (b) an act of a governmental body, and (c) an act of the employee.

In order to secure retirement from a governmental body the applicant must still be a member of such body. The filing of an application for retirement does not ipso facto terminate his connection with the department, board or commission. "It is necessary that an order of retirement be duly made." MacIntyre v. Retirement Board of San Francisco, 42 Cal.App.2d 734, 109 P.2d 962, 964. When made, the matter is at an end except for the right to apply to the courts to modify or set it aside. The same rule applies to a resignation. Kramer v. Board of Police Commissioners, 39 Cal.App. 396, 179 P. 216; Curtin v. Board of Police Com'rs, 74 Cal. App. 77, 239 P. 355.

In the present case it is not contended on appeal that appellant was coerced or unfairly or unduly persuaded to resign, although by answer the respondents averred that the resignation was offered "for the purpose of evading a trial on written charges for dismissal." "The voluntary resignation of a public employee from his position operates, however, as a complete severance therefrom, and the loss of right to the position and of all rights, benefits, or emoluments thereof, including all pension rights." 40 Am.Jur. 984, 985. This rule has been adopted in California, where in Kramer v. Board of Police Commissioners, supra, appellant claimed he had been coerced into an involuntary resignation. The court there said (39 Cal.App. at page 400, 179 P. at page 218): "Measured by these definitions it must be concluded that the plaintiff's resignation from the police department was not induced by either duress or coercion, but that the same was voluntary, and hence, upon its acceptance by the board of police commissioners, worked a final severance of the relation of the plaintiff as a police officer with the police department of the city and county of San Francisco." In Moreno v. Cairns, 20 Cal.2d 531, 534, 535, 127 P.2d 914, 916, the court said: "The petitioner contends that since his separation from the department was effected by resignation under duress, and not by unlawful suspension, lay off, or discharge, he was not required to present a written demand before filing his petition for a writ of mandate. This contention overlooks the fact that a resignation is characteristically the voluntary surrender of a position by the one resigning made freely and not under duress. * * * Whenever a person is severed from his employment by coercion the severance is effected not by his own will but by the will of a superior. * * * Petitioner's emphasis upon the coercion that forced his resignation is prompted by the fact that there can be no reinstatement after a voluntary resignation. Kramer v. Board of Police Commissioners, 39 Cal. App. 396, 179 P. 216." In the Moreno case upon the facts the court affirmed the judgment against the petitioner, an assistant chief of the Fire Department.

In my opinion, a fair interpretation of the clause dealing with resignations as applied to appellant is that, not having been retired or removed, upon the acceptance of his resignation, whether voluntary or involuntary, his connection with the department was at an end. This is not a proceeding to set aside the presentation or acceptance of a voluntary or involuntary resignation.

The petition alleges that the pension fund is for the benefit of the "members" of the department and contains the further averment that petitioner's employment ceased upon acceptance of his resignation.

The ordinance provides that those granted the benefit of pensions shall report to the chief of the department at stated periods and may, in a public emergency, be assigned to perform certain duties. Sections 8 and 10 of the ordinance. If appellant's connection with the department had ceased, the department had no further control over him.

From a practical standpoint the construction placed upon the terms of section 5 by the majority opinion would encourage an

employee against whom charges warranting dismissal or less than dismissal are pending or about to be filed, or who has been convicted but not formally dismissed from the department, to resign and so secure a pension. It might encourage employees in good physical condition to resign after ten years of service, and, while taking advantage of the pension provisions, perform employment for compensation elsewhere. It would permit an employee within the ten year service, who had been denied a pension for disability, to defeat the purpose of the disability section, 3a, of the ordinance and receive a pension by resignation. It is conceivable that a large number in the ten year class might at this time be tempted to apply for pensions, and in addition take advantage of the present high wages on the outside. Regardless of motive, however, or the amount of such wages, the whole scheme or plan to award pensions would fail in that case by reason of the financial inability of the pension body to carry the burden.

When a person agrees to accept a governmental position with pension rights, he impliedly contracts, unless health or unforeseen circumstances prevent, to serve for the ordinary period, at the termination of which he becomes entitled to retire on account of age or service. Dryden v. Board of Pension Comm'rs, 6 Cal.2d 575, 59 P.2d 104; Brooks v. Pension Board, 30 Cal.App.2d 118, 85 P.2d 956. In Douglas v. Pension Board, 75 Cal.App. 335, 340, 341, 242 P. 756, 757, the court said: "The considerations upon which a government adopts, as a part of its administrative policy, a system for the pensioning of those who have continuously, for a specified period of years, served the government in the performance of public civil duties, both as officers and employees, are, in a large measure, * * * to safeguard or insure such officers or employees against a possible condition of penury and want, when, after giving the best part of their lives both in point of time of service and ability to the service of the public, they are no longer able to perform, to the degree required, labor of any character or kind. A more just and humane consideration of the class or classes of persons for whom such a provision is made by a government can hardly be conceived. * * * *It should not be so construed and administered as to confer its benefits upon those not actually entitled thereto.*" (Italics added.)

The wording of the section in question may easily be construed technically in favor of respondents as the majority opinion holds. In my opinion the punctuation and intricacies of phraseology may be disregarded. "The fact that an act was carelessly and awkwardly drawn, or that some of its terms are inapt and susceptible of two or more interpretations, does not excuse the courts from attempting to ascertain the legislative intent or authorize them to enlarge the plain meaning and effect of an act. An awkwardly and loosely drawn statute should be so construed as to remove its inconsistencies as well as to obviate constitutional objections, and the courts will give to it the most reasonable solution permissible, even though it is not entirely satisfactory." "We have noticed the general rule that the meaning of a statute is to be sought in the language used by the legislature. But this does not mean that the courts are always to be governed by the exact phraseology and literal meaning of every word or phrase employed. The primary rule of intention is to be first applied. And intention may be ascertained, in doubtful cases, not only by considering the words used, but also by taking into account other matters, such as the context, the object in view, the evils to be remedied, the history of the times and of legislation upon the same subject, public policy, contemporaneous construction, and the like. In other words, the courts will not blindly follow the letter of a law, when its purpose is apparent, to consequences which are inconsistent with that purpose; and this would seem to be particularly true when the results of a literal interpretation, if adopted, would be absurd, and unjust, or where rights of the public are involved." 23 Cal.Jur., secs. 112, 113, pp. 734, 735, 736.

One reason given in the majority opinion for the adoption of appellant's view as to the construction is that if respondents' interpretation is correct, appellant would be "thus deprived not only of the right to a pension, but to a return of any part of the money deducted from his monthly salary for the pension fund during the preceding ten years." No issue involving the return of "money deducted" is raised by the pleadings; no finding is made thereon, and, as far as I have been able to ascertain, neither in appellant's nor respondents'

briefs is there any mention of the matter. My only comment is to adopt the language used in MacIntyre v. Retirement Board of San Francisco, supra, as follows: "No demand for accumulated contributions appears in the record, and the matter not being an issue on this appeal, it is not necessary to determine any question in relation thereto."

I respectfully submit that under a reasonable interpretation of the concededly awkward punctuation and phraseology, under the facts, and in the interest of justice, this judgment should be affirmed.

Rehearing denied; WARD, J., dissenting.

Hearing denied; EDMONDS, TRAYNOR, and SCHAUER, JJ., dissenting.



58 Cal.App.2d 497

GOULD v. RICHMOND SCHOOL DIST.

No. 12267.

District Court of Appeal, First District, Division 1, California.

May 4, 1943.

Hearing Denied July 1, 1943.

1. Judgment ⇐153(1)

The relief sought by a motion to vacate defendant's default and judgment entered pursuant thereto may be granted as provided by statute, at any time within one year after rendition of the judgment. Code Civ.Proc. § 473a.

2. Judgment ⇐518

A motion to vacate defendant's default and judgment entered pursuant thereto is a "direct" and not a "collateral attack" upon the judgment, and moving party may show in contradiction of recitals in the judgment that the judgment was rendered without having first acquired jurisdiction over person of defendant. Code Civ.Proc. § 473a.

See Words and Phrases, Permanent Edition, for all other definitions of "Collateral Attack" and "Direct Attack".

3. Appeal and error ⇐762

Points raised for first time in plaintiff's closing brief will not be considered unless some meritorious reason is shown why they were not made in opening brief.

4. Schools and school districts ⇐119

Where a suit is against a corporate school board, and there is no statute governing the matter, process should be served upon a member of the board in his official capacity.

5. Schools and school districts ⇐21

A school district is a "political subdivision of state", but as such is an independent governmental agency distinct from county, city or town in which it is wholly or in part territorially situated.

See Words and Phrases, Permanent Edition, for all other definitions of "Political Subdivision of State".

6. Schools and school districts ⇐119

A school district cannot be classed as a "county", "city" or a "town" within statute authorizing service of summons in an action to be brought against a county, city or town by delivering a copy to president of board of supervisors, president of the council, or trustees, or other head of the legislative department thereof. Code Civ. Proc. § 411, subd. 5.

See Words and Phrases, Permanent Edition, for all other definitions of "City", "County" and "Town".

7. Schools and school districts ⇐119

The statute authorizing service of summons in an action brought against a county, city or town by delivering a copy to the president of board of supervisors, president of the council, or trustees, or other head of legislative department thereof, does not authorize service of summons upon a school district by delivering a copy thereof to president of school board. Code Civ.Proc. § 411, subd. 5.

8. Schools and school districts ⇐119

Service of summons in an action against school district on one member of school board, even though he was president of the board, was not service of summons on the district, giving court jurisdiction to enter a default judgment against district, in absence of showing of any peculiar or unforeseen condition making service of summons on each member of board impossible. Code Civ.Proc. § 411, subd. 5; School Code, § 2.141.

PETERS, P. J., dissenting.

Appeal from Superior Court, Contra Costa County; A. F. Bray, Judge.

Action by Edgar J. Gould, a minor, by Grace Pieratt, his guardian ad litem, against Richmond School District, Contra Costa County, State of California for injuries alleged to have been sustained by plaintiff while on school premises under the control of the defendant district. From an order granting a motion to vacate and set aside the default of the defendant and the judgment entered against defendant pursuant thereto, the plaintiff appeals and moves for diminution of the record.

Order affirmed and motion dismissed.

Fabian D. Brown and Kenneth C. Zwerin, both of San Francisco, for appellant.

Tinning & DeLap, Francis P. Healey, Dist. Atty., and Homer W. Patterson, Deputy Dist. Atty., all of Richmond, for respondent.

KNIGHT, Justice.

Plaintiff appeals from an order granting a motion to vacate and set aside the default of the defendant, Richmond School District, and the judgment entered against the district pursuant thereto, in an action to recover damages for personal injuries alleged to have been sustained by plaintiff while on school premises under the control of the district.

The default was entered on July 3, 1941, and the judgment on February 26, 1942. The school board consisted of three members, two of whom were never served with summons, and knew nothing about the existence of the action until after the entry of judgment. Within two months after the entry of judgment and on April 15, 1942, the district presented its motion to vacate and set aside the default and the judgment upon the ground that the defendant school district had not been served with summons and that therefore the trial court was without jurisdiction to enter the judgment. On April 20, 1942, the motion was granted.

The sole contention urged for reversal in plaintiff's opening brief was that defendant's motion constituted a collateral attack on the judgment and that therefore defendant was not permitted to go behind the recital in the judgment that "the summons and complaint were duly and regularly served upon the defendant * * *." There is no merit in the contention.

[1, 2] As pointed out in defendant's brief, the authorities of this state definitely hold (1) that the relief sought by a motion of this kind may be granted, as provided in section 473a (formerly part of section 473) of the Code of Civil Procedure, at any time within one year after the rendition of the judgment; and (2) that such a motion is a direct and not a collateral attack upon the judgment and therefore the moving party may show in contradiction of the recitals in the judgment that the judgment was rendered without having first acquired jurisdiction over the person of the defendant.

Among the authorities cited by defendant supporting the first point are the following: 14 Cal.Jur. 1062; Penland v. Goodman, 44 Cal.App.2d 14, 111 P.2d 913; Smith v. Jones, 174 Cal. 513, 163 P. 890; Barnett v. Reynolds, 124 Cal.App. 750, 13 P.2d 514; Vaughn v. Pine Creek Tungsten Co., 89 Cal.App. 759, 265 P. 491; Richert v. Benson Lumber Co., 139 Cal.App. 671, 34 P.2d 840; In re Estate of Estrem, 16 Cal.2d 563, 107 P.2d 36; Sharp v. Eagle Lake Lumber Co., 60 Cal.App. 386, 212 P. 933; Waller v. Weston, 125 Cal. 201, 57 P. 892. In the case of Penland v. Goodman, supra [44 Cal.App.2d 14, 111 P.2d 915], the court said: "The sole legal question involved, therefore, is whether a party against whom a default judgment was entered and who was not served with summons and complaint may, within a year after the entry of a judgment based upon an alleged service, have the same set aside on motion under the provisions of sections 473 and 473a of our Code of Civil Procedure. There are many California cases directly in point on this matter and we have not found any conflict in the decisions with respect to the right of a person to set aside such a judgment within a year after its entry. * * * However, the power and authority of a court to vacate a judgment not void on the face of the judgment roll but void in fact for want of jurisdiction of the person of the defendant by reason of nonservice of process upon such defendant, exists independently of the provisions of section 473 of the Code of Civil Procedure or of any other statutory provisions, if the motion is made within a reasonable time." And in the case of Barnett v. Reynolds, supra [124 Cal.App. 750, 13 P.2d 515], the court in dealing with a similar motion put it this way: "The contention of appellant that the motion was one made under the provisions of section 473 of the Code of Civil Procedure, and

was therefore barred by the limitation contained in said section, having been made more than six months after the entry of judgment, is without merit. The motion, though not made within six months of the entry of judgment, was made within less than one year therefrom. Where, as here, the motion to set aside a default judgment is made upon grounds not specified in section 473 of the Code of Civil Procedure, but is one addressed to the general equity powers of the court, it must be made within a reasonable time. Under circumstances similar to those presented in the instant case, it has been held that one year was a reasonable time within which to make the motion."

The following are some of the authorities holding that a motion of this kind is a direct and not a collateral attack: Norton v. Atchison, etc., R. Co., 97 Cal. 388, 30 P. 585, 32 P. 452, 33 Am.St.Rep. 198; Vaughn v. Pine Creek Tungsten Co., supra; Sharp v. Eagle Lake Lumber Co., supra; In re Dahnke's Estate & Guardianship, 64 Cal. App. 555, 222 P. 381; 15 Cal.Jur. pp. 46, 47. As claimed by defendant, the cases last cited hold uniformly that a motion to vacate a default judgment upon the ground of want of jurisdiction because of failure to serve process is a direct and not a collateral attack on the judgment; and that even though the judgment is valid on its face and recites due service of process, it may be shown, in support of the motion, by evidence dehors the record, that the defendant was actually not served; and that the recitals in the judgment are not conclusive and that the collateral attack rule has no application; also that the relief may be granted at any time within one year from the rendition of the judgment. So clearly do those cases so hold that quotations therefrom or comment thereon would seem wholly unnecessary.

The authorities cited by plaintiff are not in point for the reason that they did not involve motions to vacate made within the time prescribed by law. They are cases in which it was held that the applications were made too late or where the question of jurisdiction was raised in a collateral proceeding and therefore constituted a collateral attack.

[3] In plaintiff's closing brief, filed several days prior to oral argument, he questioned for the first time the soundness of the trial court's finding that the defendant was not served with summons. As said in the following cases, points raised at this state of the proceeding for the first time have been refused consideration by reviewing courts unless some meritorious reason is shown why they were not made in the opening brief. Monk v. Ehret, 192 Cal. 186, 219 P. 452; Kahn v. Wilson, 120 Cal. 643, 53 P. 24; 2 Cal.Jur. 734. Moreover, the appeal herein is presented on a bill of exceptions, which does not set forth a copy of the judgment containing the recitals relied on by plaintiff, nor is there anything of an evidentiary character set forth in the bill showing that summons was ever served on any person. It does affirmatively appear from the bill that there were three duly qualified and acting members of the school board, and the affidavits of two of them, namely, Patterson and Fraser, are set forth in the bill, in which they aver that they were never served with summons and knew nothing of the existence of the action until after the entry of the judgment. The transcript on appeal, besides embodying a copy of the bill of exceptions contains without any certification by the trial judge or the county clerk copies of certain papers, most of which go to make up the judgment roll and among them is a copy of the affidavit of the service of summons on J. O. Ford, president of the school board. In view of that state of the record, defendant, in its brief and at the time of oral argument, strenuously contended that inasmuch as the judgment and affidavit of service of summons on Ford were not incorporated in the bill of exceptions, the contents of neither could be considered in the determination of any issue raised by the appeal. In reply to defendant's contention plaintiff argued that since it appeared from the bill of exceptions that said judgment and said affidavit of service were considered by the trial court in the determination of the question of whether there was a valid service of summons in the action, and that said judgment and affidavit of service were in the possession of the clerk of the trial court, it was within the province of this court to order certified copies thereof to be filed in this court for the purpose of assisting the court in the disposal of the appeal. Parker v. Shell Oil Co., 55 Cal.App.2d 48, 130 P.2d 158. Thereafter, to obtain such an order, plaintiff filed a motion for diminution of the record.

[4] Assuming for all the purposes of this appeal that plaintiff is entitled to urge

the point of the unsoundness of the trial court's finding and that the state of the record is such that this court is permitted to consider the contents of the judgment and the affidavit of service of summons, we agree with the trial court's conclusion that there was no such service of process in the action as gave the trial court jurisdiction to enter the default or the judgment. In Corpus Juris (vol. 56, p. 789) the rule is stated as follows: "Where the suit is against a corporate school board, and there is no statute governing the matter, process should be served upon each member of the board in his official capacity" (citing authorities); and in this state there is no statute governing the matter. Section 411 of the Code of Civil Procedure prescribes how and upon whom service of summons in a civil action must be made. The section contains seven separate subdivisions. The first, second and sixth pertain to suits brought against domestic and foreign corporations, and corporations which have forfeited their charters. The third and fourth subdivisions have to do with suits against minors and persons of unsound mind. The fifth covers actions brought against "a county, city or town", and provides that in such cases the summons must be served by delivering a copy "To the president of the board of supervisors, president of the council or trustees, or other head of the legislative department thereof." The seventh subdivision provides generally that "In all other cases" the summons must be served on "the defendant personally."

[5, 6] Domestic and foreign corporations are specifically defined by the Civil Code (§§ 278 and 405); and obviously a school district cannot be classed as either. Nor is it a county, city or town. It is said to be a political subdivision of the state, but as such is an independent and separate governmental agency distinct from the county, city or town in which it is wholly or in part territorially situated. Ward v. San Diego School District, 203 Cal. 712, 265 P. 821; Skelly v. Westminster School District, 103 Cal. 652, 37 P. 643. By virtue of charter provisions of the city of Richmond, the school board of the defendant Richmond School District is designated as a board of education; nevertheless the duties and powers it may exercise are the same as those fixed by the general law for governing boards of trustees of school districts, and under the general law members of a school board are not permitted to act individually or singly; they must act as a board. In this connection attention may be called to section 2.141 of the School Code, which provides: "In the name by which the district is designated the trustees may sue and be sued, and hold and convey property for the use and benefit of such school district." Therefore, since in the absence of specific statutory authority a member of the board acting singly has not the power to incur any liability against the district, it would seem to follow necessarily that in the absence of specific statutory authority a court may not acquire jurisdiction to fasten a liability on the district where only one member of the board has been served with process. To hold otherwise would, in our opinion, establish a dangerous judicial rule; and this is clearly demonstrated by the situation presented by this case. The summons was served on only one member of the board, and the other two members knew nothing of the existence of the action until after the judgment was entered. That was more than eight months after the service of the summons on Ford. No explanation is disclosed by the record as to why he did not notify either of the other members of the board, nor is any reason given for not having served summons on either of the other members. The result was that through the apparent inadvertence or neglect of the one member of the board who was served with summons, a default judgment for $40,000 was obtained against the school district.

[7] Plaintiff seems to contend that as in cases of actions against municipalities, if the summons is served on the president of a school board it is legally sufficient to give the court jurisdiction over the school district. It is apparent, however, that if the legislature had intended such to be the law it would have inserted the words "or school district" immediately after the word "town" in subdivision 5 of said section 411 of the Code of Civil Procedure; and not having done so it is beyond the power of the courts to rewrite the subdivision and insert those words by way of judicial decision. The Missouri case emphasized by plaintiff (Carr v. School District of Belton, 42 Mo.App. 154) appears to be based on some statute in that state which authorized the service of summons in an action against "a body corporate" to be made on the "head officer" of the body corporate. And the basic ground for the

decision in the other case relied upon by plaintiff (School District No. 9 of Richland County v. Fowles, 87 S.C. 552, 70 S.E. 315) was that the recitals in the judgment as to service of summons were conclusive. For these reasons we do not deem either of those cases here controlling. Nor under the school law of this state may it be held, as plaintiff seems to argue, that the president of the school board by virtue of his position is given any implied power to accept service of summons in behalf of the district.

[8] It may be that in some cases peculiar or unforeseen conditions might exist which would make it impossible to obtain service of summons on each and every member of the school board; and that in such cases it properly could be held that service on a majority of the members of the board would be legally sufficient to acquire jurisdiction over the school district. But we are not here confronted with any such situation, for as already pointed out, no reason whatever is suggested by the record why either of the other two members of the board was not served with summons. It is our conclusion, therefore, that under the facts here presented, the trial court properly held that service of summons on one member of the board, even though he was the president of the board, was not service of summons on the defendant school district.

For the reasons stated the order appealed from is affirmed; and the motion for diminution of record is dismissed, the purpose thereof having become moot.

WARD, J., concurs.

PETERS, Presiding Justice.

I dissent.

It appears from the motion for diminution of the record that there is in the custody of the clerk of the trial court certain papers that were before the trial judge on the motion to set aside the default which were inadvertently not included in the bill of exceptions; that among such papers are the complaint with the certificate of the entry of default, the summons with the return of service, and the judgment; that an examination of such papers will assist in the determination of this appeal. All these documents were mistakenly included within a judgment roll certified by the clerk alone. Under such circumstances there can be no doubt that such documents should be ordered produced, and should be considered on this appeal. § 953, Code Civ.Proc.; Parker v. Shell Oil Co., 55 Cal. App.2d —, 130 P.2d 158.

This certificate of the entry of default, one of the documents, recites that "In this action, the defendant Richmond School District * * * having been regularly served with process, and having failed to appear and answer the Plaintiff's Complaint on file herein, and the time allowed by law for answering having expired, the default of said Defendant * * * is hereby duly entered according to law." The return of service attached to the summons recites that Carl Stender "received the annexed Summons on the 20th day of June, 1941, and personally served the same, together with a copy of the complaint in said action on Richmond School District, one of the defendants named in said summons, by delivering to and leaving with J. O. Ford, President of Richmond School District, County of Contra Costa, State of California, said defendant personally, on the 20th day of June, 1941, in said County of Contra Costa, State of California, a copy of said Summons and a copy of said complaint." The judgment of the court recites that it appears "to the satisfaction of the above entitled Court that the Summons and Complaint were duly and regularly served upon the defendant herein," and that the default was duly and properly entered. These recitals are not challenged by respondent. Its motion to set aside the default judgment was predicated on the sole ground that the "judgment is null and void for the reason that the above entitled Court did not at the time of the entering of said default and said judgment, nor at any other time, have jurisdiction of the person of said defendant." The motion was supported by the affidavits of Fraser and Patterson, the other two members of the board, that they had not been personally served. The order setting aside the default from which this appeal is taken was predicated on the sole ground that "the defendant was not served with summons in this action on the 20th day of June, 1941, or at any other time whatsoever, and that the court is without jurisdiction of the person of the defendant in this action." There was no showing why Ford, after he was served, took no steps to see to it that the board filed an answer.

The record shows that the default was entered July 3, 1941, that the judgment was

entered February 26, 1942, and that the motion to set the default aside was filed April 8, 1942. Thus, the time within which the default could be set aside for mistake, inadvertence, or neglect under Section 473 of the Code of Civil Procedure, had expired. It is thus apparent that the record demonstrates to a certainty that the basic question presented to and decided by the trial court was that service on Ford, the president of the board, as a matter of law, was not service on the district. With this holding I disagree.

There is no express statutory provision either in the School Code or in the general law relating to the manner of service of process on a school district. However, this state has adopted a definite statutory policy in reference to service on domestic corporations and on most governmental bodies. Thus, Subd. 1, of § 411, of the Code of Civil Procedure, provides that a domestic corporation may be served by delivering a copy of the summons upon "the president or other head of the corporation" or upon certain other designated officers. Subdivision 5 of the section provides that a "county, city or town" may be served by delivering a copy of the summons "to the president of the board of supervisors, president of the council or trustees, or other head of the legislative department thereof."

The defendant here is the "Richmond School District, Contra Costa County, State of California." No question as to any personal liability of the members of the board is involved. The action was brought under § 2.801 of the School Code imposing liability on school boards "in the name of the district" in certain circumstances. The School Code permits a unified school district, such as is here involved, to be governed by charter provisions in certain respects. § 2.2020, School Code. Pursuant to this authority the city of Richmond by charter provision provided for the creation of this school district under the management of the Board of Education. The charter expressly provides that the board has power to choose one of its members as president of the board. The board here consists of three members, Ford being the president. Section 2.141 of the School Code provides that "in the name by which the district is designated the trustees may sue and be sued * * *." A school district is a political subdivision and a public corporation of the state, and is an independent and separate governmental agency and corporate entity, distinct from the city or county in which the district is located. Ward v. San Diego School Dist., 203 Cal. 712, 265 P. 821; Skelly v. School District, 103 Cal. 652, 37 P. 643.

Thus, the specific question here involved is whether service on the president of such a district is a valid service in the absence of any statute defining how such service may be had. Obviously, in the absence of statute, the courts must decide how such service shall be made. There are four possible ways in which a service could conceivably be made—(1) service upon any member of the board; (2) service upon the presiding officer of the board; (3) service upon a majority of the board, and (4) service upon all the members of the board. The majority opinion holds that to be a valid service on such a district all the members of the board must be served, except that it indicates that possibly in certain circumstances such as in case of the absence of a member of the board from the jurisdiction, his illness, etc., a valid service may be made by serving a majority of the board. An examination of the authorities discloses that there is authority for alternatives numbered 1, 2 and 4. No authority at all has been cited for alternative numbered 3. The majority opinion, in support of its conclusion that service on all the members of the board is normally required, quotes one sentence from 56 Corpus Juris, p. 789, § 948. That sentence undoubtedly supports the conclusion for which it is cited. But the preceding sentence of the same paragraph reads as follows: "In the absence of a statute to the contrary, there is implied authority, at common law, for the president of a school board, as head officer of a corporate school district, to receive service of process in a suit against the district." In support of that statement the case of Carr v. School Dist. of Belton, 42 Mo.App. 154, is cited. In my opinion, that is the best reasoned case on the subject appearing in the books. The factual and legal situations there involved were identical with those here existing. There, as here, there was no statutory provision on the subject. There, as here, the president of the governing board was served, the other members of the board were not served, the default of the district was taken, and the district moved to set aside the default on the ground of lack of service. The court (42 Mo.App. at page 157) held: "Defendant's

counsel, for reversal of this judgment, relies mainly on the contention that service of process on the president of the school board is not such as to give jurisdiction over the defendant. We have examined in detail the various authorities cited by counsel to sustain this position, and hold against said contention. It is true that the school law provides for no specific manner of service, as is the case with some other corporations; yet it does not follow therefrom that a school district cannot be brought into court to answer the complaints of its creditors. By force of the statute, the school district of Belton had become, on its organization, 'a body corporate,' and in its corporate name may sue and be sued, etc. R.S. 1889, sec. 8083. A board of directors is likewise provided for the management of the affairs of said corporation, from which a president or chief officer is selected. This president of the board is plainly the 'head officer' of the corporate body, and, in the absence of a statute otherwise providing, there is an implied authority, at common law, in this head officer to receive service of process in a suit against the corporation. Cloud v. Inhabitants of Pierce City, 86 Mo. 357; 1 Tidd, Pr. 161; 2 Morawetz on Corp., sec. 979. Without further discussion, then, which we deem unnecessary, we hold, with the circuit court, that legal process was served on the defendant corporation, and it was bound to answer." This case cannot be distinguished from the present one. In School Dist. No. 9 v. Fowles, 87 S.C. 552, 70 S.E. 315, the service was made upon a member of the board of trustees, and a default taken. The trial court set aside the default. This order was reversed, one ground of the opinion being that under such circumstances "the magistrate did acquire jurisdiction of the defendant" district. 70 S.E. at page 316.

Thus, there is substantial and well reasoned authority for the conclusion that, independent of statute, service upon the presiding officer of a school district is a valid service on the district. According to the authorities cited in the Carr case, supra, that was the common law rule. When that factor is considered with the factor that this state has seen fit to codify the common law rule as to private and most public corporations it seems to me that sound public policy requires a holding that as to other public bodies not covered by statute, where no personal liability is sought to be imposed on the members of the board, service on the presiding officer is all that is required. The purpose of service is to give the district notice of the fact the action is pending. Obviously, the most reasonable manner of giving such notice is to serve the presiding officer of the district. Serving the other members would seem to impose an unnecessary burden on the plaintiff with no correspondent benefit to the defendant. For these reasons, I am of the opinion that the service here involved was valid, and that the order appealed from should be reversed.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.



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